



Federal Housing Finance Board

April 8, 1999

OPINION OF THE OFFICE OF GENERAL COUNSEL

ISSUE:

Is the Federal Home Loan Bank of [REDACTED] (FHLBank) authorized under the Federal Home Loan Bank Act to provide certain consulting services to its member institutions related to financial strategies and risk management, and if so, may it do so by forming a separate group within the FHLBank's organizational structure to perform such services at no cost to the member.

CONCLUSION:

Yes. Under sections 11 and 12 of the Federal Home Loan Bank Act, as amended, 12 U.S.C. §§ 1422 *et seq.*, (Bank Act), the FHLBanks are authorized to provide a broad array of products and services to their member institutions so long as such activity is not barred by any other provision of the Bank Act. The Bank Act empowers the FHLBanks to select and employ staff and define their duties, and to have such incidental powers as are customary for corporations to conduct activities consistent with the provisions of the Bank Act. Section 8 of the Bank Act authorizes the FHLBanks to provide information to their members. There is no bar in the Bank Act to providing members with financial strategies advice and no requirement that the FHLBanks must be paid for every service provided to a member institution.

I. INTRODUCTION

In connection with the 1998 annual examination, the Office of Supervision (OS) of the Federal Housing Finance Board (Finance Board) questioned the FHLBank's authority to establish a separate group within the FHLBank to provide certain financial management consulting services described herein at no cost to its members. Additionally, OS questioned whether the FHLBank was providing "investment advice" to its members and, if so, whether the FHLBank had the authority to do so. By memorandum dated September 4, 1998, OS asked the Office of General Counsel (OGC) to review the matter. This memorandum responds to OS's request for OGC's views on the FHLBank's authority under the Bank Act to provide these financial management-consulting services and on whether the FHLBank, by providing any of these services, may be construed to be providing investment advice.

The Bank Act does not define "investment advice" nor explicitly address the issue at hand. Therefore, it is appropriate for the Finance Board to interpret the terms analyzing the

services provided to determine whether the FHLBank is acting as an “investment adviser” within the meaning of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1, *et seq.* (Investment Advisers Act). Assuming that the FHLBank is not acting as investment adviser, the issue is whether the FHLBank has authority under the FHLBank Act to provide these financial management consulting services, and whether the FHLBank may establish a separate unit within the FHLBank to provide these services at no cost to the FHLBank’s members. These questions are addressed in the following sections.

II. ANALYSIS

A. Chronology/Description of the Services

According to documents provided by OS,¹ in late 1995, the FHLBank established within its corporate structure a Planning and Consulting Division (Division). The Division’s goal is to provide member institutions with analytical and technical assistance in the following areas:

- profitability planning
- funds management
- balance sheet restructuring
- portfolio analysis
- asset/liability management
- interest rate risk management
- liquidity risk management
- loan and investment analysis
- new product development

In so doing, the Division aims to enable the FHLBank’s members to better evaluate financial performance and strategies and maximize shareholder value primarily through the use of FHLBank products and services. The Division provides risk analysis and opinions on business strategies including new products, balance sheet restructuring, portfolio management, investment analysis, and stock buy-backs. The Division closely coordinates its activities with the FHLBank’s Marketing Division to make efficient use of all resources.

A principal goal of the Division is to provide educational support and training to the FHLBank’s member institutions. Division staff members make presentations to members’ boards of directors and finance committees on a variety of topics including derivatives, liquidity management, dividend policies, and growth strategies. Additionally, since its inception, the Division has developed several financial modeling and other financial management tools including the High Performance Report; the Five Year Profitability Plan; the Liquidity Analysis Model; the Deposit Rate Adjustment Analysis Model; and the Analysis of the Effective Cost of Advances (Inclusive of FHLBI Dividends). The FHLBank has made some of these tools available to the members for downloading from the FHLBank’s website. Alternatively, the

¹ The description of the Division presented here was taken from information and documents provided by the Office of Supervision (OS) in support of OS’s request to the Office of General Counsel for a review of the FHLBank’s authority to conduct the activity.

members can request that the Division run certain models for them to aid the members' strategic planning.

