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## FEDERAL HOUSING FINANCE BOARD

### 12 CFR Parts 900 and 998

[No. 2004-07]

RIN 3069-AB22

#### Registration of Federal Home Loan Bank Equity Securities

**AGENCY:** Federal Housing Finance Board.

**ACTION:** Final rule.

**SUMMARY:** The Federal Housing Finance Board (Finance Board) is issuing a final rule requiring each Federal Home Loan Bank (Bank) to register a class of its equity securities with the Securities and Exchange Commission (SEC) under the registration provisions of section 12(g)(1) of the Securities Exchange Act of 1934 (1934 Act).<sup>1</sup> Each Bank shall thereafter be required to comply with the disclosure requirements of the 1934 Act by preparing and filing with the SEC the annual, quarterly, and current reports required under that Act, as well as any other materials required by the SEC, including those related to audited financial statements.

**DATES:** *Effective Date:* The final rule will be effective on July 29, 2004.

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**SUPPLEMENTARY INFORMATION:** To assist readers, below is an outline of the

discussion contained in this

#### SUPPLEMENTARY INFORMATION:

- I. Statutory and Regulatory Background
  - A. The Federal Home Loan Bank (Bank System)
  - B. Bank Securities
  - C. Current Bank System Disclosure
    1. Bank System Combined Reports
    2. Individual Bank Annual and Quarterly Reports
  - D. Exemptions for Bank Securities From the Registration Provisions of the 1933 Act and 1934 Act
  - E. Registration Pursuant to the Voluntary Registration Provisions of Section 12(g)(1) of the 1934 Act
  - F. Proposed Rule
- II. Finance Board Findings Supporting Adoption of the Final Rule
  - A. Legal Authority To Require Registration
    1. Authority To Require Enhanced Disclosures
    2. Authority To Require Registration With the SEC
  - B. Reasonable Exercise of Finance Board Authority
    1. Benefits of Enhanced Disclosure Generally
    2. Benefits of Disclosures That Are Consistent With Industry Standards
    3. Benefits of Registration With the SEC Versus Registration With the Finance Board
    4. Costs of SEC Registration
      - a. Compliance Costs
      - b. Liquidity Costs
      - c. Funding Costs
    5. Resolution of Operational Issues
- III. Analysis of Final Rule
- IV. Regulatory Analyses
  - A. Paperwork Reduction Act
  - B. Regulatory Flexibility Act

#### I. Statutory and Regulatory Background

##### A. The Federal Home Loan Bank System (Bank System)

The Bank System consists of 12 Banks and the Office of Finance (OF). The Banks are instrumentalities of the United States organized under the authority of the Federal Home Loan Bank Act (Bank Act).<sup>2</sup> The Banks also are “government sponsored enterprises” (GSEs), *i.e.*, federally-chartered but privately-owned institutions created by Congress to support the financing of housing and community lending by their members.<sup>3</sup> OF is a joint office of the Banks created by the Federal Home Loan Bank Board, which was the predecessor agency to the Finance

Board. As a “joint office,” OF is not a separate legal entity.

By virtue of their GSE status and the AAA credit rating awarded to Bank System debt, the Banks are able to borrow in the capital markets at favorable rates. The Banks then pass along that funding advantage to their members—and ultimately to consumers—by providing advances (secured loans) and other financial services to their members (principally, depository institutions) at rates that the members generally could not obtain elsewhere. In recent years, the Banks have established acquired member asset (AMA) programs under which the Banks acquire certain residential mortgage loans from their members and certain eligible housing associates (such as state housing finance agencies). The AMA programs represent a means of advancing the Banks’ housing finance mission, pursuant to criteria established in Finance Board regulations.<sup>4</sup>

The Banks are cooperatives, meaning that only their members may own the capital stock and share in the profits of the Banks and only their members and certain eligible housing associates may borrow from or use the other products and services provided by the Banks.<sup>5</sup> An institution that is eligible may become a member of a Bank if it satisfies certain statutory and regulatory criteria and purchases a specified amount of the Bank’s capital stock.<sup>6</sup>

The Bank System operates under the supervision of the Finance Board, an independent agency created in 1989 within the executive branch of the U.S. government.<sup>7</sup> The primary duty of the Finance Board is to ensure that the Banks operate in a financially safe and sound manner. Consistent with that duty, the Finance Board is required to supervise the Banks, ensure that they carry out their housing finance mission, and ensure that they remain adequately capitalized and able to raise funds in the capital markets.<sup>8</sup>

<sup>4</sup> See 12 CFR part 955.

<sup>5</sup> See 12 U.S.C. 1426, 1430(a), and 1430b.

<sup>6</sup> See 12 U.S.C. 1424 and 1426; 12 CFR part 925.

<sup>7</sup> See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, Title VII, sec. 702(a), 103 Stat. 413 (*codified at* 12 U.S.C. 1422a and 1422b).

<sup>8</sup> See 12 U.S.C. 1422a(a)(3)(A) and (B).

<sup>2</sup> 12 U.S.C. 1421 *et seq.*

<sup>3</sup> See 12 U.S.C. 1422a(a)(3)(B)(ii), 1430(i), and 1430(j).

<sup>1</sup> 15 U.S.C. 78a *et seq.*

### B. Bank Securities

Each Bank individually issues equity securities to its members.<sup>9</sup> A member is required to purchase and hold stock of its district Bank as a condition both of membership in the Bank and of doing business with the Bank. Members also may acquire stock, often referred to as "excess stock," in excess of the levels required to maintain membership or to support its business with its Bank.

Until the enactment of the Gramm-Leach-Bliley Act in 1999,<sup>10</sup> the Bank Act authorized the Banks to issue only one class of stock to their members.<sup>11</sup> This stock was redeemable in cash at par value six months after a member filed a notice to withdraw from the Bank.<sup>12</sup> The GLB Act altered the capital structure of the Banks. Under the GLB Act's amendments to the Bank Act, a Bank may issue one or both of two classes of stock. Class A stock is redeemable at par value six months after a member files a notice with the Bank to redeem the stock, and Class B stock is redeemable at par value five years after a member files a redemption notice.<sup>13</sup> A Bank also may repurchase, at par value, any excess stock acquired by a member. All stock purchases and redemptions are subject to certain limits relating to the Bank's capital adequacy.<sup>14</sup>

The GLB Act also required each Bank to adopt a capital plan in which the Bank must set forth, among other items, the attributes associated with each class (or subclass) of stock that the Bank intends to issue, including each class of stock's par value, dividend rights and preferences, and liquidation rights.<sup>15</sup> Until a Bank implements its capital plan, its capital structure, including its authority with regard to issuance of stock, is governed by the Bank Act requirements that were in effect immediately prior to the passage of the GLB Act.<sup>16</sup>

The Banks also issue debt securities, known as consolidated obligations (COs), to investors throughout the United States and the rest of the world, pursuant to section 11(a) of the Bank

Act, subject to certain conditions.<sup>17</sup> Among the conditions are that the COs may only be issued through OF as agent for the Banks jointly, and that the Banks shall be jointly and severally liable on all COs issued by OF on the Banks' behalf.<sup>18</sup> While the Banks may issue debt jointly through OF, a Bank is not allowed to issue debt individually in its own name. As of March 31, 2004, the Bank System had \$603.0 billion of CO bonds (with a maturity of one year or more) and \$161.9 billion of CO discount notes (with a maturity of less than one year) outstanding.

### C. Current Bank System Disclosure

#### 1. Bank System Combined Reports

The Finance Board's regulations currently require OF to prepare and distribute combined annual and quarterly financial reports for the Bank System (Bank System Combined Reports).<sup>19</sup> The disclosure in the Bank System Combined Reports must be

<sup>17</sup> Section 11 of the Bank Act provides three options for raising funds in the capital markets for the Banks. Section 11(a) authorizes the individual Banks to issue debt securities, subject to rules and regulations, terms and conditions prescribed by the Finance Board. 12 U.S.C. 1431(a). Section 11(b) authorizes the Finance Board to issue consolidated debentures, within stated limitations, and upon such terms and conditions as the Finance Board may prescribe, which shall be the joint and several obligations of all of the Banks. *See* 12 U.S.C. 1431(b). Section 11(c) authorizes the Finance Board to issue secured consolidated bonds, upon such terms and conditions as the Finance Board may prescribe, which shall be the joint and several obligations of the Banks. *See* 12 U.S.C. 1431(c).

Under section 15 of the Bank Act, obligations of the Banks issued with the approval of the Finance Board must state that they are not the obligations of, and are not guaranteed by, the United States. *See* 12 U.S.C. 1435. The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 provides that none of the housing GSE obligations or securities is backed by the full faith and credit of the United States. *See* Pub. L. 102-550, Tit. XIII, sec. 1304, 106 Stat. 3944 (Oct. 28, 1992) (*codified at* 12 U.S.C. 4503). Notwithstanding these statements, the capital markets often view debt issued by or on behalf of the Banks as having an implied government guarantee based on the GSE status of the Banks, the joint and several liability of the Banks on the COs, and the existence of section 11(i) of the Bank Act (12 U.S.C. 1431(i)), which provides that the Secretary of the Treasury is authorized, in his discretion, to purchase up to \$4 billion of obligations of the Banks issued under section 11. The Secretary's purchase or sale of such obligations would be treated as "public-debt transactions of the United States."

<sup>18</sup> *See* 12 CFR 966.2(b), 966.9, 985.3(a), and 985.6(a). Prior to 2001, the Finance Board issued COs pursuant to section 11(c) of the Bank Act through OF. The functions currently performed by OF as agent for the Banks with regard to the CO issuance are largely identical to the functions it performed on behalf of the Finance Board when the Finance Board issued the COs. While the Finance Board has retained the authority to issue debt on behalf of the Banks pursuant to section 11(c) of the Bank Act, it currently does not do so. *See* 12 CFR 966.2(a).

