

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 109

[Notice 2006–5]

#### Coordinated Communications

**AGENCY:** Federal Election Commission.

**ACTION:** Supplemental notice of proposed rulemaking; re-opening of comment period.

**SUMMARY:** The Federal Election Commission is making public data related to its ongoing rulemaking regarding coordinated communications and is re-opening the public comment period for the Notice of Proposed Rulemaking (“NPRM”) published on December 14, 2005. The Commission requests additional comments on alternatives presented in the NPRM in light of data regarding the timing of campaign advertising in recent elections. No final decision has been made by the Commission on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

**DATES:** Comments must be received on or before March 22, 2006.

**ADDRESSES:** All comments must be in writing, must be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail or fax to ensure timely receipt and consideration. E-mail comments must be sent to either [coordination@fec.gov](mailto:coordination@fec.gov) or submitted through the Federal eRegulations Portal at <http://www.regulations.gov>. If e-mail comments include an attachment, the attachment must be in either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219–3923, with paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal

service address of the commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brad C. Deutsch, Assistant General Counsel, Mr. Ron B. Katwan or Ms. Esa L. Sferra, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** On December 14, 2005, the Commission published a Notice of Proposed Rulemaking (“NPRM”) proposing to amend its current rules at 11 CFR 109.21 that set forth a three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to a candidate, a candidate’s authorized committee, or a political party committee. 70 FR 73946 (Dec. 14, 2005). The NPRM proposed seven different alternatives for revising the content prong of the coordinated communications test in response to the decisions in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (“*Shays District*”), *aff’d*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (“*Shays Appeal*”) (pet. for reh’g en banc denied Oct. 21, 2005) (No. 04–5352). In *Shays Appeal*, the Court of Appeals invalidated one aspect of the content prong—the 120-day time frame—because the court believed that the Commission had not provided an adequate explanation and justification under the Administrative Procedure Act. *Shays Appeal* at 100. The Court of Appeals emphasized that justifying the 120-day time frame (or any other time frame) requires the Commission to undertake a factual inquiry to determine the appropriate time frame regarding “election-related advocacy.” *Id.* at 102.

The Court of Appeals ordered the Commission to consider carefully certain questions in promulgating new rules, including: “Do candidates in fact limit campaign-related advocacy to the four months surrounding elections, or does substantial election-related communication occur outside that window? Do congressional, senatorial, and presidential races—all covered by this rule—occur on the same cycle, or should different rules apply to each?” *Shays Appeal*, 414 F.3d at 102.

In the NPRM, the Commission specifically requested that commenters submit empirical data showing the time period before an election during which

campaign communications generally occur. NPRM at 73949. None of the commenters on this rulemaking provided empirical data in response to the Commission’s request. One joint comment did provide, however, a compilation of selected campaign advertisements run before certain elections that took place during several recent election cycles.

The Commission held a public hearing on this rulemaking on January 25–26, 2006, at which eighteen commenters testified. At the close of the hearings, the Commission still had not received any empirical data regarding the timing of campaign advertisements.

Therefore, the Commission is issuing this Supplemental Notice of Proposed Rulemaking (“SNPRM”) to invite comment on data that the Commission has now licensed from TNS Media Intelligence/CMAG. These data, which can be accessed from the Commission’s Web site at [http://www.fec.gov/law/law\\_rulemakings.shtml#coordinated](http://www.fec.gov/law/law_rulemakings.shtml#coordinated), provide information regarding television advertising spots run by Presidential, Senate, and House candidates during the 2004 election cycle. The Commission has also provided graphical representations of these data, which are also available at this Web site address.

This SNPRM also re-opens the comment period for this rulemaking. The Commission seeks additional comment, in light of the information presented by these data, on the issues and questions raised in the NPRM regarding the content prong time frame. See NPRM at 73948–52. Comments are due on or before March 22, 2006.

Dated: March 8, 2006.

**Michael E. Toner,**

*Chairman, Federal Election Commission.*

[FR Doc. 06–2551 Filed 3–14–06; 8:45 am]

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## FEDERAL HOUSING FINANCE BOARD

### 12 CFR Parts 900, 917, 925, 930, 931 and 934

[No. 2006–03]

RIN 3069–AB30

#### Excess Stock Restrictions and Retained Earnings Requirements for the Federal Home Loan Banks

**AGENCY:** Federal Housing Finance Board.

**ACTION:** Proposed rule.

**SUMMARY:** The Federal Housing Finance Board (Finance Board) is proposing to add to its regulations provisions that would limit the amount of excess stock that a Federal Home Loan Bank (Bank) can have outstanding and that would prescribe a minimum amount of retained earnings for each Bank. The proposed amendments also would prohibit a Bank from selling excess stock to its members or paying stock dividends, and restrict a Bank's ability to pay dividends when its retained earnings are below the prescribed minimum.

**DATES:** The Finance Board will accept written comments on the proposed rule on or before July 13, 2006.

*Comments:* Submit comments by any of the following methods:

E-mail: [comments@fhfb.gov](mailto:comments@fhfb.gov).

Fax: 202-408-2580.

Mail/Hand Delivery: Federal Housing Finance Board, 1625 Eye Street, NW., Washington, DC 20006, ATTENTION: Public Comments.

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to the Finance Board at [comments@fhfb.gov](mailto:comments@fhfb.gov) to ensure timely receipt by the agency.

Include the following information in the subject line of your submission: Federal Housing Finance Board. Proposed Rule: Excess Stock Restrictions and Retained Earnings Requirements for the Federal Home Loan Banks. RIN Number 3069-AB30. Docket Number 2006-03.

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, on the Finance Board Web site at <http://www.fhfb.gov/Default.aspx?Page=93&Top=93>.

**FOR FURTHER INFORMATION CONTACT:**

Scott L. Smith, Associate Director, [smiths@fhfb.gov](mailto:smiths@fhfb.gov) or 202-408-2991; Anthony Cornyn, Senior Advisor to the Director, [cornyna@fhfb.gov](mailto:cornyna@fhfb.gov) or 202-408-2522; Office of Supervision; or Thomas E. Joseph, Senior Attorney-Advisor, [josepht@fhfb.gov](mailto:josepht@fhfb.gov) or 202-408-2512, Office of General Counsel. You can send regular mail to the Federal Housing Finance Board, 1625 Eye Street, NW., Washington, DC 20006.

**SUPPLEMENTARY INFORMATION:**

**I. Statutory and Regulatory Background**

The Federal Home Loan 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). 12 U.S.C. 1421 *et seq.* Although Banks are federally chartered institutions, they are privately owned and were created by Congress to support the financing of housing and community lending by their members (which are principally depository institutions), and as such, are commonly categorized as "government sponsored enterprises" (GSEs). *See* 12 U.S.C. 1422a(a)(3)(B)(ii), 1424, 1430(i) and 1430(j). As GSEs, the Banks are able to borrow in the capital markets at favorable rates. They then pass along this funding advantage to their member institutions—and ultimately to consumers—by providing secured loans known as advances and other financial services to member institutions at rates that the members generally could not obtain elsewhere.

The Banks and OF operate under the supervision of the Finance Board. The Finance Board's primary duty is to ensure that the Banks operate in a financially safe and sound manner. *See* 12 U.S.C. 1422a(a)(3)(A). To the extent consistent with this primary duty, the Bank Act also requires the Finance Board to supervise the Banks and ensure that they carry out their housing finance mission, remain adequately capitalized and are able to raise funds in the capital markets. *See* 12 U.S.C. 1422a(a)(3)(B). To carry out its duties, the Finance Board is empowered, among other things, "to promulgate and enforce such regulations and orders as are necessary from time to time to carry out the provisions of [the Bank Act]." 12 U.S.C. 1422b(a)(1).