In 1997, in a cooperative effort with the FHLBank's Marketing Division, the Division presented the Five Year Profitability Plan (Profitability Plan) to approximately 247 members, in an effort to persuade the members to use FHLBank advances as a permanent funding source. The Profitability Plan allows a member to evaluate its current financial position and develop methods to reach its five-year goals. It is a sophisticated proforma model that combines current financial data and spreads with the amounts and types of loans and deposit growth the institution predicts to produce a concise, readable graphics-illustrated report. A typical use would involve a member requesting that the Division run a model because the member wants to increase a 10% ROE (return on equity) to a 16% ROE in five years. If the model shows that based on historical data the member will not reach the target, the Division can recommend methods the member might use to accomplish that goal such as targeting new markets, aggressive pricing, increased dividends for shareholders, portfolio lending, acquisitions or stock repurchases. Once the member decides what methods it will choose to use, the Division can load the new data into the model to generate a new report to ascertain whether the goal will be reached. The model allows the member's management to quantify a strategy's impact on the bottom line. It is a tool that aids the member's directorate and management in making strategic planning decisions.

The High Performance Tracking Report, which permits the members to compare their performance with top ROE performers (defined as 16% or greater), was expanded to include liquidity and credit risk components. It is a diagnostic tool that looks at key performance ratios and helps to identify performance-deflating factors such as excess liquidity, excess capital, high operating expenses or high cost of funds. Additionally, the Division is making the Farm Associates' Strategic Asset/Liability Model (SAM) available to members who can request that Division staff run simulations. SAM has an added ability to do income simulation along with the market value or liquidation simulation, and it produces interest rate risk information that might otherwise be unavailable to the member. Finally, the website model for increasing earnings by funding with advances generates a generic, static analysis appropriate to comparing the relative usefulness of different strategies. The strategy results report expressly states "Prior to engaging in any strategy, financial institutions should conduct their own analysis using a variety of assumptions and scenarios."

Apart from providing such services to the FHLBank's members, the Division also develops the FHLBank's annual Strategic Business Plan. Moreover, the Division is subject to review by the FHLBank's internal audit department. In the 1997 annual review, the audit department noted no issues pertaining to staffing,² budget, or goals and objectives accomplishment. With regard to the later, the audit department reported that the goals and objectives of the Division are consistent with the FHLBank's mission and objectives, and are clearly set forth in measurable terms supported by specific strategies for accomplishing the goals and objectives.

² As of November 1997, Bob Ott, a Ph.D. economist with expertise in portfolio and risk management, headed the Division. The professional staff included an economist, a financial consultant, a credit analyst (and former OTS examiner) and a Certified Public Accountant with bank audit experience.

B. Based on the Facts Presented It Appears that the FHLBank Is Not Acting as an “Investment Adviser” Within the Meaning of the Investment Advisers Act of 1940

The OS has questioned whether the FHLBank is providing investment advice and whether it is authorized to do so. Neither the concept nor the term “investment advice” is addressed in the Bank Act, and we are unaware of any prior OGC opinions expressly defining the term. In the absence of a definition of what constitutes “investment advice” in this context, the securities laws governing investment companies and investment advisers provide a reasonable and useful benchmark by which to analyze the FHLBank’s activities. The registration and disclosure provisions of the Investment Advisers Act apply to any “investment adviser,” which is defined as:

“any person [defined as a natural person or company] who, for compensation engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities ***.”³

Fundamentally, the Investment Advisers Act was enacted to introduce the standard of full disclosure to supplant the caveat emptor doctrine in the securities industry.⁴ A central purpose of the Investment Advisers Act is to protect the investing public from fraudulent or deceitful practices of investment advisers having a fiduciary duty to their clients.⁵

From the information presented, it does not appear that the FHLBank’s financial consulting services include providing purchase/sale, product-specific securities “investment advice” or active, transactional asset management. The Division has developed or customized standardized computer models. These standardized models have been made widely available, and can be used by a member or at a member’s request to evaluate a variety of financial