<sup>19</sup> *See* 12 CFR 985.6(b).

generally consistent in scope, form, and content with the requirements of SEC Regulations S-X and S-K,<sup>20</sup> subject to exceptions that the Finance Board has approved for certain non-financial statement information.<sup>21</sup>

The Bank System Combined Reports also contain discussions of certain non-financial information on an aggregate Bank System level, such as a description of Bank System businesses, and a financial discussion and analysis. Information about each Bank is required to be presented in the Bank System Combined Reports as a segment of the Bank System as if Statement of Financial Accounting Standards No. 131, titled "Disclosures about Segments of an Enterprise and Related Information" (FASB 131), applied to the Bank System Combined Reports.<sup>22</sup>

To facilitate OF's preparation of the annual and quarterly Bank System Combined Reports, the Finance Board's regulations require each Bank to provide to OF, in such form and within such timeframes as the Finance Board or OF shall specify, all financial and other information and assistance OF shall request for that purpose.<sup>23</sup> The financial statements of the Banks must be audited in accordance with generally accepted auditing standards (GAAS) and Federal government auditing standards.<sup>24</sup>

#### 2. Individual Bank Annual and Quarterly Reports

Each Bank currently prepares and distributes to its members an annual report containing audited financial statements, a section containing some level of management discussion and analysis, and discussions of other aspects of Bank operations. Each Bank also distributes unaudited quarterly or semi-annual summary financial reports to its members, with most of the reports being brief. The Finance Board's regulations require that any financial statements contained in an annual or quarterly financial report issued by an

<sup>20</sup> SEC Regulation S-K specifies disclosure rules for non-financial items to be included in registration statements, annual reports, and proxy statements. *See* 17 CFR part 229. Major items include a description of a registrant's business, management's discussion and analysis, and disagreements with accountants. SEC Regulation S-X, and the SEC's financial reporting releases, set forth the accounting principles that must be utilized in preparing financial statements for inclusion in SEC filings. *See* 17 CFR part 210.

<sup>21</sup> *See* 12 CFR part 985 Appendix A.

<sup>22</sup> *See* 12 CFR 985.6(b)(2).

<sup>23</sup> *See* 12 CFR 989.3.

<sup>24</sup> *See* 12 CFR 989.2. OF also distributes various offering documents to investors in connection with issuances of Bank System COs. These OF disclosure documents are modeled on the disclosure documents that are prepared by issuers of investment grade debt.

<sup>9</sup> *See* 12 U.S.C. 1426a(4)(A).

<sup>10</sup> Pub. L. 106-102, 133 Stat. 1338 (Nov. 12, 1999) (GLB Act).

<sup>11</sup> *See* 12 U.S.C. 1426 (1994).

<sup>12</sup> *Id.*

<sup>13</sup> *See* 12 U.S.C. 1426(a)(4)(A).

<sup>14</sup> *See* 12 U.S.C. 1426(e)(1) (2004); 12 U.S.C. 1426 (1994); 12 CFR 931.7(b).

<sup>15</sup> *See* 12 U.S.C. 1426(c); 12 CFR 933.2.

<sup>16</sup> *See* 12 U.S.C. 1426(a)(6). All of the Banks have had their capital plans approved by the Finance Board, and eight Banks have implemented their capital plans as of the date of the adoption of this final rule.

individual Bank be consistent in both form and content with the financial statements presented in the Bank System Combined Reports prepared by OF.<sup>25</sup> Except for this requirement, there is no other Finance Board regulatory requirement that individual Bank annual or quarterly reports be in scope, form, or content generally consistent with the requirements of SEC Regulations S–K and S–X.

While the financial statements in the Banks' annual and quarterly reports are generally consistent with SEC Regulation S–X, the level of discussions in these reports of non-financial statement information varies from Bank to Bank and is not in all cases generally consistent with 1934 Act disclosure standards.<sup>26</sup> Thus, the major effect of requiring the Banks to register a class of securities with the SEC and subject themselves to an SEC-administered 1934 Act periodic disclosure regime would be greater disclosure by the Banks at the individual Bank level of non-financial statement information, with the attendant benefits discussed below in section II.B.

#### *D. Exemptions for Bank Securities From the Registration Provisions of the 1933 Act and 1934 Act*

The Securities Act of 1933 (the 1933 Act)<sup>27</sup> regulates public offerings of securities and prohibits offers and sales of securities that are not registered with the SEC, subject to certain exemptions for enumerated kinds of securities and transactions. The 1934 Act regulates trading in certain securities that are already issued and outstanding and prescribes a robust disclosure regimen for registered entities.

Since enactment of the Bank Act in 1932, the Banks have never registered their debt or equity securities under either the 1933 Act or the 1934 Act. Neither the 1933 Act nor the 1934 Act, however, exempts the Banks from registration by name or otherwise provides special status or unique exemptions for the Banks, although there are generally available exemptions from registration under those Acts for which the Banks may be eligible.

Under section 3(a)(2) of the 1933 Act, securities issued "by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States" are exempt from the

registration requirements of that Act.<sup>28</sup> Because the Banks are instrumentalities of the Federal government, both the equity and debt securities of the Banks are exempt from the registration requirements of the 1933 Act under this provision.<sup>29</sup>

Under the 1934 Act, the term "exempted securities" is defined to include, among other things, "government securities."<sup>30</sup> The term "government securities" is, in turn, defined to include "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."<sup>31</sup> The debt securities of the Banks have been exempted from the registration requirements of the 1934 Act as a result of action taken by the Secretary of the Treasury in 1937 pursuant to these provisions. In Release 34–1168, dated April 28, 1937, the SEC announced that the Secretary of the Treasury had designated for exemption those debt securities issued by the Federal Home Loan Bank Board (the predecessor agency to the Finance Board) or by the Banks under the authority of section 11 of the Bank Act.<sup>32</sup> The designation specified that the "exemption may be revoked, modified or amended at any time with respect to securities not issued prior to such time." Outstanding Bank COs have been issued under the authority of sections 11(a) and 11(c) of the Bank Act, respectively, and therefore are included within the scope of the Secretary of the Treasury's 1937 designation. By contrast, the Secretary of the Treasury has never designated the equity securities issued by the Banks as being exempted under this provision.

#### *E. Registration Pursuant to the Voluntary Registration Provisions of Section 12(g)(1) of the 1934 Act*

Notwithstanding any exemptions for issuers or securities under the 1933 and 1934 Acts, section 12(g)(1) of the 1934 Act provides a mechanism by which equity securities not otherwise required to be registered may nevertheless be registered under provisions of the 1934 Act. Section 12(g)(1) provides, among

other things, that an issuer may register any class of equity securities not required to be registered by filing a registration statement pursuant to the provisions of section 12(g).<sup>33</sup> Registration pursuant to section 12(g)(1) subjects registrants to the periodic disclosure requirements put in place under the 1934 Act, as interpreted and administered by the SEC. For the reasons discussed in part II below, the Finance Board has determined, consistent with the proposed rule, to require each Bank to register a class of its equity securities pursuant to the voluntary registration provisions of section 12(g)(1).

#### *F. Proposed Rule*

In July 2002, the Undersecretary for Domestic Finance of the United States Department of the Treasury called on all GSEs to follow the lead of the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae) and begin working with the SEC to achieve a 1934 Act securities disclosure regime administered by the SEC.<sup>34</sup> Shortly thereafter, Finance Board staff held a number of meetings with Bank System representatives (collectively, the Bank Disclosure Task Force) to discuss SEC registration and related disclosure requirements. The Finance Board subsequently relayed the Banks' principal concerns on registration issues to SEC staff. On December 2, 2002, the Finance Board held a public hearing to consider enhanced Bank disclosure generally and possible Bank registration under the 1934 Act in particular.<sup>35</sup> Finance Board staff also had numerous discussions with SEC staff on registration issues. In addition, SEC staff met with several Banks to resolve certain accounting and disclosure issues raised by 1934 Act registration.

After gathering information and analyses through these various forums, on September 17, 2003, the Finance Board published for comment a proposed rule that would have required each Bank to agree to register a class of its securities with the SEC under section 12(g) of the 1934 Act within 120 days of the adoption of the rule as a final rule.<sup>36</sup> Registration, and the resulting periodic disclosure requirements under

<sup>28</sup> See 15 U.S.C. 77c(a)(2).

<sup>29</sup> See 12 U.S.C. 1431(e)(1). See also *Fahey v. O'Melveny & Myers*, 200 F. 2d 420 (9th Cir. 1952), cert. denied, 345 U.S. 952 (1953); Merrill Lynch, Pierce, Fenner & Smith, SEC No Action Letter, 1986 SEC No-Act. LEXIS 2877 (Nov. 5, 1986).

<sup>30</sup> See 15 U.S.C. 78c(a)(12)(A).

<sup>31</sup> See 15 U.S.C. 78c(a)(42)(B) (emphasis added).

<sup>32</sup> SEC Exchange Act Release 1168 (April 28, 1937) (1937 WL 3510).

<sup>33</sup> See 15 U.S.C. 78l(g)(1).

<sup>34</sup> Fannie Mae subsequently registered its common stock with the SEC under the voluntary registration provisions of section 12(g) of the 1934 Act. Freddie Mac has agreed to register, but has not done so.

<sup>35</sup> Testimony and comments submitted at that hearing may be located at [http://www.fhfb.gov/pressroom/PR02\\_testimony4.htm](http://www.fhfb.gov/pressroom/PR02_testimony4.htm).

<sup>36</sup> See 68 FR 54396 (Sept. 17, 2003).

<sup>25</sup> See 12 CFR 989.4.

<sup>26</sup> See section II.B.2, below, for additional discussion of the differences between current Bank disclosures required under Federal securities laws.

<sup>27</sup> 15 U.S.C. 77a et seq.

the 1934 Act, would result in the Banks disclosing at the individual Bank level more comprehensive information than currently is provided in individual Bank quarterly and annual reports. The major effect of this new disclosure requirement would be greater disclosure of non-financial statement information by the Banks at the individual Bank level.

The proposed rule also would have required the Banks to provide to the Finance Board on a concurrent basis copies of all disclosure documents filed with the SEC. The proposal expressly provided that it would not limit or restrict the Finance Board's ability to carry out its responsibilities under the Bank Act, including its responsibility to ensure that the Banks operate in a financially safe and sound manner and are able to raise funds in the capital markets.