Prior to the passage of the Gramm-Leach-Bliley Act<sup>1</sup> (GLB Act) in November 1999, all Banks issued a single class of stock with a par value set at \$100. Generally, all transactions in this stock were required to occur at the par value. *See* 12 U.S.C. 1426(a) and (b)(3) (1994); 12 CFR 925.19 and 925.22(b)(2). By statute, Bank members were required to purchase and retain a minimum amount of stock equal to the greater of: (i) \$500; (ii) 1 percent of the member's aggregate unpaid principal balance of home mortgage or similar loans; or (iii) 5 percent of a member's outstanding advances. *See* 12 U.S.C. 1426(b) (1994). Further, the Bank Act did not impose specific minimum capital requirements on the Banks individually, although the Finance

Board did establish such requirements by regulation. *See* 12 CFR 966.3(a).

The GLB Act amended the Bank Act to create a new capital structure for the Bank System and to impose statutory minimum capital requirements on the individual Banks. As part of this change, each Bank must adopt and implement a capital plan consistent with provisions of the GLB Act and Finance Board regulations. Among other things, each capital plan establishes stock purchase requirements that set the minimum amount of capital stock a Bank's members must purchase as a condition of membership and of doing business with the Bank. *See* 12 U.S.C. 1426(c)(1); 12 CFR 933.2(a).

Under the new capital structure, Banks may issue either Class A or Class B stock or both. Class A stock is defined as stock redeemable in cash and at par six months following submission by a Bank member of written notice of its intent to redeem such stock, and Class B stock is defined as stock redeemable in cash and at par five years following submission of a member's written notice of its intent to do so. *See* 12 U.S.C. 1426(a)(4)(A). A Bank must establish in its capital plan the classes of stock that it intends to issue, the par value of such stock, and other rights associated with this new stock. *See* 12 U.S.C. 1426(c)(4); 12 CFR 933.2. Any transactions in Class A or Class B stock, whether involving issuance, redemption, repurchase or transfer of such stock, must be at par value. *See* 12 CFR 931.1 and 931.6.

The GLB Act also requires each Bank to meet certain minimum capital requirements once the Bank converts to the new capital structure. Under these requirements, a Bank must maintain "permanent capital" in an amount sufficient to cover the credit risk and market risk to which it is subject, with the market risk being based on a stress test established by the Finance Board.<sup>2</sup> By regulation, the Finance Board also requires a Bank to hold sufficient permanent capital to meet an operations risk charge. *See* 12 CFR 932.3. *See also* Final Rule: Capital Requirements for the Federal Home Loan Banks, 66 FR 8262, 8299-8300 (Jan. 30, 2001) (explaining reasons for operations risk capital charge) (*hereinafter* Final Capital Rule). The GLB Act also requires the Banks to hold sufficient "total capital" to comply with both a "weighted" and

<sup>1</sup> Public Law 106-102, 133 Stat. 1338 (November 12, 1999).

<sup>2</sup> *See* 12 U.S.C. 1426(a)(3)(A); 12 CFR 932.3. Permanent capital is defined by statute to include the amounts paid-in for Class B stock plus the retained earnings of the Bank, where retained earnings are determined in accordance with generally accepted accounting principles (GAAP). *See* 12 U.S.C. 1426(a)(5)(A).

“unweighted” minimum leverage requirement.<sup>3</sup>

To date, 11 of the 12 Banks have implemented their capital structure plans and converted to the new capital structure established by the GLB Act. The pre-GLB Act stock purchase and retention requirements will continue to apply to the members of the remaining Bank until the Bank implements its capital plan and issues its new capital stock.<sup>4</sup>

## II. Proposed Rule Amendments

### A. Introduction

The proposed amendments would restrict the amount of excess stock that a Bank can accumulate and keep outstanding and would establish a required minimum level of retained earnings for each Bank. These changes are being proposed for prudential reasons to address the Finance Board's concerns that some Banks increasingly use excess stock to capitalize assets that are long term in nature and not readily saleable, such as acquired member assets (AMA), or that are not mission related, and that the Banks' current levels of retained earnings are not adequate to protect against potential impairment of the par value of the Banks' capital stock.<sup>5</sup>

<sup>3</sup> See 12 U.S.C. 1426(a)(2); 12 CFR 932.2. The statute defines total capital to include a Bank's permanent capital, plus the amounts paid-in by members for Class A stock, any general allowances for losses (if consistent with GAAP), and any amounts determined by the Finance Board by regulation to be available to absorb losses. See 12 U.S.C. 1426(a)(5)(B). The “weighted” minimum leverage requirement is calculated by multiplying a Bank's permanent capital by a factor of 1.5 and adding the other elements of total capital to this result, and requires each Bank to maintain a ratio of “weighted” total capital to total assets of at least 5 percent. When the leverage ratio is calculated without weighting permanent capital, each Bank must maintain a ratio of total capital to total assets of at least 4 percent. See 12 U.S.C. 1426(a)(2); 12 CFR 932.2.

<sup>4</sup> See 12 U.S.C. 1426(a)(6). The regulatory leverage requirement in § 966.3(a) also continues to apply to a Bank until it implements its capital plan and complies with the minimum capital requirements in the GLB Act. See 12 CFR 931.9(b)(1). The one Bank that has not yet converted to the new capital structure, however, is operating pursuant to a written agreement with the Finance Board, which requires the Bank to hold capital in excess of the amount set forth in § 966.3(a). See 2005–SUP–01 (Oct. 18, 2005). (2005–SUP–01 is available electronically in the Finance Board's “FOIA Reading Room” under “Supervisory Actions”: <http://www.fhfb.gov/Default.aspx?Page=59&Top=4>).

<sup>5</sup> Among other considerations, a Bank's capital stock could be deemed impaired if losses have depleted a Bank's current income and retained earnings and resulted in “negative” retained earnings. Capital stock impairment is not necessarily indicative of capital insolvency or capital inadequacy. In fact, a Bank could exceed all its minimum capital requirements and still have capital stock that is impaired.

To enforce these proposed limitations, the amendments are proposing to restrict the amount of dividends that a Bank could pay whenever the Bank is not in compliance with the minimum retained earnings requirements, and to prohibit the Banks from issuing dividends in the form of stock. These changes principally would be incorporated into new part 934, which the Finance Board is proposing to add to current subchapter E of its regulations. Conforming changes are also being proposed to other parts of the Finance Board's regulations. The Finance Board emphasizes that the proposed excess stock requirements, the minimum retained earnings requirements and the related dividend limitations would apply to all Banks, whether or not the Bank has implemented its capital plan and converted to the new capital structure mandated by the GLB Act.

### B. Excess Stock Limitation

#### 1. Reasons for Proposing the Excess Stock Limitations

Excess stock is any Bank capital stock owned by an institution greater than the minimum amount that it is required to hold under a Bank's capital plan, the Bank Act or Finance Board regulations as a condition of becoming a member of, or of obtaining and maintaining advances or other transactions with, the Bank.<sup>6</sup> Generally, excess stock may be created in three ways: (1) When stock originally held to fulfill a membership or activity-based stock purchase requirement is no longer needed because that requirement has decreased; (2) through a Bank's payment of dividends in the form of shares of stock rather than in cash; and (3) by direct purchase of excess stock by a member.<sup>7</sup>

<sup>6</sup> While Bank stock generally is held only by members of the Bank, former members may also continue to hold stock for a limited period of time after their membership terminates. A non-member institution also may come into possession of Bank stock if it acquires a Bank member (whose membership would terminate upon its consolidation into the non-member institution), and may continue to hold that stock for a limited period of time and for limited purposes. Stock held by former members or other institutions also may be categorized as either required or excess stock. For example, under Finance Board regulations, any indebtedness or other transactions that were outstanding at the time an institution's membership terminated may be liquidated in an orderly fashion as determined by the Bank. Under Finance Board rules, however, Bank stock must continue to be held to support such indebtedness or transactions during the period of orderly liquidation and until the indebtedness or other transactions are paid off or otherwise terminated. See 12 CFR 925.29. While these non-member institutions may hold Bank stock under limited circumstances, they may not enter into any new transactions with the Bank.