³ The statute excepts from the definition of investment adviser, *inter alia*, “a bank or bank holding company”, a “lawyer, accountant, engineer or teacher whose performance of such services is solely incidental to the practice of his profession” and “any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(12), as exempted securities for the purposes of that Act. ***.” See 15 U.S.C. § 80b-2(11). Similarly, the Investment Company Act, 12 U.S.C. § 80a-1, *et seq.*, excludes from its definition of investment adviser “(i) a person whose advice is furnished solely through uniform publications distributed to subscribers thereto, (ii) a person who furnishes **only statistical and other factual information, advice regarding economic factors and trends, or advice as to occasional transactions in specific securities**, but without generally furnishing advice or making recommendations regarding the purchase or sale of securities, (iii) a company furnishing such services at cost to one or more investment companies, insurance companies, or other financial institutions, * * * or (v) such other persons as the Commission may by rules and regulations or order determine not to be within the intent of this definition.” 12 U.S.C. § 80a-2(a)(20) (emphasis supplied).

⁴ See *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 84 S.Ct. 275, 375 U.S. 180, 11 L.Ed. 237 (1963); see also *Securities and Exchange Commission v. Financial News Associates*, 607 F. Supp. 1195 (E.D. Va. 1985).

⁵ See, e.g., *Securities and Exchange Commission v. Myers*, 285 F. Supp. 743 (D. Md. 1968) and *Sullivan v. Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246 (N.D. Cal. 1978).

strategies. The purpose of these services is to assist the FHLBank's members in achieving appropriate balance sheet management and profitability. The goal is to spur the member's use of the FHLBank's products, such as advances.

It is our understanding that the FHLBank is not providing investment management services in its own name directly to its participating members. The FHLBank does not have or exercise any authority to dispose of or to acquire financial assets on behalf of such members in connection with the consulting services. The FHLBank does not retain investment discretion over such members' financial assets. The FHLBank does not act in a fiduciary capacity and does not manage investment accounts for such members. In the absence of a fiduciary, person-to-person (which by definition includes a company) relationship established for the purpose of rendering investment advice for compensation, the FHLBank is not subject to the registration and disclosure requirements of the Investment Advisers Act.

To the extent that the FHLBank provides financial management advice and technical assistance to its members with no obligation to pay for such services, the FHLBank is not providing investment advice for compensation as contemplated under the Investment Advisers Act. To the extent that the FHLBank may provide information or advice as to the timing or advisability of buying or selling Treasury notes or bonds, or FHLBank consolidated obligations or other government sponsored enterprises' securities,⁶ the FHLBank is not acting as an investment adviser as contemplated under the Investment Advisers Act.⁷ To the extent that the FHLBank is providing "only statistical and other factual information, advice regarding economic factors and trends, or advice as to occasional transactions in specific securities," it is not providing investment advice as contemplated in the Investment Company Act.⁸

Therefore, for purposes of this memorandum, OGC assumes that the FHLBank's financial management consulting services do not constitute "investment advice," and we express no opinion on whether the FHLBanks are authorized to engage in providing "investment advice" to their members.⁹

⁶ See *id.* § 80b-2(a)(11)(E), and note 3, *supra*.

⁷ See *id.* § 80b-2(b), which provides in pertinent part that no provision shall apply or be deemed to apply to the United States or any agency, "instrumentality", or "any corporation which is wholly owned directly or indirectly by" the United States or an agency or instrumentality of the United States. The FHLBanks are government instrumentalities within the meaning of the Investment Advisers Act. The Government Corporation Control Act (Control Act), 31 U.S.C. §§ 9101(1), (2), 9102 (1994), specifically enumerates the FHLBanks as mixed-ownership government corporations, § 9101(2)(C), which Congress considers to be instrumentalities of the United States. See H.R. Rep. No. 97-651, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 2109; see also *Fahey v. O'Melveny & Myers*, 200 F.2d 420, 446 (9th Cir. 1952), cert. denied, 345 U.S. 952 (1953) (stating that "a [FHL]Bank is a federal instrumentality organized to carry out public policy"), and 2 U.S.C. § 622(8) (defining "government-sponsored enterprise").