The Finance Board cited in the **SUPPLEMENTARY INFORMATION** section of the proposed rule three bases for adoption of the rule.<sup>37</sup> First, comprehensive, fully transparent securities disclosure by each Bank under an SEC-administered disclosure regime may help maintain the long-term confidence of the investment community and the national rating agencies, thereby better securing the Bank System's ability to access the capital markets. The SEC establishes the best-practices standard for disclosure, has the resources and expertise to ensure that individual Bank disclosure documents meet this standard, and enhances the credibility of registrants' financial statements through its review of those disclosures.

Second, Bank accounting and financial statement reporting issues have become significantly more complex in recent years due to new Financial Accounting Standards Board (FASB) statements on reporting requirements, necessitating more comprehensive and detailed disclosures by individual Banks. As noted in the proposal, the SEC staff has the extensive accounting expertise required to review this Bank disclosure.

Third, Fannie Mae has voluntarily registered its common stock with the SEC under section 12(g) of the 1934 Act, and Freddie Mac has agreed to do so upon completion of its restatement of its financial statements. The proposal recognized that there may be merit in having the core securities disclosures of all of the housing GSEs overseen by the same disclosure regulator.

The proposed rule provided for a 120-day comment period, which closed on

January 15, 2004. The Finance Board received 24 comment letters on the proposed rule. Commenters included: 11 Banks; one Bank member; five financial institution trade associations (with one commenter submitting two separate comments); two housing trade associations; one nonprofit social services organization; one nonprofit community development organization; one Congressional Representative (forwarding the above-mentioned letters from one of the housing trade associations, the social services organization and the community development organization); and one law student.

In general, the commenters supported more comprehensive securities disclosure by the individual Banks, provided such enhanced disclosure takes into account the unique structure of the Banks. Commenters expressed differing views on whether such enhanced disclosures should be overseen by the SEC or the Finance Board, and on the appropriate process for achieving an SEC-administered disclosure regime. Some commenters argued that the Finance Board lacks the legal authority to require SEC registration. Commenters stated that the record lacked factual or empirical evidence supporting the bases for adopting the rule and an analysis of the potential costs and benefits of the rule. The comments, and the Finance Board's responses thereto, are discussed further in part II of this **SUPPLEMENTARY INFORMATION** section.

## II. Finance Board Findings Supporting Adoption of the Final Rule

The Finance Board has carefully reviewed the issues raised by the commenters. The Finance Board's review encompassed analysis of: the Finance Board's legal authority to adopt the rule; the individual Banks' current securities disclosure as compared to the enhanced disclosure requirements, and what exceptions to 1934 Act disclosure requirements might be appropriate due to the unique structure of the Banks; the effect of enhanced disclosure on market discipline, access to the capital markets, and the safe and sound operations of the Banks; and the potential costs and benefits of enhanced disclosure under an SEC-administered, versus a Finance Board-administered, disclosure regime. In conducting this review, the Finance Board considered the comments received on the proposed rule, as well as Finance Board staff analyses and other documents included in the administrative record.

Based on this review, the Finance Board has determined to adopt the

proposed rule as a final rule, in substantially similar form and subject to a date by which all Banks must become SEC registrants. The Finance Board's findings supporting the adoption of the final rule are discussed below.

### A. Legal Authority To Require Registration

Several commenters stated that the Finance Board lacks the legal authority under the Bank Act to require each Bank to register a class of its securities with the SEC under the voluntary registration provisions of section 12(g) of the 1934 Act.<sup>38</sup> The Finance Board's authority to adopt the rule at issue involves two distinct questions: First, whether the Finance Board may require the Banks to provide enhanced disclosures in furtherance of its mission as the Banks' safety and soundness regulator; and second, if the authority exists as a general matter, whether the Finance Board has the authority to require that the registration be with the SEC.

#### 1. Authority To Require Enhanced Disclosures

As a general proposition, any action taken by a federal regulatory agency must be within the scope of the authority conferred on it by Congress.<sup>39</sup> With respect to the Bank System, Congress has vested supervisory authority with the Finance Board, which is charged with ensuring both the safety and soundness of the Banks and the achievement of their housing

<sup>38</sup> One commenter requested that the Finance Board seek an advisory opinion from the U.S. Department of Justice's Office of Legal Counsel (OLC) on this issue. The Board of Directors of the Finance Board considered this issue and determined, at its February 11, 2004 meeting, not to seek such an advisory opinion from the OLC. A review by Finance Board staff of numerous OLC opinions requested by or covering federal financial institution regulatory agencies from 1984 to date did not reveal any instances in which such an agency requested an opinion on whether the agency's enabling statute allowed it to take an action relating to its primary statutory mission.

<sup>39</sup> An agency has the power to issue binding legislative rules only to the extent that Congress has delegated such authority to the agency. See R. Pierce, *Administrative Law Treatise*, 4th Ed., § 6.4 (Pierce), citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). As long as the Finance Board's rule is addressed to, and reasonably adapted to, the enforcement of the Bank Act, it will have the "force and effect of law if it be not in conflict with express statutory provision." See Pierce, § 6.4 citing *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920). Generally, Congress has authorized federal agencies to issue binding rules through the use of the notice and comment procedure set forth in section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. See generally Pierce, § 6.4, at 341.

<sup>37</sup> See 68 FR 54398.

finance mission.<sup>40</sup> The Finance Board has plenary authority over the Banks, which is derived from numerous provisions of the Bank Act.<sup>41</sup>

Congress has given the Finance Board broad rulemaking authority to carry out its oversight responsibilities. Specifically, section 2B(a)(1) of the Bank Act authorizes the Finance Board “[t]o supervise the Federal Home Loan Banks and to promulgate and enforce such regulations and orders as are necessary from time to time to carry out the provisions of [the Bank Act].”<sup>42</sup> The language of that provision includes no limitations on the authority of the Finance Board to regulate the Banks or on its authority to adopt regulations, other than that the regulation be necessary to carry out the provisions of the Bank Act. The statute leaves to the Finance Board the discretion to determine what regulations or orders are “necessary” to carry out the provisions of the Bank Act.

The Finance Board’s authority to promulgate regulations is sufficiently broad to authorize any regulation duly promulgated by the Finance Board that has the purpose or effect of advancing the safety or soundness of the Banks or any other of the statutory duties of the Finance Board (as well as implementing any specific provision of the Bank Act).<sup>43</sup> As applied to the instant rulemaking, the intent of the Finance Board in adopting a final rule requiring the Banks to provide enhanced disclosures is to advance or promote

both the safe and sound operation of the Banks and their continued access to the capital markets through enhanced disclosures. Accordingly, it is within the authority of the Board to require enhanced disclosures.

As courts have recognized, an agency need not show that a particular action is, by itself, crucial to the ability of the agency to fulfill its duties.<sup>44</sup> If the action is “reasonably useful” or “proper” within the context of the agency’s overall responsibilities, then it may be adopted pursuant to the authority to issue regulations that are “necessary” to implement other statutory provisions.

## 2. Authority To Require Registration With the SEC

The Finance Board has analyzed whether Congress has curtailed the agency’s authority to require enhanced disclosures. The precise issue before the Finance Board is whether Congress has expressed its intent regarding the registration of Bank securities with the SEC. For the reasons outlined below, we believe that the answer to that question is no.

The Bank Act is a comprehensive statute that addresses virtually all aspects of the Bank System. Among other things, the Bank Act provides for the incorporation of the Banks, their corporate structure, their capital structure, their powers and duties, their membership base, their lending and investment powers, their borrowing authority, their tax status, and the circumstances under which they may be liquidated. In a similar fashion, the Bank Act provides for the creation of the Finance Board, confers on it both general and specific supervisory responsibilities and powers, and generally gives it “cradle to grave” supervisory authority over the Banks.<sup>45</sup>

Nowhere, however, does the Bank Act speak expressly to the issue of Bank securities disclosure, either by establishing a unique disclosure regime for the Banks or by constraining the authority of the Finance Board to do so. Moreover, the Bank Act does not affirmatively exempt the Banks from the registration requirements of the 1934 Act, as do the chartering statutes for the other two housing GSEs, Fannie Mae and Freddie Mac.<sup>46</sup>

In considering whether Congress has addressed the question of the appropriate disclosure regime for the Banks, we also have reviewed provisions of the 1933 Act and the 1934 Act. As discussed in section I.D, above, Bank securities are not currently registered under either the 1933 Act or the 1934 Act. The reasons why Bank securities have not been registered under those Acts vary. For example, under the 1933 Act, Bank debt and equity securities are exempted from the registration provisions as securities issued by a “government instrumentality.” Under the 1934 Act, Bank debt and equity securities are not generally exempted (although they may qualify under a more limited exemption or otherwise not be subject to the 1934 Act registration requirements). The Secretary of the Treasury has designated Bank debt securities as exempt from registration, but has not so exempted Bank equity securities.

This lack of uniformity in how Bank securities are treated suggests that Congress had no intention to establish a particular disclosure regime for the Banks under the federal securities laws. Although there are certain exemptions from registration that may be available to the Banks under various provisions of both the 1933 Act and the 1934 Act, none of those exemptions is targeted specifically toward the Banks. Rather, they are generally available to any issuer or type of security that meets the particular requirements for each exemption. As previously noted, Congress has not enacted an express exemption for Bank securities, as it has done in the Charter Acts of Fannie Mae and Freddie Mac, nor has it conferred 1934 Act jurisdiction over the Banks on the Finance Board, as it has done with respect to the regulators of federally

of directorships/appointment of directors), 1431 (approval/oversight of borrowing), 1440 (examinations), and 1446 (authority to liquidate/reorganize).

<sup>46</sup> Congress has expressly provided that all securities issued by Fannie Mae and Freddie Mac shall be treated as exempt securities under federal securities laws to the same extent as securities that are the direct obligations of the United States. See 12 U.S.C. 1723(c) (Fannie Mae’s securities) and 12 U.S.C. 1455(g) (Freddie Mac’s securities).

<sup>40</sup> See U.S.C. 1422a(a)(3).

<sup>41</sup> See 12 U.S.C. 1422b(a)(1) (rulemaking) and 1422a(a)(3) (statutory duties). Other provisions of the Bank Act that confer supervisory authority on the Finance Board include: Section 2B(a)(2), which authorizes the Finance Board to suspend or remove any officer, director, employee or agent of any Bank or joint office for cause, 12 U.S.C. 1422b(a)(2); section 2B(a)(5), which confers administrative enforcement powers that are substantially the same as those possessed by other federal financial institution regulators, 12 U.S.C. 1422b(a)(5); and section 20, which authorizes the Finance Board to examine the Banks and to require reports of condition of all Banks, and which confers on the Finance Board examiners the same powers, duties, privileges, and obligations as federal bank examiners have under the Federal Reserve Act and the National Bank Act, 12 U.S.C. 1440.