<sup>7</sup> Finance Board rules currently allow a member to purchase excess stock so long as “such purchase

Banks, in their sole discretion, have the right to buy back or repurchase a member's excess stock, subject to specific limitations. See 12 U.S.C. 1426(e)(1); 12 CFR 925.22(b)(2) and 931.7(b). These limitations include a restriction that prevents a Bank from repurchasing any excess stock if, after the repurchase, the Bank would fail to meet any of its minimum regulatory capital requirements or the member would no longer meet any of its stock purchase requirements.

Historically, the Banks usually have repurchased excess stock from members when requested to do so, although other aspects of the Banks' policies on excess stock may differ. In this respect, some Banks specifically have limited the amount of excess stock that members can hold, or periodically have repurchased excess stock to keep the total outstanding amounts of excess stock low. Other Banks do not implement such limits or may actively encourage member investment in excess Bank stock. Thus, the amount of excess stock outstanding at each Bank has tended to vary both in absolute value and as a percentage of the Bank's total capital base.

System-wide, as of December 31, 2005, the Banks had approximately \$7.4 billion in excess stock outstanding. This equaled about 16 percent of the Banks' combined total capital of \$46 billion. As a comparison, as of December 31, 2005, the Banks collectively had about \$36.1 billion in required stock outstanding and \$2.5 billion in retained earnings. These amounts equaled, respectively, approximately 78 percent and 5 percent of the Bank System's total capital base. For individual Banks, the amount of excess stock varied widely at the end of 2005, from zero at one Bank to a high of \$2.3 billion at another Bank. At the end of 2005, four Banks had excess stock in amounts that equaled more than one percent of their individual total assets.

Undue reliance on excess stock by a Bank to meet minimum capital requirements and to capitalize its balance sheet activities can raise both safety and soundness and public policy issues. From a safety and soundness perspective, the fact that most Banks have traditionally honored in a timely fashion a member's request to have its excess stock repurchased could give rise to capital instability, if a Bank were to experience large-scale requests to

is approved by the member's Bank and the laws under which the member operates permit such purchase.” 12 CFR 925.23. As discussed later in the preamble, the Finance Board is proposing to amend its rules and to prohibit the purchase of excess stock in the future.

repurchase stock in a short period of time. These problems could be compounded if a Bank uses excess stock to capitalize investments that cannot readily be liquidated, which could create difficulties for a Bank to shrink its balance sheet safely and easily to meet these repurchase requests.

A Bank's refusal or inability to repurchase excess stock in a timely fashion also could have consequences for members' confidence in the Bank System, especially in the long-term, because members have viewed Bank excess stock as a fairly liquid investment. It also could affect how members' regulators view Bank stock for capital or other purposes and thereby affect the value of members' investment in the Bank System. To the extent that the members' confidence in the System is shaken or they view the value of their investment as declining, members could decide to withdraw from a Bank or cease doing business with a Bank, thereby undermining a Bank's financial stability.

The Banks also may use excess stock to generate earnings through arbitrage of the capital markets. In this regard, the Banks' GSE status permits them to borrow funds at favorable rates that can then be invested in money market securities and other non-core mission assets to earn arbitrage profits. While this activity benefits the Banks and its membership, it does not necessarily further the Bank System's public purpose. It can also result in the Banks' being larger and holding more debt than otherwise would be necessary if their balance sheets were more focused on mission-related activities. Thus, from a public policy perspective, this arbitrage activity can have both safety and soundness and mission implications.

Excess stock can play a role in these arbitrage activities by providing the Banks a means to capitalize the non-mission investments, without necessarily forcing all members to hold more required stock or requiring the Bank to build retained earnings. This is especially true if a Bank's membership as a whole would be unwilling either to hold greater amounts of required stock or to accept lower dividends to build retained earnings in order to capitalize these investments. While the Finance Board currently limits the amount of mortgage backed securities in which a Bank can invest to 300 percent of a Bank's capital, other types of non-mission investments are not subject to any limitation.

## 2. Description of the Proposed Amendments Regarding Excess Stock

*Prohibition on the Sale of Excess Stock.* Under the proposed amendments, a Bank would be prohibited from selling stock to members, or institutions in the process of becoming members, that would be excess stock at the time of the sale. To promulgate this change, the Finance Board is proposing to revise § 925.23 of its regulations, which currently allows members to purchase excess stock if certain conditions are met. The Finance Board intends that the proposed prohibition on the purchase of excess stock would be interpreted narrowly and would only prevent the sale of excess stock by the Banks and would not affect how other transactions are treated under Finance Board rules.

Thus, the proposed revisions to § 925.23 would not alter any right of a member to continue to hold stock once the stock was no longer required as part of a membership or activity based stock purchase requirement, albeit such rights would be subject to Bank's complying with the limits in the proposed rule, a Bank's discretion to repurchase excess stock at any time and to any applicable provisions in a Bank's capital plan. Nor would the proposal prevent a member from acquiring excess stock in a transfer from another institution as long as the transaction was consistent with applicable provisions in the Bank Act, Finance Board rules and a Bank's capital plan. The proposal also would not affect how stock may be transferred as part of a member's consolidation into another institution.

The Finance Board is also proposing a conforming change to § 931.2(a) to prohibit a Bank from selling stock to members or institutions in the process of becoming a member that would be excess stock at the time of the sale. This proposed revision is intended to be similar in scope to that proposed for § 925.23 and would affect only the sale of excess stock by a Bank and not affect current practices or rules with regard to other transactions.

*Overall Excess Stock Limitation and Stock Dividend Prohibition.* The other major limitations on excess stock are being proposed in new § 934.1. Under proposed § 934.1(a), the aggregate amount of excess stock that could be outstanding at a Bank would be limited to one percent of a Bank's total assets. The 1 percent limit would be consistent with requiring the Banks to capitalize their mission assets with required stock while allowing them to capitalize their mortgage backed securities portfolio (limited to no more than 300 percent of

a Bank's capital) and a liquidity portfolio, equal to what has been the historic average of around 10 to 12 percent of total assets, with excess stock. In the past, Banks have been able to operate along these lines without running into the types of potential difficulties that are of concern to the Finance Board and that it believes could arise from undue reliance on excess stock.

Proposed § 934.1(b) would prohibit a Bank from declaring or paying a dividend in the form of stock. Stock dividends, along with the direct sale of excess stock to members, are the main causes of growth in excess stock on the Banks' balance sheets. Thus, the Finance Board believes it would be prudent to address the question of whether the Banks should be able to issue stock dividends in the future as part of this proposed rulemaking. The Finance Board also believes that it would be difficult for Banks to issue stock dividends on other than a sporadic basis and still comply with the proposed limit on excess stock. The Finance Board therefore is proposing to prohibit the issuance of stock dividends. The Finance Board specifically requests comment on whether the proposed prohibition on the issuance of stock dividends is necessary, especially in light of the overall limit on outstanding excess stock that is being proposed.

*Non-Compliance with Excess Stock Limit.* While the Finance Board intends the Banks to maintain compliance with the one percent excess stock limit at all times, proposed § 934.1(c) would require a Bank specifically to report to the Finance Board whenever the Bank is not in compliance with the limit as of the close of the last business day of any quarter.<sup>8</sup> After reporting the violation to the Finance Board, a Bank would have 60 days from the end of the quarter in which the reported violation occurred to either certify that it is again in compliance with the excess stock limitation or develop an excess stock compliance plan, acceptable to the Finance Board, that would demonstrate how the Bank would bring itself into compliance with the regulatory excess stock limits. The Finance Board believes that a 60 day period would be adequate for a Bank either to develop a suitable compliance plan or to rectify minor or readily-correctable violations of the

<sup>8</sup>Banks that repeatedly violate the one percent excess stock limit during a quarter could be required to develop an excess stock compliance plan, if the Finance Board believed the Bank was attempting to manipulate excess stock levels to comply with the limits as of the last day of the quarter but not as a general matter throughout the quarter.

limits. Banks that report a violation of the excess stock limitation but are already operating under an acceptable excess stock compliance plan would, of course, not need to develop a new plan.

