



REGULATORY INTERPRETATION 2007-RI-02

September 19, 2007

Subject:

The Federal Home Loan Bank (Bank) nomination and election process under 12 C.F.R. §§ 915.6 and 915.8, using electronic communications.

Introduction:

One of the Banks has raised a question about whether or not part 915 of the Finance Board's regulations, in particular sections 915.6 and 915.8, allows the Banks to conduct elections of directors electronically, such as by use of the Internet. The board of directors of each Bank, or a committee of its disinterested directors, is responsible for administering and conducting the elections in accordance with part 915 (§ 915.3(a)), and part 915 does not address specifically the use of electronic communications. The Bank notes that certain terms used in part 915 are associated with conducting the election process through the mails, and it seeks an interpretation as to whether those terms were meant to be construed so narrowly. This Interpretation identifies those terms and concludes that they are meant to include a broader range of communications.

Communication Terms and Issues they present:

During the nomination and election process, Banks must do the following:

- (1) Provide *written notice* to members at the start of the nomination process (§ 915.6(a)).
- (2) *Mail* ballots (§ 915.8(a)).
- (3) *Notify* members in *writing* if there are no nominees (§ 915.8(c)).
- (4) Provide *written notice* of the results of an election (§ 915.8(f)).
- (5) Leave ballots *unopened* until after the closing date (§ 915.8(e)).
- (6) *Retain* all nominating certificates and ballots for 2 years (§§ 915.6(b) and 915.8(e)).

Members, in turn, must do the following:

- (1) *Submit* nominating certificates to the Bank (§ 915.6(b)) when nominating elective director candidates.
- (2) *Mark* a name on a ballot, *execute* the ballot by an appropriate writing or by resolution of the member's board of directors, and *deliver* the ballot to the Bank (§ 915.8(d)).

May the Banks use electronic communications to conduct the nomination and election processes that are required under 12 C.F.R. part 915, without violating these and other requirements of part 915?

If part 915 does not preclude a Bank from conducting the election process electronically, are there any limitations on the manner in which electronic communications may be used?

Conclusion:

The Banks are responsible for conducting the process of electing directors to their boards of directors, and 12 C.F.R. part 915 of the Finance Board regulations does not prohibit the use of the Internet or other electronic communications at any stage in the process. If a Bank does use electronic communications in its election process, the Bank should be mindful of engaging in practices that will not violate part 915. If members must access an Internet Web site in order to participate in the election process, such members should be given the opportunity to opt out of that particular electronic process, in which case any Bank with an opt-out member should provide opt-out members with an alternative method of participating in the election process.

A discussion of some of the practices that are consistent with the requirements of part 915 is set forth below.

Analysis and Discussion:

Pursuant to 12 C.F.R. § 915.3(a) of the Federal Housing Finance Board's (Finance Board) regulations, each of the Banks must administer and conduct annual elections to fill the elective directorship positions at the Bank. Such elections must be conducted in accordance with part 915. Nowhere in part 915 is there a requirement to use the U. S. mails or any other particular method of mailing, distributing or receiving the materials necessary to accomplish an election. In adopting part 915, the Finance Board did not intend to exclude any mode of communications, so long as the requirements of part 915 would be met.

Part 915 first became effective on November 30, 1998. Since then, sending and receiving messages, information and materials electronically has become almost a universally accepted practice. Congress recognized this change and, in the year 2000, helped facilitate the use of electronic communications in interstate commerce by passing the Electronic Signatures in Global and National Commerce Act (E-SIGN Act).¹ The E-SIGN Act provides that any electronic form of signature or writing in interstate commerce cannot be denied legal effect.² Even in the context of voting for directors of companies, the Internet is a recognized and accepted mode of communication for receiving and responding to proxy voting requests.³

Within the confines of electronic communications, there may be more than one way to conduct an election in compliance with part 915. The discussion below is divided into two parts: (1) the use of electronic communications generally, and (2) the use of a host Web site.

Elections Using Electronic Communications Generally.

The terms used in part 915 do not preclude the use of electronic communications to comply with its requirements and to carry out its purpose. More specifically, note the following:

¹ Pub. L. No. 106-229, 114 Stat. 464 (2000).

² 15 U.S.C. § 7001(a).

³ See Internet Availability of Proxy Materials, Exchange Act Release No. 34-55146, 72 Fed. Reg. 4147 (Jan. 29, 2007).

- (1) The phrases “provide ... written notice” to a member and notify a member “in writing,” as used in 12 C.F.R. §§ 915.6(a), 915.8(c) and 915.8(f), may be accomplished by a Bank by sending electronic messages to a member at an electronic address of the member, which message contains the same kind of information that a writing on paper would contain. An electronic message that may be viewed or printed by the recipient is a type of writing.
- (2) The verb “mail,” as used in 12 C.F.R. §§ 915.6(b)(3) and 915.8(a), may be accomplished electronically by a Bank, as illustrated by the use of the term “e-mail” to describe sending and receiving messages and document attachments to messages by electronic means. To mail something, such as a ballot, means to deliver the ballot through a service that undertakes delivery, and one definition of delivery is to give possession or control to another.⁴ (Emphasis added) The Finance Board’s use of the words “mail” in part 915 does not preclude the use of the Internet for electronic mailing. Even in the context of electronic mailing there may be various ways of making electronic delivery, so the Banks have some discretion in how electronic mailing will occur. One method of mailing might be to create an electronic ballot and send it to the member by e-mail.
- (3) The terms “mark” a name and “execute the ballot ... by an appropriate writing signed by an individual,” as required by 12 C.F.R. § 915.8(d) before a Bank may accept a ballot, may be accomplished electronically. A common way to mark a name is to make or leave a mark beside the name, such as a check mark or “x” in a block by a name, and such marks may be made electronically. Although the verb “execute” connotes more legal effect than does the verb “sign,” both words essentially mean the act of putting a signature on a document. As noted above, the E-Sign Act recognizes the concept of signatures in electronic form and gives legal effect to them.