<sup>42</sup> See 12 U.S.C. 1422b(a)(1).

<sup>43</sup> See, e.g., *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141, 159–162 (1982) (upholding rule addressing lending practices of savings associations as within scope of delegation from Congress and in furtherance of the purposes of the statute); *Texas Savings & Community Bankers Association, et al. v. Federal Housing Finance Board*, No. 98–50758 (5th Cir. 2000) (upholding Finance Board approval of a Bank mortgage loan purchase program); and *WFS Financial Inc. v. Dean*, 79 F. Supp. 1024, 1026 (W.D. Wis. (1999)) (upholding rule addressing operating subsidiaries as within delegation of authority from Congress and consistent with advancing purposes of the statute).

<sup>44</sup> See, e.g., *Shinn v. Encore Mortgage Services, Inc.*, 96 F. Supp. 2d 419, 424 (D.N.J. 2000) (upholding Office of Thrift Supervision (OTS) rule regulating alternative mortgage transactions as an appropriate exercise of its authority to “prescribe such regulations and issue such orders as the Director may determine to be necessary for carrying out this chapter and all other laws within the Director’s jurisdiction.”); *Home Mortgage Bank v. Ryan*, 986 F.2d 372, 377 (10th Cir. 1993) (upholding OTS merger regulation as a “permissible exercise of OTS’s regulatory responsibility over state-chartered savings associations”); *Federal Labor Relations Authority v. United States Department of the Navy*, 96 F.2d 747, 752 (3rd Cir. 1992) (upholding the Fair Labor Relations Authority determination that disclosure of home addresses was “necessary” for collective bargaining, and stating that “Congress delegated this sort of specific determination to the FLRA in the Labor Statute.”). As stated by the United States Supreme Court, “An agency ‘must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances.’” *Rust v. Sullivan*, 500 U.S. 173, 186–187 (1991).

<sup>45</sup> See 12 U.S.C. 1422a (creation), 1422b (general powers), 1426 (capital standards), 1427 (designation

insured depository institutions.<sup>47</sup> Based on the absence of any Bank-specific provisions in these laws, and the inconsistent treatment generally afforded to Bank securities, we believe that there is no evidence that Congress intended to establish a particular disclosure regime for the Banks pursuant to the provisions of the federal securities laws or the Bank Act.

In the view of one commenter, the proposal constituted an impermissible delegation of authority by one agency of its responsibilities to another. That commenter cited several cases as supporting the proposition that a federal agency may not delegate statutory decision-making authority to an outside entity without express authority from Congress.<sup>48</sup>

We do not believe that these cases are controlling in the current rulemaking. In each of the cases cited, the courts were faced with specific delegations of authority by Congress to an agency, which the agency then subdelegated to a third party. In short, the agency at issue was relying on a third party to fulfill the agency's responsibilities. In *USTA v. FCC*, for instance, the court rejected the FCC's attempt to delegate to state utility commissions its responsibility to make determinations related to requiring telecommunication carriers to open up their infrastructure to competition. Similarly, in *NPS v. Stanton*, the court rejected the NPS's attempt to delegate to an outside entity its responsibilities for managing a national scenic river. The common element in the cited cases is that the agency had delegated to an outside party decision-making authority that a statute had required it to perform.<sup>49</sup>

<sup>47</sup> See section 12(i) of the 1934 Act, codified at 15 U.S.C. 78l(i). Under section 12(i), certain federally insured depository institutions that are subject to the 1934 Act registration requirements must make their 1934 Act disclosure filings with the federal banking regulator that supervises their operations. Section 12(i) requires the banking agency to adopt substantially similar disclosure regulations as those adopted by the SEC, unless it finds that implementation of a regulation is not necessary or appropriate in the public interest or for the protection of investors. The agency must publish a detailed explanation of the reasons for its departure from the 1934 Act rules in the **Federal Register**. The number of depository institutions making 1934 Act filings with their banking regulators is rather small. For example, 17 state member banks (out of 949 such banks) made such filings with the Federal Reserve (as of December 31, 2002), and 15 savings associations (out of 928 such associations) make such filings with the OTS.

<sup>48</sup> The primary cases cited by the commenter include *United States Telecom Ass'n (USTA) v. FCC*, 2004 WL 374262 (D.C. Cir. March 2, 2004); and *National Park Service (NPS) v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999).

<sup>49</sup> Other cases cited by the commenter also are not persuasive or applicable to this rule-making. The other cases deal with situations in which: (i) An

In contrast to the central facts of those cases, the Finance Board, in requiring the Banks to register a class of securities under the 1934 Act, is not delegating to the SEC any of the statutory responsibilities assigned to the Finance Board by section 2A(a)(3) of the Bank Act. The Finance Board remains the sole entity responsible for ensuring that the Banks operate in a financially safe and sound manner and that they remain adequately capitalized and able to raise funds in the capital markets. Instead, the Finance Board, having determined that enhanced disclosure would further its duty to ensure the safety and soundness of the Banks—a point with which the commenters agree—has determined further that registration with the SEC under the 1934 Act would be the most appropriate means to fulfill the Finance Board's statutory duties.

By adopting the regulation, the Finance Board is not abdicating its role as Bank supervisor or giving up any enforcement power but instead is requiring the Banks to subject themselves to a disclosure review by a specialized outside entity. Rather than delegating decision-making authority, the Finance Board is using authority granted under the Bank Act to direct the Banks to avail themselves of an established securities registration regime so that the Finance Board may do its job better. Such action does not violate any explicit prohibition in the Bank Act or the 1934 Act, nor is it contrary to any express intent of Congress.

The ability of the Finance Board to fulfill its responsibilities as the Banks' safety and soundness regulator will be enhanced by improved disclosures that are on a par with disclosures in other businesses, including the other housing GSEs.<sup>50</sup> The discipline imposed by debt and equity investors on the operations of financial institutions has come to be viewed as an important complement to minimum capital requirements and the supervisory review process in ensuring the safe and sound operation of a financial institution. Adequate and consistent disclosure is an important element in achieving market discipline,

agency attempted to exercise authority which Congress clearly had not granted it (*ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988)); (ii) a party (unsuccessfully) challenged the constitutionality of the delegation by Congress of decision-making authority to an agency as lacking sufficient standards (*Touby v. United States*, 500 U.S. 160 (1991)); or (iii) the delegation was in violation of the clear terms of the statute in question (*Shook v. DC Financial Responsibility and Management Assistance Authority*, 132 F.3d 775 (DC Cir. 1998)).

<sup>50</sup> This point is discussed in greater detail in Section II.B of this SUPPLEMENTARY INFORMATION.

since it is through such disclosure that market participants gain access to information on the risks faced by the institution in question. Critical to that process is the ability to compare information across similar institutions at a point in time and over time.

As is well recognized, public disclosure is not a replacement for regulatory oversight but is an important complement to the regulatory and supervisory oversight process in ensuring the safe and sound operation of a financial institution.<sup>51</sup> In this respect, the registration rule is analogous to existing requirements that Banks and OF annually submit to accounting audits by an independent external auditor.<sup>52</sup> The rule also is analogous to the Finance Board regulation that conditions the acceptability of certain investments on ratings received from a nationally recognized statistical rating organization (NRSRO).<sup>53</sup>

In several of the cases cited by the commenter, the entity receiving delegated powers had no independent authority to act. Here, the SEC's authority to accept the Banks as registrants and to oversee disclosure comes from the 1934 Act itself, not from any power delegated to it by the Finance Board.<sup>54</sup> Given the SEC's well-established authority to regulate securities disclosure, it is reasonable for the Finance Board to rely on the SEC's expertise in this area, absent a specific expression that Congress did not intend such an outcome.

Congress specifically provided that issuers that are not required to register under the 1934 Act could avail themselves of the benefits of SEC disclosure by "voluntarily" registering their stock, and authorized the SEC to accept such registration.<sup>55</sup> One

<sup>51</sup> See, e.g., Basel Committee on Banking Supervision, Consultative Document: The New Basel Capital Accord Part 4 (April 2003) (Basel II).

<sup>52</sup> See 12 CFR 989.2.

<sup>53</sup> 12 CFR 955.3(a) and 956.3.

<sup>54</sup> In fact, the SEC registration rule appears to be closer to the use of an outside entity than the D.C. Circuit distinguished as not covered by the non-delegation doctrine in one of the cases cited by the commenter. *USTA v. FCC*, 2004 WL 374262. The *USTA* court distinguished the delegation at issue before it with the facts of *U.S. v. Matherson*, 367 F. Supp. 779 (E.D.N.Y. 1973), in which the court upheld the regulations by an official of the Department of the Interior requiring an applicant for a permit to drive in a national seashore park to first obtain a permit from one of the neighboring municipalities. The *Matherson* Court found that the Superintendent's regulation "is in no way an abdication of the Superintendent's power to administer the National Seashore. Rather, the instant section merely exemplifies an effort by the Superintendent to facilitate an orderly prevention of erosion on the land."

<sup>55</sup> See 15 U.S.C. 78l(g).

commenter criticized the Finance Board's proposal on the ground that there was nothing voluntary about the proposal and, therefore, the provisions in the 1934 Act governing voluntary registrations are inapplicable. The Finance Board agrees that its rule makes registration of securities with the SEC mandatory. However, it does so as a requirement stemming from the *Bank Act*. References in the proposal to voluntary registration with the SEC simply underscore that those not otherwise required by the *federal securities laws* may register with the SEC. Thus, there is no inconsistency to say that registration is mandatory under the banking laws while done so in accordance with the procedures available to those who are not otherwise subject to 1934 Act registration requirements.