*Definitions.* The Finance Board is also proposing to make a conforming revision to the current definition of "excess stock" and to move that definition from § 930.1 to § 900.2 of its rules. "Excess stock" currently is defined with reference to the minimum investment requirements set forth in a Bank's capital plan. See 12 CFR 930.1 and 931.3. The definition, therefore, only is applicable to Banks that have implemented their capital plans and converted to the new capital structure mandated by the GLB Act. The Finance Board intends, however, that the proposed excess stock limitations would apply to a Bank whether or not it has implemented its capital plan.

The proposed revision would define excess stock with reference to any minimum investment in capital stock required under a Bank's capital plan, the Bank Act or Finance Board rules, as applicable. This change would allow the definition to apply whether or not a Bank has converted to the new capital structure. The proposed revision also would make clear that any outstanding stock can be excess stock whether it is held by a member, a former member or another institution that may have acquired such stock through a merger or consolidation with a member. The current definition of excess stock only refers to stock "held by a member." Further, under the proposed definition of "excess stock," all stock held by an individual institution that exceeds its minimum stock purchase requirement would be counted as excess, regardless of whether the Bank's capital plan would allow such stock to be "loaned" or otherwise used to capitalize the activity of other members.

The Finance Board also proposes to move the definition to § 900.2 so that the definition would be applicable to all parts of its regulations, including the proposed revised § 925.23. Section 930.1, where the current definition of "excess stock" is located, by contrast, only applies to terms used in subchapter E.

### 3. Legal Authority

The Bank Act provides the Finance Board with broad authority to take actions or promulgate regulations as are necessary to supervise the Banks and to ensure that they operate in a safe and sound manner and carry out their housing finance mission. See 12 U.S.C. 1422a(a)(3) and 1422b(a). Given the prudential and mission-related purposes

in proposing this rule, the Finance Board believes that the proposed limitations on the issuance and holding of excess stock are within the bounds of these authorities.

Further, at least with regard to the Class A and Class B stock issued under the GLB Act amendments to the Bank Act, the Finance Board is specifically authorized to adopt regulations that, among other things, permit the Banks "to issue, with such rights, terms and preferences not inconsistent with this [Bank] Act and the regulations issued hereunder" and "prescribe the manner in which the stock of a [Bank] may be sold." 12 U.S.C. 1426(a)(4). The proposed prohibitions on the sale of excess stock and issuance of stock dividends would fall within the scope of this authority.

### C. Retained Earnings Requirement and Dividend Limitations

#### 1. Reasons for Proposing the Retained Earnings and Dividend Requirements

A Bank's retained earnings serve a variety of related functions. Most significantly, they provide a cushion to absorb losses, help prevent capital stock impairment by protecting the par value of Bank stock, act as a source of funds to maintain dividend payments in the event of temporary shortfalls in Bank earnings, and provide a source of capital to fund growth. Given these functions, retained earnings afford a margin of protection to both the shareholders and the creditors of a Bank.

The Banks, however, tend to distribute a larger percentage of their net income as dividends when compared to other financial institutions, and as a consequence have lower levels of retained earnings than other financial institutions of comparable size. In part, these lower levels of retained earnings may reflect the difficulties that Bank members have in realizing tangible pecuniary benefits from higher levels of retained earnings given that all transactions in Bank stock occur at par value.<sup>9</sup> Thus, instead of being able to capture the value of higher levels of retained earnings in the price at which their stock will be redeemed, repurchased or transferred, members must forfeit any interest in the retained

earnings (above the par value of the stock) associated with such shares upon undertaking any of these stock transactions.

While the Banks and members may have incentives to keep the level of retained earnings low, a level of retained earnings that is insufficient to protect the par value of Bank stock from losses also can have serious consequences, if those losses are realized and the par value of the stock becomes impaired. In fact, impairment could affect the willingness of the members to enter into transactions with the Bank as well as trigger regulatory restrictions that can prevent or restrict the Bank from paying dividends or from repurchasing or redeeming capital stock.

Whether or not a Bank has converted to the new capital structure mandated by the GLB Act, members must purchase new shares of Bank stock at par value. See 12 CFR 925.19 and 931.1; 12 U.S.C. 1426(a) (1994). Any stock purchased at par value when the par value of the capital stock is impaired will result in an immediate economic loss to the acquirer. Moreover, if the members were required to record Bank stock on their books at its impaired value, any purchase would also result in an immediate financial loss to the members. Under these circumstances, members could well be reluctant to purchase additional stock needed to carry out new transactions with the Bank or to maintain minimum membership requirements, negatively affecting demand for Bank products and the attractiveness of membership in the Bank System.

Impairment of the par value of a Bank's capital stock would also trigger certain regulatory restrictions on various Bank transactions, which could further reduce the value of membership in a Bank. First, Finance Board rules allow a Bank's board of directors to declare or pay a dividend "only if such payment will not result in the projected impairment of the par value of the capital stock." 12 CFR 917.9. This provision would prevent payment of dividends during periods of stock impairment.<sup>10</sup> More generally, because a Bank can only pay dividends from current net earnings or previously retained earnings a Bank would not have a source of funds to pay a dividend whenever it is experiencing losses that

<sup>9</sup> See 12 U.S.C. 1426(a)(4); 12 CFR 931.1 and 931.6. The history of the Bank System may also play a role in the Banks reluctance to build retained earnings. In the late 1980s, the Competitive Equality Banking Act of 1987 and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) required the Banks to pay approximately \$3.1 billion from their retained earnings to capitalize the Financing Corporation (FICO) and the Resolution Funding Corporation (REFCORP). See 12 U.S.C. 1441(d) and 1441b(e).

<sup>10</sup> As part of this proposed rulemaking, the Finance Board is proposing to move the provision prohibiting payment of dividends when capital stock is impaired or when such payment would result in the projected impairment of Bank stock from § 917.9 to new § 934.4 of its rules.

eliminated its retained earnings. See 12 U.S.C. 1436(a).

Statutory restrictions put in place by the GLB Act would also prevent a Bank from redeeming or repurchasing capital stock without the written permission of the Finance Board if the Bank has incurred or is likely to incur losses that will result in charges against the capital of the Bank.<sup>11</sup> The Finance Board has defined the phrase "charge against capital of the Bank" to track criteria set forth in the Industry Audit Guide published by the American Institute of Certified Public Accountants (AICPA) for evaluating impairment of Bank stock. See Proposed Rule: Capital Requirements for Federal Home Loan Banks, 66 FR 41462, 41465–66 (August 8, 2001) (citing AICPA "Industry Audit Guide," §§ 5.97–5.101 (May 1, 2000)); Final Rule: Capital Requirements for Federal Home Loan Banks, 66 FR 54097, 54106 (October 26, 2001); 12 CFR 930.1.

While harder to predict, an incident of capital stock impairment may also result in market reactions that could affect the Bank's cost of doing business. For example, impairment of the par value of the Bank's capital stock could lead to a downgrade in the credit rating of the Bank that, in turn, could raise the rates at which counterparties would be willing to enter into hedging transactions with the Bank. Further, given that there has not been an incident of capital impairment at a Bank, a future incident of impairment could affect the costs of funds for the Bank System, at least in the short term, as the market attempts to sort out the potential consequences of the event.

In August 2003, the Finance Board's Office of Supervision undertook to get the Banks to address concerns with their relatively low level of retained earnings and the Banks' overall approaches to retained earnings by issuing Advisory Bulletin 2003–AB–08, *Capital Management and Retained Earnings* (August 18, 2003). The Advisory Bulletin noted the Banks' low levels of retained earnings when compared to those held by large banks and thrifts. It then called on each Bank, at least

<sup>11</sup> See 12 U.S.C. 1426(f). Under the GLB Act provisions, if the Finance Board gives permission for repurchases or redemptions while capital stock is impaired, such transactions nonetheless would occur at the par value of stock. See 12 U.S.C. 1426(a)(4)(A); 12 CFR 931.7. Allowing for such transaction, thus, would be problematic if the impairment were severe.