⁸ See note 3.

⁹ Notwithstanding § 80b-2(b), under certain circumstances where a FHLBank could be construed to be providing investment advice (assuming the FHLBank would be authorized to do so under the Bank Act), the FHLBank might be well-advised to seek specifically an exemption from the registration and reporting requirements of the Investment Adviser Act from the SEC. See, e.g., 15 U.S.C. §§ 80a-2(a)(20)(v); 80a-6(c) and 80b-5(e).

C. Legal Authority of the FHLBanks to Provide Unpaid Financial Management Consulting Services to Members Pursuant to the Federal Home Loan Bank Act

Although the Federal Home Loan Bank Act (the Bank Act) does not expressly authorize the FHLBanks to provide financial management consulting services to their members, the Act provides ample authority for the FHLBank to provide such services.

1. The FHLBanks Provide Liquidity and Other Services to their Members.

The FHLBank System is a cooperative system.¹⁰ The stock in each of the twelve regional FHLBanks is owned solely by their member financial institutions. *Fidelity Finan. Corp. v. FHLBank-San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986) (“*Fidelity Financial*”). Since its inception, the FHLBank System has served as a credit reservoir for its member institutions.” The primary responsibility of the FHLBanks is to assist their members by providing liquidity for housing finance. See, e.g., 12 U.S.C. §§ 1422a(a)(3)(B)(ii), 1423, 1424, 1429, 1430, 1430b, 1432 (a); 12 C.F.R. § 900.4(a)(3). See also *Laurens Fed. Sav. & Loan Ass’n v. South Carolina Tax Comm’n*, 365 U.S. 517, 521-22 (1961); *Fidelity Financial*, 792 F.2d at 1434. In addition to providing advances, see generally 12 U.S.C. §§ 1429, 1430, 1430b, the FHLBanks provide a variety of services for their member institutions including check clearing, letters of credit, and trustee functions. See 12 U.S.C. §§ 1431(e) and (f).

Moreover, the Bank Act grants to the FHLBanks a number of express powers, including the authority to “**make studies of * * * subjects such as they may deem useful for the general guidance of their policies and operations and those of institutions authorized to secure advances.**” 12 U.S.C. § 1428 (emphasis supplied). Importantly, section 12 of the Bank Act grants to the FHLBanks a broad array of powers associated with corporations generally. Pursuant to this authority, the FHLBanks may make contracts, and select, employ and compensate “officers, employees, attorneys, and agents as necessary for the transaction of its business subject to the approval of the [Finance] Board * * * [and] define their duties.” See 12 U.S.C. § 1432 (a). Section 12 further authorizes each FHLBank, through its board of directors and subject to the approval of the [Finance] Board, to “prescribe * * * the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed * * *.” *Id.* Finally, section 12 states unequivocally that each FHLBank “shall have all such incidental powers, not inconsistent with the provisions of this chapter, as are customary and usual in corporations generally.” *Id.*

¹⁰ Congress defined the FHLBank System as “the Federal Home Loan Banks under the supervision of the [Finance] Board.” 12 U.S.C. § 1422(2)(B). Finance Board regulations provide that the FHLBank System consists of the twelve Federal Home Loan Banks and the Office of Finance, a joint office of the FHLBanks. 12 C.F.R. § 941.1. The FHLBanks are a cooperative in that they are owned by their members and pay out almost all of their earnings as dividends to their member shareholders.

¹¹ “[T]he home-loan bank system is a central discount banking system * * * .” 75 Cong. Rec. H12614 (daily ed. June 10, 1932) (statement of Rep. Hancock).