In allowing a member to execute a ballot electronically, a Bank must establish a procedure that will enable the Bank to be reasonably assured that the electronically executed ballot has been executed by the member in accordance with 12 C.F.R. § 915.8(d)(2).

- (4) Under 12 C.F.R. § 915.8(d), a voting member must “deliver” a marked and executed ballot to its Bank. Electronic delivery has been an accepted mode of delivery for quite some time. The Securities and Exchange Commission first publicly recognized it as a form of delivery in 1995.⁵

Delivery to a Bank of a ballot by a member, as required by 12 C.F.R. § 915.8(d), presumes that the Bank previously has mailed the ballot to the member. The Finance Board’s use of the word “deliver” in part 915 does not preclude the use of the Internet for electronic delivery. Even in the context of electronic delivery there may be various ways to accomplish electronic delivery, so the Banks have some discretion in determining how electronic delivery will be made and received. For example, after electronically marking and executing a ballot, a member could deliver it back to the Bank by e-mail.

⁴ Black’s Law Dictionary 461 (8th Ed. 2004).

⁵ See Use of Electronic Media for Delivery Purposes, Securities Act Release No. 33-7233, 60 Fed. Reg. 53458 (Oct. 13, 1995).

If a member notifies its Bank that it cannot “deliver” the ballot back to the Bank through use of the Internet, then the member must be given the opportunity to use some other form of delivery. In such cases, that may mean that the Bank will have to provide an alternative means of voting.

- (5) A member may “submit” a nominating certificate to a Bank, as set forth in 12 C.F.R. § 915.6(b), and such certificates can be submitted electronically. To “submit” something does not always mean to deliver it. In some contexts, the submitting of something, such as a nominating certificate, might be accomplished merely by making it available. In the context used in section 915.6(b), though, the term is similar in meaning to the term “deliver,” because a Bank must receive a nominating certificate by an established deadline or it cannot act on that certificate.⁶ Thus, a Bank’s election procedures should require actual delivery to the Bank, whether electronically or otherwise. Like delivery of executed ballots, if a member notifies its Bank that it cannot return a nominating certificate electronically, it must be allowed an alternative means of returning the certificate.
- (6) Section 915.8(e) requires each Bank to leave a ballot “unopened” until after the closing date. Electronically, a ballot is opened when electronic access to the ballot is obtained. If a Bank has the ability to have electronic access to a ballot after it has been executed, the Bank must maintain procedures to prevent its access to the ballot from the time a member votes the ballot until after the vote closing date. One way this could be accomplished is to maintain the ballots with a third party administrator that has the capability to block access to each ballot from the time it is voted until after the vote closing date.
- (7) Section 915.8(e) also requires each Bank to “retain” all voted ballots for a period of at least two years from the date of election. Ballots voted electronically may be retained electronically. If a Bank uses a third party administrator for the election process, those records may be retained with that administrator, provided the Bank can produce the records if requested by the Finance Board. If a Bank maintains all the data from each voted ballot, including the date voted, in some understandable format for a period of at least two years, such record maintenance, in lieu of retaining all voted ballots, will satisfy the requirement.

Elections Using an Internet Web site.

Rather than e-mailing ballots, a Bank could choose to make ballots accessible through an Internet Web site. If it does so, the Bank must provide a means for its members to have notice of the availability of ballots at that Web site. Each Bank has some discretion in how to notify its members of the availability of the ballots. E-mailing the notice to an electronic address of a member could be an acceptable mode of notice to that member. Having an Internet Web site which is accessible to all members that are eligible to vote and merely posting the notice on that Web site would not be acceptable unless the Bank can demonstrate that all nonvoting members eligible and consenting to vote through this Web site had both notice of the availability of the ballots and an opportunity to vote to the same extent as those members that voted.

⁶ 12 C.F.R. § 915.6(b)(3).

A member's capability to access and vote a ballot is dependent both on how the Bank makes it available and on the electronic skills, software and hardware of the member. For that reason, the Bank should either obtain consent from a member to use the site to vote or provide the member with an alternative means of voting that the member can use. Consent may be obtained through writing on paper, by telephone (if a recorded or written record of the call is maintained), or electronically. Consent will be inferred if the member receives from the Bank a consent request that provides all the procedural information necessary to understand how the process will work and informs the member both that it has the right to opt out of this mode of voting and how to do so and that its failure to opt out will be deemed a consent to this mode of voting.

Even if a member has notice of the availability of a ballot at an Internet Web site, the member will not have the ability to control (will not have delivery of) the ballot unless it has the capability to access the ballot and to mark and execute it. If the Bank's chosen Internet Web site has all the required capabilities except that it does not provide the member with a means to execute the ballot, the Bank's procedures may require the member to use the alternative form of execution, which is by resolution of the member's board of directors.⁷

For those ballots that never leave a Web site established by a Bank, a member's delivery of an executed ballot to the Bank is accomplished when a member makes the executed ballot available to the Bank.

A Regulatory Interpretation is subject to modification or rescission by action of the Board of Directors of the Finance Board. 12 C.F.R. part 907.
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⁷ See 12 C.F.R. § 915.8(d).