The issue of whether voluntary registration under the 1934 Act is available for disclosures that are mandated by some other law is a question of interpretation of the securities law. In that regard, the Finance Board is persuaded by the views of the SEC. In testimony delivered before the Committee on Banking, Housing, and Urban Affairs of the United States Senate on February 10, 2004, by Alan L. Beller, Director of the Division of Corporation Finance of the SEC (the Beller Testimony), Mr. Beller stated:

Since at least 1992, the Commission has expressed the view that, because the GSEs, most prominently Fannie Mae and Freddie Mac, but also including the Federal Home Loan Banks, sell securities to the public and have public investors, and do not have the "full faith and credit" government backing of government securities, their disclosures should comply with the disclosure requirements of the federal securities laws. \* \* \* [T]he manner by which mandatory compliance is achieved—including through voluntary registration with the Commission—may be less significant.<sup>56</sup>

Thus, the SEC interprets the 1934 Act in a way that permits filings under the provisions governing voluntary registration, notwithstanding that the registration is required by some other law or regulation.

#### *B. Reasonable Exercise of Finance Board Authority*

Based on its review and analysis of the record, the Finance Board has

determined that there is a reasonable basis to conclude that requiring enhanced Bank securities disclosure under an SEC-administered periodic disclosure regime under the 1934 Act will assist the Finance Board in carrying out its primary duty to ensure that the Banks operate in a financially safe and sound manner and that they have access to capital markets.

#### *1. Benefits of Enhanced Disclosure Generally*

The benefits of enhanced disclosure have been well documented. A leading study in this area, conducted by staff at the Federal Reserve Board (FRB Study), documents how enhanced disclosure of a commercial bank's business risks and financial information can supplement the existing oversight regime for such banks.<sup>57</sup> The FRB Study notes that banking regulators have increasingly accepted the fact that market discipline can serve as one element of an effective program of bank supervision, and discusses in detail how the concepts of financial disclosure, market discipline, and bank supervision are interrelated.

Briefly stated, the stakeholders of a banking institution, by deciding what return they are willing to accept on their investments in a bank's securities, can effectively determine the availability and cost of the bank's funding and thereby influence the bank's business decisions. This ability to "discipline" a bank's risk-taking through market forces is accepted by banking regulators as contributing to the stability of the banking system. The ability of the stakeholders to exert such influence on a bank, however, depends in large part on whether they can accurately assess its financial condition, risks, and earnings prospects, which, in turn, depends on the quality and extent of the institution's financial disclosures. The FRB Study notes that this recognition of the value of market discipline as a supplement to the regulatory regime has prompted banking regulators to focus on methods of improving the transparency of commercial banks' financial condition through enhanced disclosure. It also has led the other housing GSEs to take steps voluntarily to promote market discipline.

Basel II also underscores the importance of enhanced disclosure. Basel II will establish new international standards on bank capital adequacy, and is intended to improve the existing regulatory capital framework for commercial banking organizations. The

Accord is based on three separate "pillars" of supervision. The first pillar consists of the minimum regulatory capital requirements for each banking organization, which will be much the same as the existing Basel capital requirements. The second pillar relates to supervisory review of banking institutions by their regulators, which in part entails an assessment of capital adequacy in light of the overall risks to the bank. The third pillar is market discipline, which the Basel Committee expects will complement both the minimum capital requirements of Pillar 1 and the supervisory review process of Pillar 2 and thereby promote safety and soundness in banks and the financial system. The Basel Committee has explained that "the rationale for Pillar 3 is sufficiently strong to warrant the introduction of disclosure requirements for banks using the New Accord," and that it intends "to encourage market discipline by developing a set of disclosure requirements which will allow market participants to assess key pieces of information on the scope of application, capital, risk exposures, risk assessment processes, and hence the capital adequacy of the institution."<sup>58</sup>

#### *2. Benefits of Disclosures That Are Consistent With Industry Standards*

Both the FRB Study and Basel II demonstrate that market discipline has become an accepted element of effective bank supervision, particularly with regard to the adequacy of a banking institution's capital. Full and consistent disclosure is an important element in achieving market discipline because it is only through such disclosure that market participants can obtain, and assess, information on the risks faced by individual financial institutions. Moreover, a common and consistent framework for such disclosure will enhance the ability of market participants to compare information across similar institutions and over time. The Office of Federal Housing Enterprise Oversight (OFHEO) made similar observations about the importance of public disclosure to safety and soundness oversight when it recently adopted disclosure requirements for Fannie Mae and Freddie Mac.<sup>59</sup>

<sup>58</sup> Basel II, ¶ 757 and ¶ 758.

<sup>59</sup> See 68 FR 16715 (April 7, 2003) (adopting 12 CFR part 1730) ("As users of and participants in the financial markets, the success of the Enterprises [i.e., Fannie Mae and Freddie Mac] in meeting their public policy missions and in maintaining their safe and sound operations is inextricably tied to full and robust disclosure. \* \* \* Full and adequate disclosure of information by the Enterprises regarding their financial conditions and risks is an

<sup>56</sup> Beller Testimony at 1 (emphasis added). The Beller Testimony may be located at <http://www.sec.gov/news/testimony/ts021004alb.htm>. SEC staff recently confirmed to the Finance Board that the statements made in that testimony "continue to be accurate and to reflect the views of the [SEC] staff." Letter from Alan Beller to Alicia R. Castaneda, Chairman, Federal Housing Finance Board, June 1, 2004, at 1.

<sup>57</sup> Staff Study 173, *Improving Public Disclosure in Banking*, Federal Reserve Study Group on Disclosure (March 2000).



At present, the annual or quarterly financial statements prepared by a Bank are required to be consistent, in both form and content, with the combined financial statements prepared by OF for the entire Bank System.<sup>60</sup> The practices among the Banks, however, vary from Bank to Bank as to the level of detail that is provided by the annual and quarterly financial reports of the individual Banks. In conjunction with this rulemaking process, Finance Board staff has reviewed past quarterly and annual Bank disclosure documents of several Banks. As a result of that comparison, staff has concluded that the current individual Bank disclosures fall short, in certain respects, of the requirements for 1934 Act-compliant financial disclosures.

Areas where some of the Banks' current disclosures in annual reports were found by Finance Board staff to fall short of SEC-administered 1934 Act standards include:

- A description of Bank businesses and operations;
- The discussions of dividend payments, including why dividends are paid in the form of cash or stock, factors that could cause dividends to increase or decrease, and the interrelationship between advance rates and dividend payments;
- The discussions of selected financial data that highlight significant trends in the institution's financial condition and results of operations;
- Management discussion and analysis, particularly with respect to the risks associated with Bank mortgage assets;
- Qualitative and quantitative disclosures of interest rate, credit, and operational risks;
- Disclosures regarding accounting issues;
- Disclosures about officers and directors of the Banks, including disclosures about the compensation awarded to, earned by, or paid to directors and certain senior executive officers;
- Evaluations of the effectiveness of disclosure controls and procedures, or internal controls and procedures;
- CEO and CFO certifications as to the accuracy of the content of the Bank's annual report, the effectiveness of disclosure controls and procedures, and

important part of the OFHEO's supervisory program. Full disclosure enhances market discipline."'). 68 FR at 16715, 16716 (footnotes omitted).

<sup>60</sup> See 12 CFR 989.4. OF prepares the combined annual and quarterly financial statements for all twelve of the Banks, the scope, form, and content of which must be consistent with the requirements of SEC Regulations S-K and S-X.

any deficiencies in internal controls and procedures; and

- Disclosures of certain accounting-related fees and services.

The final rule adopted by the Finance Board will lead to the elimination of these deficiencies, resulting in an increase in both the quality and quantity of individual Bank disclosures.

In addition to facilitating the Finance Board's efforts to ensure the safety and soundness of the Banks through increased market discipline, disclosures by the Banks that are consistent with industry standards will help the Finance Board in its efforts to ensure that the Banks remain able to raise funds in the capital markets. When issuing COs in the debt markets, the Banks compete primarily against the other two housing GSEs, Fannie Mae and Freddie Mac. As noted previously, both Fannie Mae and Freddie Mac have agreed to register their stock with the SEC under the 1934 Act. Fannie Mae has already done so, and Freddie Mac has stated that it will do so after it resolves certain accounting matters. Thus, unless the Finance Board requires the Banks to enhance their disclosures, once Freddie Mac has registered with the SEC, the Banks will be the only housing GSEs that are competing for funds in the capital markets with financial disclosures that are not subject to SEC scrutiny under the 1934 Act.

This may have negative effects in several ways. First, member interest in holding Bank stock may be diminished. Members of a Bank must hold a certain level of Bank stock, with the amount of stock that must be purchased determined by the capital plan of each Bank.<sup>61</sup> However, many Banks permit members to buy and hold "excess" stock, which is stock beyond what is required to remain a member of, or to do business with, the Bank. Members may be more reluctant to purchase or hold Bank "excess" stock if they conclude that they lack adequate information about the Bank issuer.

Second, since Bank membership is now voluntary,<sup>62</sup> the attractiveness of

holding Bank stock may be adversely affected by a member's inability to obtain information that permits it to evaluate fully its investment. The change to all-voluntary membership increases the importance of disclosure in maintaining member confidence and thereby in maintaining adequate Bank capitalization.

Moreover, a perception, right or wrong, by the capital markets that non-SEC reviewed disclosures about the Bank System are less complete than are the disclosures of Fannie Mae and Freddie Mac also may adversely affect the ability of the Bank System to compete with the other housing GSEs for funding. As described more fully in section I.C.1, above, OF currently prepares combined disclosures based on information provided to it by the 12 Banks. The quality of the disclosures made by OF depends, therefore, on the quality of the information it receives from each of the Banks.<sup>63</sup>

Whether the prospective disparity between the quality of the disclosures provided by Fannie Mae and Freddie Mac and the Banks, respectively, is apt to affect significantly the ability of the Banks to raise funds in the capital markets is difficult to quantify, especially before the fact. By requiring the Banks to publish financial disclosures that are equivalent to those provided by their principal competitors, the Finance Board is eliminating the possibility that the Banks' access to the capital markets will be disadvantaged because of any perceived differences in the quality of their financial disclosures.

### 3. Benefits of Registration With the SEC Versus Registration With the Finance Board

Many of the commenters raised questions about the appropriateness of requiring registration by the Banks with

Loan Act that required a federal savings association to become a member of and maintain membership in the Bank district in which it maintained its principal place of business. GLB Act sec. 603.

