



Federal Housing Finance Board

February 11, 2000

OPINION OF THE OFFICE OF GENERAL COUNSEL

ISSUE:

May the Federal Housing Finance Board (Finance Board) approve a transfer of the stock of a Federal Home Loan Bank (FHLBank) from a non-member institution, which acquired the stock through a merger with an affiliated institution as part of a corporate reorganization, to another affiliated institution in order to allow that institution to become a member of the FHLBank, pursuant to section 6(f) of the Federal Home Loan Bank Act (Bank Act)?

CONCLUSIONS:

Yes. Section 6(f) of the Bank Act permits a "direct transfer" of FHLB stock between institutions, provided that the Finance Board approves the transfer. Typically, the transfer will be between members. In this case, however, the member that owned the stock merged into an affiliate, as part of a corporate reorganization. The affiliate, which is a non-member, intends to transfer the stock to another affiliate so that it may become a member of that FHLBank.

In these circumstances, where the FHLBank stock is transferred through affiliated institutions as part of a corporate reorganization, the multi-step transfer is not significantly different from a direct transfer between affiliated members, even if the reorganization requires a non-member to hold the FHLBank stock temporarily. So long as the stock is transferred either to a member of that FHLBank or to an institution applying for membership, section 6(f) of the Bank Act would apply. Accordingly, the FHLBank may permit such a transfer only with the approval of the Finance Board.

I. Background.

On December 1, 1999, Bank of America, FSB, Portland, Oregon (FSB), a member of the FHLBank of Seattle, relocated its home office to Salt Lake City, Utah and converted from a federal savings bank into a national bank. On the same day, the Salt Lake City national bank was merged into an affiliated institution, Bank of America, N.A., Charlotte, North Carolina (BOA Charlotte). As a result of these transactions, FSB no longer exists, and its assets and liabilities, including its FHLBank stock and advances, are now held by BOA Charlotte. BOA Charlotte is a wholly-owned subsidiary of the Bank of America Corporation (BOA). BOA Charlotte is not eligible to become a member of the FHLBank of Seattle, but has asked the FHLBank of Seattle to allow it to transfer the capital stock originally held by FSB to an affiliated de novo national bank, to be known as Bank of America, N.A., Portland, Oregon (BOA Portland), which will operate at the location of the former FSB. BOA Portland will be a wholly-owned subsidiary of the NB Holdings Corporation, a registered bank holding company which is itself a wholly-owned subsidiary of BOA. The relocation, conversion and merger of FSB and the formation of BOA Portland are part of a larger BOA reorganization.

On December 15, 1999, BOA Portland received preliminary approval for its national bank charter from the Office of the Comptroller of the Currency, Department of the Treasury (OCC). Final approval of the charter was contingent on a number of events, including approval by the Federal Reserve Board (FRB) of BOA's application to acquire BOA Portland. By letter dated January 25, 2000, the FRB approved the acquisition of BOA Portland. The Federal Deposit Insurance Corporation (FDIC) also conditionally approved an application to obtain deposit insurance for BOA Portland on January 25, 2000. BOA Portland received final charter approval from OCC by letter dated February 4, 2000.

BOA Portland is chartered as a bankers' bank. Its activities will be limited to investing in and managing interests in long-term mortgage loans acquired from its affiliated banks and managing the funding of these instruments. In this regard, BOA Portland will participate with other lenders both within and outside of the FHLBank of Seattle's district in the origination of various single- and multi-family home loans. It will also accept time and savings deposits from its affiliates. According to the FHLBank of Seattle, BOA Portland also expects to expand its community investment activities and affordable lending programs through loan participations with other FHLBank members and through the purchase of mortgage assets from affiliates and other sources.

BOA Charlotte intends to transfer the advances that it acquired from FSB to BOA Portland, after BOA Portland becomes a member of the FHLBank of Seattle. At the time of its merger, FSB had outstanding advances totaling [REDACTED] and [REDACTED] Community Investment Program (CIP) advance totaling [REDACTED]. In addition, FSB had [REDACTED] in Affordable Housing Program grants and advances under monitoring for [REDACTED] projects. Many of the outstanding advances have maturities of 15 to 30 years. BOA Charlotte also wishes to transfer the FHLBank Seattle stock which it acquired from FSB directly to BOA Portland to enable BOA Portland to become a FHLBank member.

FHLBank Seattle has indicated that BOA Portland already submitted an application for membership. The FHLBank of Seattle's preliminary review indicates that BOA Portland's application for membership will be approved. The FHLBank of Seattle has also indicated that given the size and complexity of its business relationship with the BOA entities, it would be operationally easier for it and for BOA if both the stock and the advances could be transferred directly from BOA Charlotte to BOA Portland.. Accordingly, the FHLBank of Seattle has requested that the Finance Board approve the transfer of the FHLBank's stock from BOA Charlotte to BOA Portland.