The provisions in the Bank Act prior to the GLB Act amendments required the repurchase of stock to occur at the impaired value of stock rather than at the par value whenever the Finance Board found "that the paid-in capital of a \* \* \* Bank [was] or [was] likely to be impaired as a result of losses in or depreciation of the assets held." 12 U.S.C. 1426(e) (1994); 12 U.S.C. 1426(b)(3) (1994).

annually, to assess the adequacy of its retained earnings under a variety of economic and financial scenarios. The Advisory Bulletin also required each Bank to adopt a retained earnings policy, which was to include a target level of retained earnings. Notwithstanding the requirements in the Advisory Bulletin, the Finance Board has found that there is a general lack of consistency among the Banks' retained earnings policies and target retained earnings levels. The Finance Board also believes that the retained earnings policies adopted by the Banks often lacked clarity and failed to address key risk elements cited in the Advisory Bulletin.<sup>12</sup> Thus, the Finance Board continues to have concerns with how the Banks are addressing issues related to their retained earnings.

The Finance Board also has concerns because of recent incidents at some Banks that raise questions about the adequacy of retained earnings. For example, one Bank suffered a credit downgrade of certain of its investment securities that were backed by manufactured housing loans. As a result, the Bank sold the assets at a loss of nearly \$189 million. After experiencing the loss, the Bank had to suspend the payment of dividends for a time to rebuild its retained earnings. Other Banks in recent years have experienced steep declines in quarterly earnings or recorded actual quarterly losses. Of these Banks, one currently has suspended payment of dividends in an effort to manage reduced earnings and expected losses over the near term, and two Banks have suspended repurchases of stock. Such incidents further underscore the need for Banks to hold sufficient retained earnings to protect against such events. This is especially true in light of the fact that the increase

<sup>12</sup> The Advisory Bulletin stated that:  
\* \* \* each \* \* \* Bank should specifically assess the adequacy of its retained earnings in light of alternative possible future financial and economic scenarios. The scenarios should include optimistic, pessimistic and most likely forecasts. At the minimum, the analysis should show the expected change in retained earnings that would result from immediate parallel shifts in the yield curve. As a matter of sound practice, the analysis should be supplemented with non-parallel rate shocks such as flattening and a steepening of the yield curve. It would also be useful to analyze scenarios that highlight the effect on retained earnings of other key factors, including changes in prepayment speeds; changes in interest-rate volatility; changes in basis spread between \* \* \* Bank funding costs and Treasury rates, mortgage rates and LIBOR; and changes in the credit quality of the \* \* \* Bank's investment portfolio.

Advisory Bulletin 2003–AB–08, at p. 2. This Advisory Bulletin can be obtained electronically from the Finance Board's Web site by accessing "Advisory Bulletins" in the "FOIA Reading Room": <http://www.fhfb.gov/Default.aspx?Page=59&Top=4>.

in the Banks' holdings of mortgage assets over the last few years has resulted in the Banks' having to manage arguably riskier balance sheets than had previously been the case. Changes in accounting rules and in the make up of the Banks' balance sheets have also added to the potential income volatility that may be experienced by the Banks.<sup>13</sup>

To help to ensure that each Bank's level of retained earnings adequately reflects its risk profile and that there is greater consistency among the Banks' retained earnings policies, the Finance Board is proposing a minimum retained earnings requirement. The minimum target levels, and the associated proposed restrictions on the Banks' ability to pay a dividend when their retained earnings are below their minimum targets are intended to encourage the Banks to build retained earnings to adequate levels. The Finance Board believes that its proposed regulatory changes would reduce the risk that losses could deplete a Bank's retained earnings and cause the impairment of the par value of a Bank's stock.

The Finance Board recognizes that capital stock impairment is not necessarily indicative of capital inadequacy, and its purpose in proposing the rule change is not necessarily to require the Banks to increase their overall levels of capital. The Finance Board believes that its capital rules and the Banks' overall capital levels remain adequate and the risk of capital insolvency at any Bank in the foreseeable future is *de minimis*. The proposed rule, however, does aim to change the composition of capital and to ensure that the Banks hold retained earnings in amounts that would significantly reduce the risk that losses at a Bank would result in capital stock impairment. The Finance Board believes that the potential operational and financial consequences of capital stock impairment for both the Bank and the members justifies addressing the Banks'

<sup>13</sup> An important accounting change contributing to earnings volatility has been the Statement of Financial Accounting Standards (FAS) No. 133, *Accounting for Derivative Instruments and Hedging Activities*, which contributes to higher earnings volatility due to its asymmetric accounting for different financial instruments. On January 25, 2006, the Financial Accounting Standards Board (FASB) released an exposure draft, "The Fair Value Option for Financial Assets and Financial Liabilities, Including an Amendment of FASB Statement No. 115." The changes proposed in the exposure draft would allow a Bank to designate certain hedged assets to be carried at fair value and thereby eliminate much of the asymmetric accounting of derivative instruments and held-to-maturity hedged items. The proposed changes would allow entities to re-designate the carrying status of existing assets.

levels of retained earnings as a safety and soundness matter.

## 2. Description of the Proposed Amendments Regarding Retained Earnings

*Minimum Retained Earnings Requirement.* Under proposed § 934.2(a), each Bank would be required to achieve and maintain a minimum level of retained earnings, known as the Retained Earnings Minimum or REM. Each Bank would calculate its REM each calendar quarter. The REM calculated for a quarter would be used to determine whether the dividend restrictions proposed in § 934.3 would apply. For example, the REM calculated in the first quarter of the year would determine whether any restrictions would apply to the dividend that would be paid based on the Bank's first quarter's results. This would be true even though under other restrictions being proposed as part of this rulemaking, a Bank would not be able to declare or pay its first quarter dividend until after the beginning of the second quarter. If, after adjusting the retained earnings for any dividend that the Bank intends to pay for that quarter, the Bank's retained earnings would be below its REM, the Bank must assure that the intended dividend conforms to the limitations set forth in proposed § 934.3.<sup>14</sup>

As proposed in § 934.2(b), the REM would equal \$50 million plus 1 percent of a Bank's non-advance assets. Non-advance assets would equal the daily average of the Bank's total assets less the daily average of its advances, as recorded in the calendar quarter immediately preceding the date of the calculation. Thus, a Bank's non-advance assets for the REM calculation done for the second quarter of a year would equal that year's first quarter's daily average of the Bank's total assets less the first quarter's daily average of the Bank's advances.

The Finance Board believes that the proposed REM formula would provide a straightforward, consistent and predictable means to establish minimum retained earnings

<sup>14</sup> Thus, to calculate its retained earnings for a quarter for purposes of determining compliance with the rule, the Bank would subtract from its retained earnings balance as of the close of the quarter (*i.e.*, its previous retained earnings plus its current net earnings) the amount of the dividend it would like to pay for the quarter. The amount of the dividend should include any payments on stock subject to FAS No. 150. *See* n.17. If the resulting amount from this calculation is less than the Bank's REM for that quarter, the Bank would have to verify that it first complied with all limitations proposed in § 934.3 in order to declare and pay its intended dividend.

requirements across the Banks. Basing the REM on non-advance assets would provide a broad approximation of the potential risks faced by a Bank given that risk of losses from advances is very low and the greatest risk of credit or market losses would arise from a Bank's non-advance assets.

A number of provisions of the Bank Act protect the Banks from potential credit losses associated with advances.<sup>15</sup> First, the Bank Act requires that a member fully collateralize any advances by specific types of high quality collateral. *See* 12 U.S.C. 1430(a)(3). In addition, under the Bank Act, a Bank has a lien on any Bank stock owned by its member against any indebtedness of the member, including advances, to a Bank.<sup>16</sup> Thus, should a member default on an advance, the Bank has a variety of statutory means to assure that the defaulting member absorbs any potential credit losses so that the par value of other members' stock would not be affected. Such statutory protections are not necessarily applicable to other assets on the Banks' balance sheets.