<sup>63</sup> OF would not be required under the final rule to register a class of securities with the SEC and, therefore, would not be subject to SEC oversight. OF is a joint office of the 12 Banks, and was established to facilitate the issuing and servicing of the COs of the Banks. OF, like the Banks, is regulated by the Finance Board. As recognized by the SEC, because of the structure of the Bank System, there is no issuer tied to the Bank System Combined Reports and, therefore, no issuer to register with the SEC. See Beller Testimony, at 7. However, Finance Board regulations require that the Reports prepared by OF be consistent with SEC Regulations S-K and Regulation S-X in scope, form, and content generally. See 12 CFR 985.6(b)(1). These Reports are to be filed with, and reviewed by, the Finance Board. The SEC has requested the opportunity to review the Reports and provide the Finance Board with whatever comments the SEC may have, and the Finance Board intends to provide the SEC with this opportunity.

<sup>61</sup> In the case of the four Banks that have not implemented their new capital plans, the amount of stock that members must hold is determined by the Bank Act rules that applied before they were amended by the GLB Act.

<sup>62</sup> Both before and after its amendment by the GLB Act, section 6 of the Bank Act required members to buy and hold stock to capitalize the Bank. See 12 U.S.C. 1426. Prior to the GLB Act amendments, section 6 set uniform stock purchase requirements applicable to members of each Bank. The GLB Act changed the Bank Act by requiring each Bank to adopt stock purchase requirements for its members in its capital plan. In addition, the GLB Act made membership in the Bank System voluntary for all members when it removed provisions from section 5(f) of the Home Owners'



the SEC. These commenters noted that the Finance Board has a much better understanding of the Banks' business than does the SEC and would be better able to tailor disclosure requirements in a manner that will yield the most appropriate disclosures from the Banks. Commenters proposed that the Finance Board establish a disclosure regime modeled on section 12(i) of the 1934 Act, which requires various depository institutions to file their 1934 Act disclosure documents with their respective primary Federal banking regulatory agencies.<sup>64</sup> The commenters suggested that, because the SEC's emphasis is on investor protection while the Finance Board's emphasis is on the Banks' safety and soundness, registration with the SEC risks subjecting the Banks to conflicting regulatory directives. These commenters cited a disagreement in 1998 between the SEC and bank regulators over the appropriate treatment of a financial institution's loan loss reserves as an example of the problems that may arise.

After carefully considering the benefits and disadvantages of requiring disclosures to be filed with the SEC as opposed to the Finance Board, the Finance Board has determined that registration with the SEC is appropriate, for the reasons set forth below.

a. The SEC is the nation's functional disclosure regulator. As a matter of national policy, Congress has designated the SEC as the securities disclosure authority. Since its creation in 1934, the SEC has been at the forefront of investor protection and is generally recognized as significantly contributing to the integrity of the United States securities markets. The rules and regulations that form the SEC's disclosure system are widely recognized as establishing the best practices for disclosure, both domestically and internationally.

SEC staff is the nation's expert in the interpretation of disclosure and accounting rules. This is especially important in light of the changes in recent years in Bank activities, and the resulting increase in the complexity and sophistication of the Banks' accounting and financial statements. Furthermore, new FASB statements on reporting requirements, which will result in more comprehensive and detailed disclosures by the Banks, have given rise to interpretive complexities with regard to accounting and financial reporting. The SEC staff has the extensive accounting

expertise required to review these types of disclosures.

b. While improved disclosure likely would mean greater transparency and more effective market discipline irrespective of who administers the disclosure regime, only Bank disclosures held to the same standards required of Fannie Mae, Freddie Mac, and other competitors for funding will enable investors to evaluate potential investments without concern that the information they are reviewing may differ due to inconsistent standards applied from one agency to the next. Investors in equity and debt securities have become familiar with disclosure documents filed with the SEC. Disclosures that diverge from what investors have come to expect would make it difficult for investors to make meaningful comparisons between the Banks, the other housing GSEs, and other companies seeking investors.

Departure from the standard practices followed by other market participants—including Fannie Mae and Freddie Mac—could lead the markets to draw negative inferences no matter how unwarranted. Only by registering with the SEC, and therefore submitting to SEC review, will the Banks be able to declare unambiguously that Bank disclosures comply with 1934 Act standards.

c. The unique characteristics of the Bank System can be accommodated by the SEC disclosure regime. The Finance Board recognizes that the Banks are different from virtually every other SEC registrant because they are cooperatives and they issue debt on a joint and several basis. However, the SEC has, as a result of extensive conversations with Bank representatives, demonstrated a willingness and ability to accommodate the Banks' unique status where appropriate.<sup>65</sup>

d. The SEC effectively coordinates its actions with other regulators. For instance, the SEC is the regulator responsible for reviewing 1934 Act disclosures of bank holding companies in the United States. The Federal Reserve Board (FRB) is the regulator responsible for the safety and soundness supervision of bank holding companies. In reviewing the coordination of the FRB's and SEC's roles, respectively, we found no instance of significant costs due to regulatory overlap between the two agencies. SEC officials have indicated that it is the SEC's operating policy to contact a registrant's primary

regulator before taking action, including public release of information on an SEC enforcement action. SEC officials also have indicated that in such instances the primary regulator often is aware of the underlying issues through its examination program.

Bank supervision and disclosure review are independent, but complementary, missions. Enhanced disclosures, on a par with disclosures in other businesses, including the other housing GSEs, should help to promote safety and soundness. As previously discussed, the market discipline imposed by debt and equity investors on the operations of financial institutions has come to be viewed as an important complement to minimum capital requirements and the supervisory review process in ensuring the safe and sound operation of a financial institution.<sup>66</sup> Adequate and consistent disclosure is an important element in achieving market discipline since it is through such disclosure that market participants gain access to information on the risks faced by the institution in question. Critical to that process is the ability to compare information across similar institutions at a point in time and over time.

An effective structure for protecting the safety and soundness of the Bank System and the interests of investors in Bank debt and equity securities requires a regime in which the Finance Board, as safety and soundness regulator, is not the final arbiter for accounting and disclosure standards for the Banks. The principal responsibility of the Finance Board is to ensure that the Banks operate in a financially safe and sound manner and to keep any unsafe and unsound practices from creating unsafe and unsound conditions among the Banks. At the same time, the principal responsibility of the SEC is to ensure consistent and accurate disclosures for the benefit of debt and equity investors. The SEC is best able to ensure that the disclosures of the Banks are appropriately consistent with and on a par with those of other SEC registrants. This point was made in a "Joint Report on the Government Securities Market," prepared in 1992 by the Department of Treasury, the SEC, and the FRB.

While issues like the one noted by the commenters may arise where the SEC and the Finance Board disagree on the appropriate resolution of a particular issue, there is no reason to assume that these issues will be insurmountable. Indeed, in the one example provided concerning the appropriate treatment of loan loss reserves, the SEC and the bank

<sup>64</sup> As previously noted, section 12(i) explicitly assigns to the respective Federal banking regulatory agencies responsibility and authority to perform this function. The Finance Board and the Banks are not listed in section 12(i).

<sup>65</sup> For a more detailed discussion of the unique issues presented by the Bank System and the manner in which the SEC intends to address those issues, see section II.B.5, below.

<sup>66</sup> See, e.g., Basel II.

regulator were able to resolve the issue and, in so doing, developed a better understanding of each other's respective interests.

e. SEC administration of Bank disclosures could be achieved quickly. The SEC disclosure standards are well established, and the SEC has the personnel in place to administer and enforce those standards on the Banks. A disclosure regime administered and enforced by the SEC could be implemented quickly, without the need for additional staff, and without a direct charge to the Banks. Finance Board staff would not be able to match the SEC staff's background or its access to comparative information. Disclosure review carried out by the Finance Board would likely take longer to implement as the Finance Board hired additional, highly expert staff. Moreover, regardless of how expert the Finance Board staff would become with 1934 Act disclosure standards, the limited universe subject to their review would make it difficult for them to obtain the depth and breadth of experience of SEC staff.

#### 4. Costs of SEC Registration

A number of commenters cited a study commissioned by the Banks and prepared by First Manhattan Consulting Group (FMCG Study),<sup>67</sup> which attempted to assess the potential economic costs and benefits of requiring Bank registration of a class of securities with the SEC. The FMCG Study concluded that the Banks' compliance, liquidity, and funding costs under an SEC-administered disclosure regime could be significantly higher than comparable costs under a Finance Board-administered disclosure regime.

The Finance Board has reviewed and evaluated the FMCG Study and, for the reasons discussed below, has determined that the FMCG Study's conclusions are unfounded. While improving their level of disclosure from current levels to 1934 Act disclosure standards would increase the Banks' overall compliance costs, those costs would not be higher under an SEC-administered disclosure regime than under a Finance Board-administered disclosure regime. In addition, there is no evidence that the Banks' liquidity and funding costs under an SEC-administered disclosure regime would be higher than those under a Finance Board-administered disclosure regime.

a. *Compliance Costs.* Given that any disclosure regime instituted by the Finance Board would be designed to

achieve parity with that of the SEC, there likely would be no additional compliance costs to the Banks under the SEC-administered disclosure regime stemming from the preparation and submission of the relevant documents. In fact, the compliance costs of SEC-administered registration are likely to be somewhat lower than would be the costs of filing with the Finance Board. As previously discussed, the SEC has the resources to review Bank disclosures, unlike the Finance Board. The SEC does not currently charge a filing fee for basic 1934 Act periodic disclosure documents, whereas the Finance Board would recover its increased costs of implementing a 1934 Act-compliant disclosure regime through higher assessments on the Banks. Thus, the costs of an SEC-administered disclosure regime compared to the costs of one administered by the Finance Board are likely to be somewhat lower for the Banks.

