Federal Housing Finance Board

Memorandum

October 17, 1991

TO: Philip L. Conover, Director
District Banks Directorate

THROUGH : Renie Y. Grohl RYG
Deputy General Counsel

FROM : Jon E. Boustany JB
Attorney-Advisor

SUBJECT: Delegation of Authority to Approve Membership Applications to the FHLBanks

This memorandum is in response to your request for a preliminary analysis of whether the Federal Housing Finance Board ("Finance Board") may delegate the authority to approve new membership applications to the Federal Home Loan Banks ("FHLBanks"). Currently, all applications for FHLBank membership are subject to the approval of the Finance Board. The Chairman of the Finance Board signs a resolution approving each application for membership.

The current membership application process was devised and implemented by the Finance Board as a result of several changes made to the Federal Home Loan Bank Act ("Bank Act") by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRRREA"). See FIRREA, Pub. L. No. 101-73, 103 Stat. 183 (1989). Thus, it is necessary to review the changes made by FIRREA to the sections of the Bank Act that address membership. Furthermore, a discussion of the pre-FIRREA membership rules and procedures is necessary in order to understand how the changes in FIRREA affected the membership process.

Pre-PIRREA Membership Rules

The Office of General Counsel ("OGC") of the former Federal Home Loan Bank Board ("FHLBB") on several occasions opined that the authority to approve an institution's application for FHLBank membership was vested in the FHLBB. See Opin. Gen. Couns. FHLBB (Aug. 25, 1981); Opin. Gen. Couns. FHLBB (Mar. 10, 1981); Opin. Gen. Couns. FHLBB (Nov. 7, 1978); Opin. Gen. Couns. FHLBB (July 8, 1970) and Opin. Gen. Couns. FHLBB (Mar. 29, 1938). Because of the multiple roles of the FHLBB, the review and approval of FHLBank membership applications for federal and state chartered savings associations was done simultaneously with the review and approval of their applications for deposit insurance. As a condition to

obtaining deposit insurance from the Federal Savings and Loan Insurance Corporation ("FSLIC") (now the Savings Association Insurance Fund), federal and state chartered savings associations were required to become members of the FHLBank System. The resolution signed by the FHLBB concurrently approved an applicant's membership in the FHLBank System and its FSLIC deposit insurance.

In addition to FSLIC insured savings associations, insurance companies and state-chartered savings banks insured by the Federal Deposit Insurance Corporation ("FDIC") had the option to join the FHLBank System and, thus, were voluntary members. In contrast to FSLIC insured savings associations, these voluntary members went through a different application process. Pursuant to its authority in pre-FIRREA section 17 of the Bank Act, the FHLBB delegated the authority to approve membership applications of eligible voluntary members to the FHLBank presidents acting as Principle Supervisory Agents of the FHLBB. See 12 U.S.C.A. § 1437 (1989); See also 12 c.F.R. §§ 523.3-3 & 541.18 (1989). This practice continued up until the enactment of FIRREA.

Post-FIRREA Membership Rules

The enactment of FIRREA resulted in several changes to the Bank Act, which, in turn, resulted in changes to FHLBank membership rules and procedures. First, section 702 of FIRREA added sections 2A and 2B to the Bank Act, which provide for the establishment of the Finance Board and the enumeration of its powers and duties. Most importantly, the new section 2B imposed far greater limits on the Finance Board's ability to delegate its authority to the FHLBanks than the delegation of authority that had been given to the FHLBB. Specifically, section 2B of the Bank Act provides in pertinent part:

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

12 u.s.c. § 1422b (supp. I 1989).

Due to the limitations that section 2B placed on the Finance Board's ability to delegate its authority, the Finance Board did not adopt section 523.3-3 of the former FHLBB's regulations, which delegated the authority to approve voluntary membership applications to the Principal Supervisory Agents. All membership applications since the enactment of FIRREA have been subject to approval by the Finance Board.

Analysis

Since the Finance Board may delegate only ministerial as opposed to discretionary functions to the FHLBanks, the authority to approve membership applications must be a ministerial function in order to be delegated to the FHLBanks. The Bank Act does not define the term "ministerial function." Furthermore, the legislative history of FIRREA provides no instructive guidance on this particular exception to the general prohibition against delegation of functions to the Bank System.