Moreover, based on the recent credit losses and financial difficulties experienced by individual Banks, the Finance Board believes that the level of retained earnings required under the proposed formula would be sufficient to provide reasonable protection against capital impairment while not unduly burdening the Banks. In developing a measure for a retained earnings minimum based on the risk of the Banks, we explored a number of risk measures, but determined that use of the more straightforward approach being proposed simplified the application of the proposed requirement and provided a robust approximation of the amount of retained earnings needed given potential losses faced by a Bank, as calculated under the alternative analysis.

The alternative analysis relied on two risk measures that are commonly available for all Banks, one to represent credit risk and the other to represent market risks going forward. First, for credit risk, the analysis used the Internal Ratings-Based Approach from the Basel II Accord that would apply to large and/or complex financial

<sup>15</sup> A Bank has never suffered a credit loss on an advance to a member, and the Banks also have a long history of effectively managing the interest rate and market risks associated with their advances.

<sup>16</sup> *See* 12 U.S.C. 1430(c). Further, under the Bank Act as in effect prior to its amendment by the GLB Act or under the capital plans of the 11 Banks that have already implemented the new capital structure, a member must buy stock to capitalize any advances made to it by the Bank.

institutions. *See* Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards, A Revised Framework*, pp. 48–139 (November 2005); Basel Committee on Banking Supervision, *Consultative Document, the New Basel Capital Accord*, pp. 38–120 (April 2003). The Basel II methodology assigns a capital charge to credit exposures based on the credit rating, maturity and the loss given default for the exposure, assuming a credit risk horizon of one year and a particular target rating for the institution holding the exposure. In applying the Basel II approach to the Banks, the analysis assumed a given Bank would maintain a target rating of AA/Aa. This approach to measuring credit risk capital is considered state of the art for standardized measures. In measuring the credit risk for the Banks, this Basel II measure was applied to all credit exposures except advances. Advances were excluded because the Banks have never had a credit loss associated with an advance to a member institution and because of the statutory protections against credit losses on advances provided under the Bank Act. *See* 12 U.S.C. 1430(a), (c) and (e).

Second, market risks were estimated based on market value of equity losses given parallel interest rate shocks of  $+/- 50, 100$  and  $200$  basis points. The Banks already provide this information to the Finance Board, and currently, these are the only measures of market risk going forward that are available for all Banks on a consistent basis. The measure of market risk incorporated into the analysis equaled the simple average of the worse cases for the up and down shocks.

Finally, the regression analysis indicated that the sum of these credit and market risk measures could be reasonably well approximated by \$50 million plus 1 percent of non-advance assets. This more straightforward formula was deemed more appropriate than using a direct measure because it eliminates concerns about model error at the Bank level, and is more transparent and easy to monitor and apply over time.

As proposed, the rule also would provide the Finance Board with the flexibility to address specific problems or events at individual Banks by requiring a Bank to hold levels of retained earnings that would be higher than that calculated under the formula, if warranted for safety and soundness reasons. This flexibility would allow the Finance Board to refine a Bank's REM if a Bank is more exposed to credit or prevailing market risks than would be



captured by the formula, or if unique operational situations at a particular Bank need to be addressed. Addressing these types of issues on a case-by-case basis would also avoid having to develop a more complicated and complex method for calculating the REM than that being proposed.

The Finance Board also does not believe that the proposed requirements would be unduly burdensome for the Banks. In this respect, based on estimates of the Banks' earnings and other relevant data, the Finance Board believes that if the proposed retained earnings requirement had become effective in the fourth quarter of 2005, one Bank would have been able to comply with its REM as of December 31, 2005. Further, the Finance Board estimates that based on a fourth quarter 2005 effective date for the proposed retained earnings requirement, the other Banks would have been able to meet their REMs in line with the following schedule: one Bank in early 2006; another two Banks before the end of 2006; five more Banks by the end of 2007; and two more Banks by mid 2008. The earnings of the remaining Bank currently are unusually low and, given the Bank's current earnings outlook, it is difficult to estimate when the Bank would be able to meet the proposed requirements.

*Dividend Restriction Based on Non-Compliance with REM.* Under the proposed rule, if a Bank's retained earnings balance as of the close of the quarter and after adjustment for any dividend that the Bank intends to pay for that quarter, were less than the Bank's applicable REM, the Bank would be subject to the limitations on the payment of dividends for that quarter proposed in § 934.3. The proposed rule would allow for an initial transition period during which the dividend limitation would be less strict than thereafter. The dividend limitation that would be in effect during this period is set forth in proposed § 934.3(a), while the limitation that would become effective thereafter is contained in proposed § 934.3(b).

Under proposed § 934.3(a), a Bank that is not in compliance with its REM when the rule first takes effect would be allowed a transition period until such time as the Bank first reaches or exceeds its REM. During this transition period, a Bank generally would be allowed to pay a dividend that did not exceed 50 percent of its current net earnings.<sup>17</sup> The

proposed rule would allow a Bank to pay a dividend in excess of this 50 percent limit only with the Finance Board's prior approval. Among the factors that the Finance Board would consider in deciding whether to grant any request under this provision would be the size of the gap between the Bank's level of retained earnings and its REM, the earnings outlook for the Bank, the Bank's risk profile and any recent examination findings related to Bank's risk management, corporate governance and other relevant areas that could affect the Bank's ability to operate in a financially safe and sound manner.

After a Bank initially complies with its REM, the dividend limitations in proposed § 934.3(b) would require a Bank to receive Finance Board permission before declaring or paying any dividend for a quarter in which the Bank no longer met its REM. In deciding whether to grant such a dividend request, the Finance Board would consider the same factors discussed above. Overall, the dividend limitations in proposed § 934.3 are intended to encourage the Banks to comply with their retained earnings targets while still allowing the Banks the flexibility to pay dividends if circumstances warrant. The Finance Board specifically invites comment on whether higher percentages for the dividend limitations than those being proposed in § 934.3 may be appropriate, keeping in mind the Finance Board's goals of encouraging the Banks to achieve their REMs in a timely fashion and maintain compliance with their REMs thereafter.

*Additional Dividend Limitations.* Proposed § 934.4 would set forth limitations on the payment of dividends that would apply to a Bank whether or not it has met its REM. First, proposed § 934.4(a) would prohibit a Bank from declaring or paying a dividend based on projected or anticipated earnings and would require a Bank to declare a dividend only after its earnings for a particular quarter had been calculated. This provision would make clear procedures that already are strongly implied given the fact that under the retained earnings proposal, a Bank would need to know its retained earnings balance as of the close of a quarter to determine whether the proposed dividend limitations apply. Thus, a Bank would need to calculate its

<sup>150</sup>, capital stock that is subject to a mandatory redemption request would be classified as a liability on the Bank's balance sheet and dividend payments made on such stock would be classified as an interest expense for accounting purposes.

As discussed below, the Finance Board also is proposing to add a definition for "current net earnings" to § 930.1.

quarterly earnings before its board of directors would be in a position to declare a dividend, even in the absence of proposed § 934.4(a).

Second, proposed § 934.4(b) would incorporate the restriction now contained in § 917.9 of the Finance Board's regulations that prohibit a Bank from declaring or paying a dividend if the par value of the Bank's stock is impaired or would be projected to become impaired after paying the dividend. The Finance Board also is proposing to make suitable conforming changes to §§ 917.9 and 931.4 to reflect the limitations on dividends proposed in Part 934.<sup>18</sup>

*Definitions.* The Finance Board is proposing to add a definition of "current net earnings" in § 930.1. Specifically, "current net earnings" would be defined as "the net income of a Bank for a calendar quarter calculated in accordance with GAAP after deducting the Bank's required contributions for that quarter to the Resolution Funding Corporation under sections 21A and 21B of the Act (12 U.S.C. 1441a and 1441b) and to the Affordable Housing Program under section 10(j) of the Act (12 U.S.C. 1430(j)) and § 951.2 of this chapter, but before declaring any dividend under section 16 of the Act (12 U.S.C. 1436)." The Finance Board believes that this proposed definition is consistent with the current method for calculating earnings for the purpose of paying dividends and, if adopted, would be consistent with the statutory restrictions set forth in section 16 of the Bank Act with regard to how to determine the Bank's current earnings for purposes of paying dividend. See 12 U.S.C. 1436(a). The Finance Board also is proposing to add a definition to § 930.1 that "Retained Earnings Minimum or REM means the minimum amount of retained earnings a Bank is required to hold under § 934.2."