Compliance costs would be higher under an SEC-administered disclosure regime if (i) disclosures to the Finance Board would be less robust than what would be required by the SEC, or (ii) the Finance Board would review the disclosures and follow up on issues with less vigor (or at least a greater willingness to sanction selective non-disclosure) than would the SEC. Neither of these outcomes would be true if Banks were to register with the Finance Board, but, even if they were, they would simply serve to underscore the appropriateness of registration with the SEC.

b. *Liquidity Costs.* The FMCG Study contended that the Banks could face significantly higher liquidity costs under an SEC-administered regime than a Finance Board-administered regime, because SEC registration would increase the possibility of a future disruption in Bank System debt issuance, thereby requiring the Banks to substantially increase their liquidity holdings. The FMCG Study conclusions are premised on the assumption that SEC registration will cause investors to focus more on Bank-level events that are not material on a Bank System-wide level. The FMCG Study concludes that, as a result, it is reasonable to assume an anticipated funding disruption of 30 to 60 days and a mixed strategy of adding more liquid assets and purchasing liquidity back-up facilities.

However, the FMCG Study estimated additional liquidity costs based on worst-case scenarios, not expected outcomes, and the estimates make no reference to the likelihood that the worst-case scenarios would ever be

realized. The FMCG estimates are little more than conjecture and apparently are based on an unfounded assumption that the SEC would respond more rigorously to disclosure issues than would the Finance Board. Moreover, the Finance Board is unconvinced that funding sources will be unable or unwilling to distinguish issues arising at a particular Bank from the combined condition of the 12 Banks. Neither the FMCG Study nor any other comment disagrees with the benefits of enhanced disclosure by the Banks. To suggest, as the FMCG Study does, that the Banks will be disadvantaged compared to Freddie Mac and Fannie Mae because the latter two GSEs disclose only those events that are material to their nationwide operations is inconsistent with the stated support by the commenters for enhanced disclosure at the Bank level. Thus, the Finance Board has determined that the FMCG Study's conclusions concerning the likely increase in liquidity costs when comparing the disclosure alternatives are unpersuasive.

Even assuming that SEC registration will result in a greater need for liquidity than would be the case if registration were with the Finance Board, the Finance Board notes that the Banks already maintain substantial liquidity. Finance Board staff analysis has concluded that aggregate Bank System liquidity is sufficient for a period of interrupted market access as long as 30 days, and may be sufficient for even longer periods. Thus, there is ample liquidity in the Bank System to accommodate the disruptions to market access that the FMCG Study has hypothesized could result as a result of SEC registration.

c. *Funding Costs.* The FMCG Study contended that the Banks could face substantially higher funding costs under an SEC-administered regime than under a Finance Board-administered regime, because SEC registration may diminish the market's perception of the GSE status of the Banks.<sup>68</sup>

The Finance Board is unconvinced that SEC registration necessarily will lead to increased funding costs due to a diminution in the Banks' status as GSEs. As the FMCG Study acknowledges, Fannie Mae's debt spreads compared to Treasury obligations improved slightly after it registered with the SEC. Finance Board staff analysis of bond spread data during

<sup>67</sup> See Study entitled "Potential Costs Related to the SEC Registration of the FHL Banks' Stock," dated October 15, 2003.

<sup>68</sup> The FMCG Study also noted that several accounting issues may arise as a result of SEC registration that are, in the words of FMCG, "red herring" in nature but which may nevertheless raise investor concerns. The accounting issues noted in the FMCG Study have been addressed by the SEC. See Beller Testimony.

the period surrounding Fannie Mae's SEC registration indicated there was no discernible effect on spreads. While there may be many reasons for these findings, one possibility is that the markets found the newly disclosed information slightly better than they expected or that the increased market discipline and regulatory scrutiny inherent in SEC oversight led the market to view Fannie Mae's debt more favorably.

Whether enhanced disclosures will affect funding costs will depend on the disclosure. It is possible that funding costs will decrease, either because investors are reassured by the availability of disclosures that meet the same level of scrutiny that other companies face or because there may be unfounded concerns that are allayed through better disclosure.

Regardless of the effect on funding costs, the Finance Board takes issue with any suggestion that it is preferable to withhold information that may cause concern among funding sources. The responsiveness of funding costs to favorable or unfavorable information is exactly the type of market discipline that financial transparency is meant to produce. It likely will encourage the Banks to manage the risks in their portfolios proactively to maintain low funding costs, rather than to manage them reactively in response to pressure from the Finance Board.

##### 5. Resolution of Operational Issues

Several commenters did not oppose registration with the SEC, but stated that the registration date should be delayed until operational issues related to the unique structure of the Banks are resolved with the SEC. Several commenters recommended that the Finance Board and the SEC enter into a Memorandum of Understanding (MOU) to resolve the operational issues, and indicated their preferred outcome with respect to those issues. These commenters requested that the MOU relieve the Banks of the registration requirement in the event that the positions reached by the SEC change or if the SEC takes an action that impairs the Banks' access to the capital markets. Some commenters also recommended that the Banks be parties to, or third-party beneficiaries of, the MOU.

Examples of operational issues cited by commenters include: the accounting treatment of Bank joint and several liabilities; the accounting treatment of the Banks' Resolution Funding Corporation (REFCORP) payments; the characterization of Bank stock as "puttable" or "redeemable;" the short-cut hedge accounting treatment for

swaps associated with swapped callable debt; the preparation of Bank System Combined Reports rather than reports that consolidate the financial statements of the 12 Banks; the requirement to make the certifications required by the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley);<sup>69</sup> the requirement to prepare annual meeting proxies; and the requirement that certain member stockholders file an insider trading form with the SEC each time the stockholder conducts a transaction in the registrant's stock.

SEC staff testified recently that many of these issues have been resolved. For instance, the SEC does not object to the treatment of REFCORP payments as the equivalent of a tax, with the result being that the capitalized obligation would not appear on a Bank's balance sheet. The SEC also has agreed that a Bank's stock, though "puttable" (meaning that the stock is, as a general matter, redeemable), may be treated as equity by the Bank.<sup>70</sup> Moreover, the SEC will permit each Bank to include on its balance sheet as long-term indebtedness only the amount of COs for which that Bank is the primary obligor.<sup>71</sup> SEC staff has advised that certain other disclosure requirements and changes to the Banks' existing accounting policies would not be imposed on the Banks if the Banks were to register, and has indicated that it would continue to work with the Banks to determine the appropriateness of certain disclosures under the 1934 Act.<sup>72</sup> The Finance Board understands that the SEC will issue to Banks a "No Action" letter addressing various disclosure issues as well as an interpretive letter addressing a number

of issues, including those discussed in the Beller Testimony.

In its deliberations leading up to adoption of the final rule, the Finance Board has explored with the SEC whether the SEC's and the Banks' resolution of the various accounting and disclosure issues that were raised because of the cooperative nature of the Bank System would be changed unilaterally by the SEC. In conversations involving representatives of the SEC and the Finance Board, SEC staff has stated that the SEC has never rescinded a No Action letter, and that, absent a change in the facts or applicable law, recipients of such a letter may rely on it even if the SEC were to reach a different conclusion when considering the issue at a later time. In addition, the SEC staff stated that it will communicate with the Finance Board before changing any of the SEC's views as stated in the Beller Testimony and reiterated in the letter from the SEC to the Finance Board dated June 1, 2004. The Finance Board has adopted this final rule relying on the SEC's staff representations concerning the effectiveness of No Action letters as well as the statements made by the SEC in the Beller Testimony and subsequent communications with the Finance Board. The Finance Board will consult with the SEC to achieve a satisfactory resolution of any issue that arises that interferes with the Finance Board's authority under the Bank Act.

Commenters proposed varying dates that would trigger the requirement to register, including: 2005; the filing date for the 2005 annual report (2006); 18 months from the effective date of the final rule; and 18 months from the later of (i) the effective date of the final rule, (ii) the effective date of an MOU on operational issues, or (iii) the resolution of the relevant operational issues. Commenters stated that if these unique accounting, regulatory, and economic issues were not resolved before the Banks are required to register with the SEC, the Banks' access to the capital markets could be disrupted or delayed.

Given the successful resolution of many of the issues raised by commenters with the SEC and the significant period of time that has elapsed since the Finance Board began considering this issue, the Finance Board believes that it is appropriate to set a date certain in the final rule by which registration with the SEC is to be effective. Based on information obtained from the SEC staff concerning the steps required to have an effective registration of a class of equity securities under the 1934 Act, the Finance Board has

<sup>69</sup> Pub. L. 107-204.

<sup>70</sup> SEC staff noted, however, that the SEC will continue to have a dialogue with the Banks on the proper accounting treatment in the event that a stockholder puts the stock to a Bank. Beller Testimony at 7.

<sup>71</sup> See Beller Testimony at 6-7.

<sup>72</sup> Congress has assigned to the SEC the authority and responsibility to prescribe the methods to be followed in the preparation of financial accounts and the form and content of financial statements to be filed under the securities laws. See, e.g., sections 7, 19(a), and Schedule A, items (25) and (26) of the 1933 Act (15 U.S.C. 77g, 77s(a), 77aa(25) and (26)); and sections 3(b), 12(b), and 13(b) of the 1934 Act (15 U.S.C. 78c(b), 78j(b), and 78m(b)). Subject to SEC oversight, the Financial Accounting Standards Board (FASB) has been delegated the authority to set accounting standards to be used by public companies. See SEC Policy Statement Reaffirming the Status of FASB as a Designated Private-Sector Standard Setter (Release Nos. 33-8221; 34-47743; IC-26028; FR-70), 68 FR 23333 (May 1, 2003). The Banks' disclosures are required to satisfy the generally accepted accounting standards established by FASB. Accordingly, all Finance Board regulatory interpretations concerning accounting issues are superseded by SEC and FASB pronouncements on point.

determined that it is appropriate for each Bank to file a registration statement under the 1934 Act with the SEC by no later than June 30, 2005, and have the registration effective no later than August 29, 2005. These dates may be extended if the Finance Board determines, upon a written request by one or more of the Banks, that good cause exists for extending the deadline for registration.

Some commenters noted that bills are pending in Congress that could restructure the Bank System's regulatory regime, and suggested that the Finance Board delay action on a final rule until the legislative uncertainties are resolved. However, the Finance Board believes that it has the duty to fulfill the responsibilities entrusted to it under the Bank Act, and, unless and until those responsibilities are changed by Congress, the Finance Board must continue to conduct business accordingly. It is in furtherance of those duties that the Finance Board adopts this final rule.