However, the Supreme Court of the United States in the context of suits brought against government officials under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. § 2671 et seq., has artfully laid out the distinctions between ministerial an discretionary functions.[1]

The Supreme Court considers as a ministerial function, an agency's action based on federal statutes, regulations or policy guidelines that are mandatory directives and leave no room for discretionary decisions. In contrast, the Court defines as a discretionary function, an agency's action based on federal statutes, regulations or policy guidelines that leave room for an employee to make discretionary decisions and policy judgments.[2]

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1. There is a discretionary function exception from liability under the FTCA that deprives the courts of jurisdiction over claims "based on the exercise or performance or the failure to perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1989). This exception is not available if the claim involves ministerial functions performed by a federal agency or employee.

2. For example, in Berkovitz v. United States, 486 U.S. 531 (1988), the plaintiff filed suit under the PTCA alleging that he contracted polio as a result of the government's failure to comply with its own statutes and regulations on the approval of vaccines. The Supreme Court barred the government's claim that it was exempt from prosecution under the discretionary function exception.

   The Court held that the exception does not bar claims based upon conduct of federal agencies in violation of federal statutes, regulations, or formalized agency policy affording employees no discretion. Specifically, the Court held that the exception does not apply to tort claims based upon an agency's failure to comply with statutory and regulatory provisions mandating that it receive all data a manufacturer is required to submit, examine the product, and determine that it complies with all regulatory standards, before licensing a vaccine. 486 U.S. at 542-43. Thus, the Court considered the agency's failure to comply with federal statutory and

The Court in Berkovitz considered ministerial the action of an employee reviewing data on a vaccine and determining whether it met federal statutory and regulatory standards. Similarly, a FHLBank's review of information provided by a membership applicant and its determination that the applicant meets the eligibility criteria in section 4 of the Bank Act also could be viewed as ministerial. However, since section 4 of the Bank Act on its face leaves room for discretionary decisions, it would be necessary for the Finance Board to clarify the criteria for membership with enough specificity as to eliminate the use of any discretion on the part of the FHLBanks.

For example, the Finance Board should clarify what constitutes "makes such home mortgage loans as, in the judgment of the Board, are long-term loans...." 12 U.S.C. § 1424(a)(1)(C) (Supp. 1989). This issue was discussed in our memorandum to you dated October 11, 1991. In addition, the Finance Board should clarify what types of loans satisfy the requirement that an institution that was not a member on January 1, 1989, have at least 10 percent of its total assets in residential mortgage loans in order to be eligible for membership. Finally, the Finance Board should provide more guidance on what satisfies the requirements that (1) the insured depository institution's financial condition is such that advances may be safely made to it, and (2) the character of its management and its home-financing policy are consistent with sound and economical home financing. See 12 U.S.C. § 1424(a)(2)(8-C) (Supp. 1989).

The Finance Board's membership policy guidelines provide a good starting point for setting forth criteria for membership that are not discretionary and can be used as the basis for drafting regulations. We would recommend that this be done by regulation. An alternative would be to have a formalized agency policy that would set forth the eligibility criteria. Although the Berkovitz case dealt with noncompliance with federal statutes and regulations, the Supreme Court in dicta insinuated that formalized policy guidelines may in some cases adequately eliminate discretionary decisions. Subsequently, the Eighth Circuit has expounded on the Berkovitz case and has held that mandatory

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(Footnote 2 continued from previous page)
regulatory provisions that afforded the employee no discretion as a ministerial function.

In describing situations in which the government's discretion is protected, the Court stated that the exception would bar claims that challenge an agency's "formulation of policy as to the appropriate way in which to regulate." 486 U.S. at 546, Likewise the court further stated that "if the policies and programs" of an agency "allow judgments" on the part of employees, the exception "protects the acts taken . . . in the exercise of this discretion." Id.

directives may be placed in formalized policy guidelines. See Hurst v. United States, 882 F.2d 306 (8th Cir. 1989). However, before we recommend the use of policy guidelines, we would like to do more thorough research on this issue.

Subject to the foregoing, the approvals of membership applications of CAMEL 1 and 2 rated institutions can be delegated to the FHLBanks and the other membership applications can continue to be approved by Finance Board.

cc Beth Climo
Amy Maxwell