II. Analysis.

Section 6(f) of the Bank Act, 12 U.S.C. § 1426(f) provides that:

A Federal Home Loan Bank may, with the approval of the [Finance] Board, permit the disposal of stock to another member, or to an institution eligible to become a member, but only to enable such an institution to become member.¹

Section 6(f) does not expressly address the transfer of FHLBank stock from a non-member institution to an institution that is applying for membership. Finance Board regulations promulgated pursuant to section 6(f) provide that a transfer of FHLBank stock is "deemed" to be approved by the Finance Board if the transfer results from the consolidation, merger, or purchase of all assets and assumption of all liabilities of one FHLBank member by another member in the same FHLBank district. See 12 C.F.R. § 933.24 (1999), and 12 C.F.R. § 933.1(ee)(1999) (defining "consolidation"). The Finance Board rules also allow a non-member institution to continue to hold FHLBank stock when it acquires such stock through consolidation, merger, or purchase of all assets and assumption of all liabilities of a FHLBank member, provided that the non-member applies for FHLBank membership and meets the other requirements set forth in the regulations. See 12 C.F.R. § 933.25 (1999). The Finance Board's rules do not otherwise address the instances in which FHLBank stock may be transferred from a non-member institution to a member.

Section 6(f) of the Bank Act provides that the Finance Board may authorize a FHLBank to permit "the disposal of stock to another member, or to an institution eligible to become a

¹ The Gramm-Leach-Bliley Act (GLB Act), Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999), extensively amended Section 6(f) of the Bank Act, along with the other paragraphs of Section 6, and has effectively repealed the section. The GLB Act, however, specifically provided that the requirements relating to purchase and retention of capital stock of a FHLBank by any member thereof in effect on the day before the date of the enactment of the GLB Act shall continue in effect until the regulations required by the amendment have been adopted and the FHLBanks have implemented the capital structure plan required thereunder. See Pub. L. No. 106- 102, § 608, 113 Stat. 1456, 1458. Thus, until such time as the Finance Board has approved the FHLBanks' capital structure plans and the FHLBanks have implemented these plans, Section 6(f) of the Bank Act, as it existed immediately prior to the enactment of the GLB Act, continues to apply.

member, but only to enable such an institution to become member." While the use of the term "another member" may imply that the transferor also must be a member, we do not believe that such a reading is the only way to construe the provision. The legislative history of the provision provides no insight into whether Congress intended section 6(f) to apply to transfers of capital stock from a non-member, and OGC has previously stated that:

...there is no legislative history regarding Congress' intent in adopting section 6(f), and thus there is no guidance as to whether Congress, by specifically authorizing such transfers between members, intended to prohibit the Finance Board from approving transfers of FHLBank stock from non-members²

Given the ambiguity of the statutory language and the lack of useful guidance in the legislative history, the Finance Board is free to construe section 6(f) as applying, or not applying, to a direct transfer of stock from a non-member.

On the facts presented, however, we do not believe that the Finance Board must address that issue in order to approve the transfer of stock from BOA Charlotte to BOA Portland. In our view, the BOA transaction is not substantially different from a member-to-member transfer, which clearly requires Finance Board approval under section 6(f). In this case, the stock initially was owned by a member of the FHLBank of Seattle, and it is intended to be transferred to an eligible institution that has applied for membership in the FHLB in order to allow that institution to become a member of that Bank. The only nuance in this situation is that the proposed transfer would occur as part of a corporate reorganization of certain BOA banking subsidiaries, which has involved a non-member holding the stock of the FHLBank for a limited period of time. On these facts, we believe that the Finance Board has the legal authority to approve the proposed transfer as being tantamount to a member-to-member transaction, notwithstanding the stock's being held for a short period by a non-member.

Where a statute is ambiguous, an expert agency may adopt an interpretation that is reasonable in light of the policy goals committed to the agency. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). If a court finds that "Congress has not directly addressed the precise question at issue" in the statute or the legislative history, courts will uphold the expert agency's interpretation of the statute as long as it is "permissible." *Chevron, U.S.A., Inc.*, 467 U.S. at 843 & n.9 (1984). Under *Chevron*, a "permissible interpretation" is one that represents a "reasonable accommodation of conflicting policies that were committed to an agency's care by the statute." *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)). Even if an agency's interpretation or corresponding policy choice is one that the court would not have chosen itself, the court may not overturn the interpretation unless "it appears from the statute or legislative history that the accommodation is not one that

² Memorandum dated August 26, 1993, from Bruce W. McDougal, Attorney Advisor to Thomas D. Sheehan, Assistant Director, Regulatory Oversight Division at 2. While the Memorandum discussed the legislative history of section 6(f) of the Bank Act, it did not address whether section 6(f) would permit the Finance Board to allow the transfer of FHLBank stock from non-members to members or to institutions eligible for membership in order to become FHLBank members.

Congress would have sanctioned," Id. Given the ambiguity in the wording of section 6(f) and the lack of legislative history concerning the provision, as well as the facts of this transaction, it is our view that the Finance Board may interpret section 6(f) as applying to this transaction and approve it in the usual course.


Thomas E. Joseph
Attorney-Advisor

Concur: 
Neil R. Crowley
Deputy General Counsel