2. The Bank Act Authorizes the FHLBanks to Provide a Broad Array of Products and Services to their Members.

In addition to their express powers, and general corporate incidental authority, the FHLBanks have broad incidental authority, contained in two closely related provisions in section 11 of the Act. See 12 U.S.C. §§ 1431(a) and 1431(e)(1). Section 11(a) of the Bank Act provides that “[e]ach [FHL]Bank shall have power, subject to rules and regulations prescribed by the [Finance]Board * * * to do all things necessary for carrying out the provisions of this chapter **and all things incident thereto.**” *Id.* § 1431(a) (emphasis supplied). Section 11(e)(1) provides that “no [FHL]Bank shall transact any banking or other business not incidental to activities authorized by this chapter.” *Id.* § 1431(e)(1). Read in conjunction with section 11(a), section 11(e)(1) recognizes that FHLBanks may conduct ‘banking or other business’ so long such business is incidental to activities authorized by the Bank Act.¹² Section 11 of the Bank Act is the result of a conscious effort by Congress to make the FHLBanks’ incidental authority more expansive.

With the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Congress expressly broadened the FHLBanks’ authority to engage in activities and to provide services to their members so long as such activities or services are “incidental to activities authorized by [the Bank Act].”¹³ This language was chosen deliberately to “ensure that the banks might provide a variety of products and services.” Cong. Rec. H4994 (daily ed. Aug. 3, 1989) (statement of Rep. Garcia). Prior to the enactment of FIRREA, the incidental authority provision of section 11(e)(1) did not contain the words “incidental to activities” and stated, more restrictively, that “no [FHL]Bank shall transact any banking or other business not authorized by this chapter.” See 12 U.S.C. § 1431(e)(1) (1988).

During the time that the Bank Act contained this more restrictive provision, two federal courts considered whether certain activities approved by the former Federal Home Loan Bank Board (predecessor to the Finance Board) were properly within the scope of the FHLBanks’ incidental authority. Both courts, while allowing that the FHLBanks had significant incidental powers, implied from section 11(e)(1) that the incidental powers of the FHLBanks must be viewed more narrowly than those of national banks. See *Association of Data Processing Serv. Orgs., Inc., v. Federal Home Loan Bank Board*, 568 F.2d 478 (6th Cir. 1977) (*ADAPSO*); *Central Bank, N.A. v. Federal Home Loan Bank of San Francisco*, 430 F. Supp. 1080 (N.D.Cal. 1977), *vacated*, 620 F.2d 309 (9th Cir. 1980) (*Central Bank*).¹⁴ The legislative history of FIRREA makes clear that Congress intended, through this amendment, not only to broaden the incidental

¹² The legislative history of the Bank Act indicates that, even before the FIRREA amendment (discussed *infra.*), the prohibition stated in section 11(e)(1) was intended primarily to limit FHLBank dealings with the general public, and not to prohibit the FHLBanks from engaging in particular types of activities with their members. See H.R. Rep. No. 1418, 72d Cong., 1st Sess. 6 (1932) (stating “The [FHL]Banks are specifically restrained from doing any general banking or commercial banking business. Their functions are confined solely to serving member institutions.”).

¹³ See Pub. L. No. 101-73, § 709(1), 103 Stat. 418 (1989).

¹⁴ The principal issue in each of these cases was whether the FHLBanks could provide services to their members not expressly authorized by the Bank Act. At issue in *ADAPSO* was the authority to provide on-line data processing services. The *CentralBank* case involved the provision of money orders. The section following discusses why the analysis applied in these cases is no longer persuasive.

authority of the FHLBanks in a general sense, but also specifically to overrule the *ADAPSO* decision.¹⁵

The intent of Congress is clear from the FIRREA Conference Report and a statement entered into the Congressional Record by Rep. Robert Garcia, a member of the House Banking Committee and the author of the amendment to section 11(e)(1). Section 11 was amended “to provide that the [FHL]Banks are permitted to engage in activities that are incidental to those expressly authorized by the Act,” in order to “ensure that [FHL]Bank members are able to provide economical housing finance.” H.R. Rep. No. 222, 101st Cong., 1st Sess. 426 (1989) (Report). The Report provides several examples of activities authorized under the FHLBanks’ expanded incidental authority,¹⁶ and specifically states that “[t]he [FHL]Banks are also able to provide other correspondent banking services for members.” *Id.* Rep. Garcia amplifies the congressional intent, stating:

It is my understanding, as author of this provision, that the amendment is intended to permit the [FHL]Banks to engage in activities incidental to their express statutory powers, and that Congress **contemplated this incidental power to be broadly read.**

* * * *

The reason that the banks’ incidental power was intended to be viewed broadly is that it supports the primary purpose of the banks; namely, housing finance. **It also permits the [FHL]Banks to help their members to control operating costs and interest rate and credit risk.**

* * * *

Under the current statute, it is possible to construe the home loan banks’ incidental activities more narrowly than those permitted for national banks. [The amendment] is intended to clarify this point. **It is my understanding that the incidental activities of national banks and the home loan banks should now be viewed as similarly broad.**

* * * *

Incidental activities do not need to be strictly necessary to the home loan banks’ exercise of their express powers. Neither are they limited to activities that only the banks can engage in, or services only they can perform. **The amendment is intended to ensure that the banks may provide a variety of**

¹⁵ Congress had already overruled *the Central Bank* decision, which restrictively read the authority of the FHLBanks to engage in correspondent services for members, by adding section 11(e)(2) to the Bank Act. 12 U.S.C. § 1431(e)(2). See Pub. L. 96-221, § 311, 94 Stat. 149 (1980); *see also Central Bank, N.A. v. Federal Home Loan Bank of San Francisco*, 620 F.2d 309 (9th Cir. 1980) (vacating district court opinion in light of the statutory revision).

¹⁶ “For example, these activities include collection and settlement of checks, and related services that [FHL]Banks can provide to or for members. The Banks can also provide courier and custody services for, and can process and transmit information related to these services.” Additionally, the report stated, in connection with providing correspondent banking services, the FHLBanks can provide services such as reconciliation of customer accounts and payrolls, “as well as the analysis and transmission of such information.” *See id.*

products and services. This variety makes membership in the banks appealing to eligible institutions. By sustaining membership, the banks are better able to meet the financial obligations that [FIRREA] imposes on them.

* * * *

I understand the amendment to permit a broader range of incidental credit transactions between the banks and their members and affiliates.

See 108 Cong. Rec. H4994 (daily ed. August 3, 1989) (statement of Rep. Garcia).

The FHLBank’s financial management consulting services are “convenient and useful” to the FHLBank’s express power to provide information to its members which it deems “useful for the general guidance of * * * [the] policies and operations * * * of institutions authorized to secure advances.” 12 U.S.C. § 1428. Providing information that can assist a member in more cost-effectively and efficiently managing its operations furthers many of the goals enunciated in the legislative history of FIRREA’s section 11 amendment. The advantages to the FHLBanks to having their members apply for and appropriately use advances cannot be gainsaid. In amending the incidental powers of the FLHBanks, Congress expressly acknowledged the benefit of empowering the FHLBanks to assist their members with housing finance funding, controlling operating costs, and management of interest rate and credit risk. By allowing the FHLBanks to provide a broader range of services to their members, the FHLBanks can ensure that membership in the FHLBank System is more meaningful and desirable. The FHLBank is authorized pursuant to the incidental powers provision to provide the financial management consulting developed by the Division to assist the members and enhance the value of their membership in the FHLBank System.

Revisions to the incidental authority clause support a conclusion that the FHLBank may provide investment strategy alternatives under Section 8 of the Bank Act. Prior to the enactment of FIRREA, the Office of General Counsel of the Federal Home Loan Bank Board opined on the FHLBanks’ authority to provide “investment advice” under the incidental powers.* Constrained by the former text of section 11(e)(1) the 1976 OGC Opinions concluded that the FHLBanks did not have investment advisory authority.” The 1983 OGC Opinion undertook a broader analysis,

¹⁷ See, e.g., *Arnold Tours v. Camp*, 472 F.2d 427 (1st Cir. 1972) (construing the National Bank Act and finding incidental powers are those that are “convenient and useful” to the exercise of express powers).