### 3. Legal Authority

The proposed amendments aim to require the Banks to hold retained earnings sufficient to protect against the impairment of their capital stock. They are in many respects a more comprehensive version of the current prohibition in § 917.9, which prohibits dividend payments if such payments result in the impairment of capital stock and which the Finance Board adopted for safety and soundness reasons in 1999. See Interim Final Rule:

<sup>18</sup>The limitations on dividends in proposed § 934.4 would be in addition to other dividend limitations set forth in the Bank Act and Finance Board rules. See, e.g., 12 U.S.C. 1426(h)(3) and 1436(a); 12 CFR 917.9 and 931.4.

<sup>17</sup>In determining compliance with this provision, a Bank would be expected to include any payments made on its capital stock subject to FAS 150 in the total amount of the dividend paid out. Under FAS



Devolution of Corporate Governance Responsibilities, 64 FR 71275, 71276 (December 21, 1999); Resolution No. 2000-29 (June 22, 2000). The Finance Board believes that the more thorough approach proposed in this rulemaking is needed to address concerns that have arisen since § 917.9 was adopted in light of the change in the risk on the Banks' balance sheets and the prospects for more volatile earnings in the future.

As detailed in other parts of the preamble, impairment of a Bank's capital stock can present safety and soundness and mission problems other than ones related to immediate insolvency of a Bank. The Finance Board believes that these concerns provide adequate justification for adopting the proposed retained earnings requirement to assure that the Banks operate in a safe and sound manner and that they accomplish their statutory mission and are able to access the capital markets. Moreover, the Bank Act provides the Finance Board with authority to adopt rules to address these types of concerns. See 12 U.S.C. 1422a(a)(3) and 1422b(a)(1).

The Finance Board also believes that section 16 of the Bank Act provides an alternative source of authority to adopt the proposed requirement. Specifically, section 16 provides the Finance Board with authority to require the Banks to "establish such additional reserves and/or make such charge-offs on account of depreciation or impairment of its assets as [it] shall require." 12 U.S.C. 1436. The provision does not limit the reasons for which the Finance Board can require the Banks to establish these additional reserves.

Section 16 states that the required reserves are to be established from net earnings of a Bank and makes a Bank's payment of a dividend subject first to funding these reserves. 12 U.S.C. 1436. Historically, reserves required under section 16 of the Bank Act were included in retained earnings of the Banks, but the use of these reserves to pay dividends was restricted. Further, the term "reserves" as used in section 16 had also been interpreted to exclude loan loss or similar type reserves that were recorded elsewhere on the Banks' balance sheets.<sup>19</sup>

<sup>19</sup> See, e.g., OGC Opinion Memo, from K. Heisler to R. Burklin; Re: "Reserves of FHLBanks," at p.2 (Dec. 9, 1942) (valuation reserves which are held against estimated losses in the value of specific assets or similar types of reserves "are not reserves within the meaning of section 16 of the \* \* \* Bank Act). This long-standing interpretation of section 16 remains consistent with the current wording of that provision. Specifically, section 16 states in relevant part that Banks may pay dividends out of "previously retained earnings or current net earnings remaining after reductions for all reserves

The requirements in section 16 that the Banks "establish such additional reserves \* \* \* as the [Finance Board] shall require" and pay dividends only "out of net earnings remaining after all reserves \* \* \* required under this [Bank] Act" have been funded date back to original Bank Act in 1932. Public Law 72-304, July 22, 1932, c. 522 sec. 16, 47 Stat. 725, 736. Under the original Bank Act, however, these reserves were in addition to the section 16 requirement that each Bank carry to "a reserve account semiannually 20 per centum of its net earnings until said reserve account shall show a credit balance equal to 100 per centum of the paid-in capital of such [B]ank," and thereafter, that each Bank add to such reserve "5 per centum of its net earnings. \* \* \*"*Id.* This was often referred to as the "legal reserve" requirement.

FIRREA amended the Bank Act to delete the provision that the Banks carry a mandated percentage of their net earnings to a reserve, and substituted the current language that a Bank "may carry to a reserve account from time-to-time such portion of its net earnings as may be determined by its board of directors." The language authorizing the Finance Board to require each Bank to establish additional reserves remained, although after FIRREA such reserves would be in addition to any that the Bank had voluntarily established.<sup>20</sup>

\* \* \* required under [section 16]." This wording indicates that section 16 reserves are funded after a Bank calculates its current net earnings but before the payment of dividends. There would be no need for section 16 to limit payment of dividends to "current net earnings remaining after reductions for all reserves \* \* \*" if the reference to "reserves" meant loan loss or similar reserves, since provisions for those types of reserves would already be considered in the calculation of net earnings. 12 U.S.C. 1436(a) (emphasis added). To read the authority provided in section 16 to refer to requiring the Banks to hold loan loss or similar reserves would violate principles of statutory construction which generally require that a statute be read to give effect, if possible to every word, clause or sentence. See Norman J. Singer, 2A STATUTES AND STATUTORY CONSTRUCTION § 46:06 (6th ed. 2000). The fact that section 16 requires the reserves to be funded from net earnings also supports the conclusion that the reserves should be part of a Bank's retained earnings. Thus, the most reasonable reading of the "additional reserves" authority in section 16 remains that it allows the Finance Board to require the Banks to maintain specific levels of retained earnings.

<sup>20</sup> FIRREA also changed section 16(a) of the Bank Act to allow after January 1, 1992, a Bank to pay dividends from "previously retained earnings or current net earnings remaining after reductions for all reserves, charge-offs, purchases of capital certificates of the Finance Corporations, and payments relating to the Funding Corporation \* \* \* have been provided for" subject to certain additional exceptions. This change was meant to account for the termination of the legal reserve requirement and allow any remaining legal reserves that were held by the Banks to be used as a source of funds for dividends. As explained by the Finance

While FIRREA eliminated the mandatory legal reserve requirement, neither the wording of the FIRREA provisions nor available legislative history suggests that Congress intended to alter either the long standing accounting treatment or interpretations with regard to reserves required under section 16—namely that they were accounted for in retained earnings and were not valuation or similar reserves—or the Finance Board's authority under this section to require the Banks to hold additional reserves. The proposed retained earnings requirement comports with this definition of what is meant by reserves under section 16, and the scope of the authority provided the Finance Board under this section would be sufficient to support the Finance Board's adopting a retained earnings rule along the lines currently proposed.

### III. Regulatory Flexibility Act

The proposed rule would apply only to the Banks, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). See 5 U.S.C. 601(6). Therefore, in accordance with section 605(b) of the RFA, 5 U.S.C. 605(b), the Finance Board hereby certifies that the proposed rule, if adopted as a final rule, would not have a significant economic effect on a substantial number of small entities.

### IV. Paperwork Reduction Act

The proposed rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995. See 44 U.S.C. 3501 *et seq.* Therefore, the Finance Board has not submitted any information to the Office of Management and Budget for review.