A few commenters suggested that the Finance Board postpone acting on the proposed SEC registration regulation until each Bank completes its conversion to a new capital plan, in accordance with the provisions of the GLB Act. The Finance Board recognizes that Banks in transition may have some unique issues to address in their registration filings. However, the Finance Board believes that it is best to realize the benefits of registration, as outlined above, as soon as possible, without waiting for the remaining Banks to convert. The Finance Board notes that the availability of SEC-reviewed disclosure documents prior to a capital plan conversion may assist Bank members in understanding issues related to the implementation of a new capital plan by their Bank.

### III. Analysis of Final Rule

In light of the preceding discussion, the Finance Board has determined to adopt in substantially similar form the proposed rule as a final rule. The specific provisions of the final rule, which amends existing § 900.3 and adds a new part 998, are described in the following sections. These provisions, and substantive changes made to language contained in the proposed rule, are discussed below.

#### *Part 900—General Definitions Applying to All Finance Board Regulations*

##### Section 900.3

The final rule amends § 900.3 of the Finance Board's regulations, 12 CFR 900.3, to include the following three

additional definitions of terms related to securities disclosures that are used in the final rule: "GLB Act," meaning the Gramm-Leach-Bliley Act (Pub. L. 106–102 (1999)); "SEC," meaning the United States Securities and Exchange Commission; and "1934 Act," meaning the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Finance Board received no comments on the proposed addition of these three defined terms to § 900.3, and has adopted them as proposed.

#### *Part 998—Registration of Federal Home Loan Bank Equity Securities*

##### Section 998.1—Purpose

Section 998.1 of the proposed rule noted that the purpose of new part 998 is to require each Bank to prepare and publicly distribute certain financial and other disclosures. It also noted that the disclosure requirements set forth in part 998 did not limit or restrict the Finance Board's ability to act pursuant to its safety and soundness authority.

The final rule retains a description of the purposes of the rule, but amplifies on that description by stating that the purposes of part 998 are to enhance the quality of the financial disclosures provided by each Bank, to promote a greater degree of consistency and uniformity of such disclosures from Bank to Bank, to provide a greater degree of transparency regarding the financial condition of each Bank, and to conform the disclosure practices of the Banks to those of other financial institutions who raise funds in the global debt markets. The Finance Board believes that this is a more accurate and complete statement of the purposes of the securities disclosure regulation.

The discussion concerning the Finance Board's continued authority to require Banks to take steps in addition to those required by part 998, including the authority to require additional disclosures as appropriate, has been set out in a separate § 998.3, as discussed below.

##### Section 998.2—Registration and Periodic Disclosures

Proposed § 998.2 contained four requirements. First, it required each Bank to prepare and make public disclosures relating to financial condition, results of operations, trends or uncertainties affecting its business, and management's assessment of the Bank's business and financial condition. Second, it required each Bank to satisfy the disclosure requirement by subjecting itself to the 1934 Act's periodic disclosure regime. Third, the proposed rule required each Bank to subject itself

to the 1934 Act's periodic disclosure requirements by registering a class of securities with the SEC within 120 days of the adoption of a final rule by the Finance Board. Lastly, the proposed rule required each Bank to provide to the Finance Board, on a concurrent basis, copies of all disclosure documents filed with the SEC, unless otherwise directed by the Finance Board.

The final rule retains the basic requirements set out in the proposed rule, but revises them so that they are now set out more clearly. Paragraph (a)(1) of § 998.2 states that each Bank shall file a registration statement by no later than June 30, 2005 to register a class of its equity securities pursuant to the provisions of section 12(g)(1) of the 1934 Act. Each Bank shall ensure that its registration statement becomes effective as provided in section 12 no later than August 29, 2005. This will require each Bank to file a Form 10 with the SEC and have the Form 10 become effective as contemplated by 1934 Act rule 12b–6. A Bank that files a Form 10 and then withdraws it will not be deemed in compliance with this requirement. Thereafter, Banks will be required to maintain such registration in effect at all times. Paragraph (a)(2) of § 998.2 states that the Finance Board may by order extend the registration date for one or more Banks if it determines, based on factors presented in a written request to the Finance Board, that good cause exists to do so.

Paragraph (b) requires Banks to comply with periodic disclosure requirements under the 1934 Act and disclose any other information required by SEC rules, regulations, or interpretations. These requirements will be modified to the extent relief is granted to the Banks by the SEC in No Action letters or interpretive letters.

Paragraph (c) sets forth the general requirement that Banks provide to the Finance Board on a concurrent basis copies of all disclosure documents that are filed with the SEC.

##### Section 998.3—Reservation of Authority

Section 998.1(b) of the proposed rule explicitly retained the authority of the Finance Board to exercise any other authority that has been vested in it by Congress, specifically including the authority to require additional disclosures as appropriate. That reservation of authority has been relocated to a new § 998.3 and revised to improve the rule's clarity. As set forth in the final rule, the requirements of part 998 do not diminish, or otherwise restrict the ability of the Finance Board to exercise, any and all authority conferred by the Bank Act to ensure that

the Banks operate in a financially safe and sound manner, that they carry out their housing finance mission, and that they remain adequately capitalized and able to raise funds in the capital markets. Nor do the requirements of part 998 diminish or otherwise restrict the Finance Board's authority to supervise the Banks, to conduct examinations, to require reports and other disclosures, and to enforce compliance with applicable laws, rules, orders or agreements.

#### IV. Regulatory Analyses

##### A. Paperwork Reduction Act

One commenter stated that the Finance Board failed to comply with the requirements of the Paperwork Reduction Act of 1995 (PRA) by failing to submit the disclosure requirements in the proposed rule to the Office of Management and Budget (OMB) for review.<sup>73</sup> However, as noted in the **SUPPLEMENTARY INFORMATION** section of the proposed rule, the proposed rule does not contain any collections of information as defined by the PRA, nor does the final rule. Under the OMB's implementing PRA regulation, the term "collection of information" includes the collecting of information from instrumentalities of the United States only if the results are to be used for general statistical purposes.<sup>74</sup> Although the Banks are instrumentalities of the United States, the required disclosures will not be used for general statistical purposes, and thus they do not constitute a "collection of information" subject to the PRA. Consequently, the Finance Board has not submitted any information to the OMB for review.

##### B. Regulatory Flexibility Act

The final rule will apply only to the Banks, which do not come within the meaning of "small entities," as defined in the Regulatory Flexibility Act (RFA).<sup>75</sup> Therefore, in accordance with section 605(b) of the RFA,<sup>76</sup> the Finance Board hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

##### List of Subjects in 12 CFR Parts 900 and 998

Credit, Federal home loan banks, Financial disclosure, Government-sponsored enterprises, Records, Reporting and recordkeeping requirements, and Securities disclosure.

■ Accordingly, the Finance Board hereby amends title 12, chapter IX, Code of Federal Regulations, as follows:

#### PART 900—GENERAL DEFINITIONS APPLYING TO ALL FINANCE BOARD REGULATIONS

■ 1. The authority citation for part 900 continues to read as follows:

**Authority:** 12 U.S.C. 1422b(a).

■ 2. Amend § 900.3 by adding the following three definitions in alphabetical order:

##### § 900.3 Terms relating to other entities and concepts used throughout 12 CFR chapter IX.

\* \* \* \* \*

"GLB Act" means the Gramm-Leach-Bliley Act (Pub. L. 106-102 (1999)).

\* \* \* \* \*

"SEC" means the United States Securities and Exchange Commission.

\* \* \* \* \*

"1934 Act" means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

\* \* \* \* \*

■ 3. Add Subchapter M (part 998) to title 12, chapter IX, to read as follows:

##### Subchapter M—Federal Home Loan Bank Disclosures

#### PART 998—REGISTRATION OF FEDERAL HOME LOAN BANK EQUITY SECURITIES

Sec.

998.1 Purpose.

998.2 Registration and periodic disclosures.

998.3 Reservation of authority.

**Authority:** 12 U.S.C. 1422a(a)(3), 1422b(a)(1).

##### § 998.1 Purpose.

The purposes of this part are to enhance the quality of the financial disclosures provided by each Bank, to promote a greater degree of consistency and uniformity of such disclosures from Bank to Bank, to provide a greater degree of transparency regarding the financial condition of each Bank, and to conform the disclosure practices of the Banks to those of other financial institutions who raise funds in the global debt markets.

##### § 998.2 Registration and periodic disclosures.

(a) *Registration.* (1) Each Bank shall file a registration statement by no later than June 30, 2005 to register a class of its equity securities pursuant to the provisions of section 12(g)(1) of the 1934 Act. Each Bank shall ensure that its registration statement becomes effective as provided in section 12 no later than August 29, 2005.

(2) Notwithstanding paragraph (a)(1) of this section, the Finance Board may by order extend the registration date for one or more Banks if it determines, based on factors presented in a written request to the Finance Board, that good cause exists to do so.

(b) *Periodic disclosures.* Consistent with the registration required pursuant to paragraph (a) of this section, each Bank, after registering a class of equity securities with the SEC, shall comply with the periodic disclosure requirements of the 1934 Act by preparing and filing with the SEC such annual, quarterly, and current reports, as well as any other materials required pursuant to SEC rules, regulations, or interpretations, including those related to audited financial statements, as may be required by the SEC under the 1934 Act.

(c) *Submission to Finance Board.* Unless otherwise directed by the Finance Board, each Bank shall provide to the Finance Board on a concurrent basis copies of all disclosure documents filed with the SEC.

##### § 998.3 Reservation of authority.

The requirements of this part do not diminish, or otherwise restrict the ability of the Finance Board to exercise, any and all authority conferred by the Bank Act to ensure that the Banks operate in a financially safe and sound manner, that they carry out their housing finance mission, and that they remain adequately capitalized and able to raise funds in the capital markets. Nor do the requirements of part 998 diminish or otherwise restrict the Finance Board's authority to supervise the Banks, to conduct examinations, to require reports and other disclosures, and to enforce compliance with applicable laws, rules, orders or agreements.

Dated: June 23, 2004.

By the Board of Directors of the Federal Housing Finance Board.

**Alicia R. Castaneda,**  
*Chairman.*

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<sup>73</sup> See 44 U.S.C. 3501 *et seq.*

<sup>74</sup> See 5 CFR 1320.3(c)(3).

<sup>75</sup> See 5 U.S.C. 601(6).

<sup>76</sup> 5 U.S.C. 605(b).