¹⁸ See, e.g., Memorandum from the Office of General Counsel to Deputy Director, Office of Federal Home Loan Banks, dated February 23, 1976, entitled “Advisory Investment Functions of Federal Home Loan Banks;” and the Memorandum from the Office of General Counsel to Deputy Director, Office of Federal Home Loan Banks, dated March 22, 1976, entitled “Advisory Investment Authority of Federal Home Loan Banks,” which supplemented the prior memorandum (collectively, the 1976 OGC Opinions). In 1983, the Office of General issued a memorandum on the issue of whether the Federal Home Loan Banks “have the legal authority under the Bank Act to provide their member institutions with services other than those expressly authorized by the Act.” Memorandum from A. Patrick Doyle, Acting General Counsel, to the Board of Directors of the Federal Home Loan Bank Board, dated July 27, 1983, West Doc. No. 5310 (1983 OGC Opinion).

¹⁹ Another reason cited in the old OGC opinions concluding that the FHLBanks did not authority to provide investment advisory services to their member was the fact that the FHLBanks played a role in the supervision of the system members. FIRREA ended that practice, the FHLBanks are no longer both regulator and cooperative collaborator.

reviewing many member services under the incidental powers clause and in light of the ADAPSO and *Central Bank* decisions. While the 1983 OGC Opinion stated that the Bank Act did not authorize investment management and consulting services, OGC foresaw the possibility that information on investments could be provided under the incidental powers clause (even prior to the FIRREA revision):

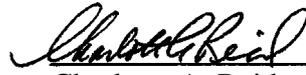
“[I]t may be possible under [12 U.S.C. § 1428] for the [FHL]Banks to provide their members with assistance in evaluating various investment alternatives and methods of structuring their portfolios, without actually advising them as to which alternative should be chosen. For example, it may be possible for a [FHL]Bank to, using standardized computer based models, to inform a member of the effect on its investment portfolio of various hedging strategies that are available to it. Similarly, given the possible investment alternatives that the management of a member may wish to pursue, a [FHL]Bank may be able to assess the advantages and disadvantages [of] particular investment strategies. In each instance, the [FHL]Bank only would evaluate the various possibilities available to choose from and the actual choice among the alternatives would be made by the members. A rationale for this would be that the provision of objective analysis of various investment or hedging strategies would not constitute giving advice if the adoption of a strategy was left with the member. The use of standardized models to provide the analysis would further support this distinction.”

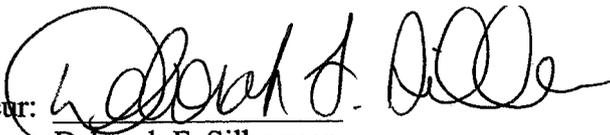
See 1983 OGC Opinion, at 11.

III. CONCLUSION

The Bank Act permits the FHLBanks to provide information and analysis of financial strategies under section 8, which empowers the FHLBanks to make available information deemed to useful to their members for operations and lending. Under the incidental authority provisions of section 11, as amended by FIRREA, the FHLBanks may undertake to provide a broad array of products and services to their members. The FHLBanks are authorized under section 12 of the Bank Act to select and direct their employees **in the transaction of the FHLBanks’ business and define their duties.** Thus, the FHLBank of ██████████ was authorized to create the Division to provide financial management consulting services as described herein for the member institutions. The services described herein do not constitute the provision of investment advice as contemplated in the Investment Company Act or the Investment Advisers

Act. There is no provision in the Bank Act requiring the FHLBank to charge the member for these services. Therefore, based on the information presented, and assuming the facts as represented to be true, the FHLBank of ██████████ had authority to provide the financial management consulting services of the Division to its members.


Charlotte A. Reid
Special Counsel

Concur: 
Deborah F. Silberman
General Counsel