### List of Subjects

#### 12 CFR Part 900

Community development, Credit, Federal home loan banks, Housing,

Board when it adopted rules to implement this FIRREA change to the dividend provision:

The \* \* \* Banks' retained earnings are comprised of the legal reserve, the dividend stabilization reserve and undivided profits. Since the \* \* \* Banks are prohibited from paying dividends from the legal reserve in section 16 of the Bank Act, [Finance Board rules] could not generally provide for the payment of dividends from retained earnings. Rather [they] specifically listed the two components of retained earnings from which there could be payment of dividends, namely the dividend stabilization reserve and undivided profits. Effective January 1, 1992, however, section 724 of [FIRREA] amends the Bank Act by eliminating the legal reserve in section 16 of the Bank Act. \* \* \* Thus, retained earnings shall only include the dividend stabilization reserve and undivided profits.

Proposed Rule: Dividends Paid on Federal Home Loan Bank Stock, 56 FR 59898, 59899 (Nov. 26, 1991).

Reporting and recordkeeping requirements.

*12 CFR Part 917*

Community development, Credit, Federal home loan banks, Housing, Organizations and functions (Government agencies), Reporting and recordkeeping requirements.

*12 CFR Part 925*

Credit, Federal home loan banks, Reporting and recordkeeping requirements.

*12 CFR Part 930*

Capital, Credit, Federal home loan banks, Investments, Reporting and recordkeeping requirements.

*12 CFR Part 931*

Capital, Credit, Federal home loan banks, Investments, Reporting and recordkeeping requirements.

*12 CFR Part 934*

Capital, Credit, Federal home loan banks, Investments, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Finance Board proposes to amend 12 CFR, chapter IX, 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 § 900.2 by adding in alphabetical order, a defined term to read as follows:

**§ 900.2 Terms relating to Bank operations, mission and supervision.**

\* \* \* \* \*

*Excess stock* means that amount of a Bank's capital stock held by a member or other institution in excess of its minimum investment in capital stock required under the Bank's capital plan, the Act, or the Finance Board's regulations, as applicable.

\* \* \* \* \*

**PART 917—POWERS AND RESPONSIBILITIES OF BANK BOARDS OF DIRECTORS AND SENIOR MANAGEMENT**

3. The authority citation for part 917 continues to read as follows:

**Authority:** 12 U.S.C. 1422a(a)(3), 1422b(a)(1), 1426, 1427, 1432(a), 1436(a), and 1440.

4. Revise § 917.9 to read as follows:

**§ 917.9 Dividends.**

(a) A Bank's board of directors may declare and pay a dividend only from previously retained earnings or current net earnings and only in accordance with any other applicable limitations on dividends set forth under the Act or this chapter. Dividends on such capital stock shall be computed without preference.

(b) The requirement in paragraph (a) of this section that dividends shall be computed without preference shall cease to apply to any Bank that has established any dividend preferences for one or more classes or subclasses of its capital stock as part of its approved capital plan, as of the date on which the capital plan takes effect.

(c) A Bank's board of directors may declare and pay a dividend only after the close of the quarter to which the dividend pertains and the Bank's earnings for that quarter have been calculated, and may not declare or pay a dividend based on projected or anticipated earnings.

**PART 925—MEMBERS OF THE BANKS**

5. The authority citation for part 925 continues to read as follows:

**Authority:** 12 U.S.C. 1422, 1422a, 1422b, 1423, 1424, 1426, 1430, and 1442.

6. Revise § 925.23 to read as follows:

**§ 925.23 Prohibition on purchase of excess stock.**

A member, or an institution that has been approved for membership in a Bank, may not purchase capital stock from a Bank if that stock would be excess stock at the time of purchase.

**PART 930—DEFINITIONS APPLYING TO RISK MANAGEMENT AND CAPITAL REGULATIONS**

7. The authority citation for part 930 is revised to read as follows:

**Authority:** 12 U.S.C. 1422a(a)(3), 1422b(a), 1426, 1436(a), 1440, 1443, and 1446.

8. Amend § 930.1 by removing the definition of the term "excess stock" and adding, in alphabetical order, the following defined terms to read as follows:

**§ 930.1 Definitions.**

\* \* \* \* \*

*Current net earnings* means the net income of a Bank for a calendar quarter calculated in accordance with GAAP after deducting the Bank's required contributions for that quarter to the Resolution Funding Corporation under sections 21A and 21B of the Act (12 U.S.C. 1441a and 1441b) and to the Affordable Housing Program under section 10(j) of the Act (12 U.S.C.

1430(j)) and § 951.2 of this chapter, but before declaring any dividend under section 16 of the Act (12 U.S.C. 1436).

\* \* \* \* \*

*Retained Earnings Minimum* or *REM* means the minimum amount of retained earnings a Bank is required to hold under § 934.2 of this chapter.

\* \* \* \* \*

**PART 931—FEDERAL HOME LOAN BANK CAPITAL STOCK**

9. The authority citation for part 931 is revised to read as follows:

**Authority:** 12 U.S.C. 1422a(a)(3), 1422b(a), 1426, 1436(a), 1440, 1443, and 1446.

10. Revise § 931.2(a) to read as follows:

**§ 931.2 Issuance of capital stock.**

(a) *In general.* A Bank may issue either one or both classes of its capital stock (including subclasses), as authorized by § 931.1, and shall not issue any other class of capital stock. A Bank shall issue its stock only to its members and only in book-entry form, and the Bank shall act as its own transfer agent. All capital stock shall be issued in accordance with the Bank's capital plan. A Bank may not sell capital stock to a member or to an institution that has been approved for membership in the Bank if that stock would be excess stock at time of the sale.

\* \* \* \* \*

11. Revise § 931.4(b) to read as follows:

**§ 931.4 Dividends.**

\* \* \* \* \*

(b) *Limitation on payment of dividends.* In no event shall a Bank declare or pay any dividend on its capital stock if after doing so the Bank would fail to meet any of its minimum capital requirements, nor shall a Bank that is not in compliance with any of its minimum capital requirements declare or pay any dividend on its capital stock. A Bank also may not declare or pay a dividend that would violate any limitation on dividends set forth in part 934 of this chapter.

12. Add part 934 to title 12, chapter IX, to read as follows:

**PART 934—EXCESS STOCK LIMITS, MINIMUM RETAINED EARNINGS, AND DIVIDEND LIMITATIONS**

Sec.

934.1 Limitation on excess stock and stock dividends.

934.2 Minimum level of retained earnings.

934.3 Dividend limitations if retained earnings are below the Retained Earnings Minimum.

934.4 Additional limitations on dividends.

**Authority:** 12 U.S.C. 1422a(a)(3), 1422b(a), and 1436.

**§ 934.1 Limitation on excess stock and stock dividends.**

(a) *Excess Stock Limitation.* The aggregate amount of a Bank's outstanding excess stock may not exceed one percent of the total assets of that Bank.

(b) *Prohibition on Stock Dividends.* A Bank may not declare or pay a dividend in the form of additional shares of capital stock.

(c) *Violation of the Excess Stock Limitation.* If the aggregate amount of a Bank's outstanding excess stock exceeds one percent of its total assets as of the close of the last business day of a quarter:

(1) The Bank shall report such violation to the Finance Board; and

(2) Within 60 calendar days of the close of that quarter, the Bank shall:

(i) Develop an excess stock compliance plan acceptable to the Finance Board that addresses how the Bank will bring its outstanding amount of excess stock into compliance with the limitation, unless the Bank is already operating under such a plan; or

(ii) Certify in writing to the Finance Board that it has corrected the violation and is in compliance with the excess stock limitation.

**§ 934.2 Minimum level of retained earnings.**

(a) *General.* Each Bank is required to maintain a level of retained earnings at least equal to the Bank's Retained Earnings Minimum (REM). If a Bank's retained earnings, as of the close of the quarter and after deducting the amount of any intended dividend for that quarter, would be below its REM, the Bank must comply with the applicable dividend limitation set forth in § 934.3 of this part.

(b) *Calculation of the REM.* Each Bank's REM will equal \$50 million plus 1 percent of the Bank's non-advance assets. Each Bank shall calculate its REM each calendar quarter. For purposes of the REM calculation, a Bank's non-advance assets shall equal the daily average of the Bank's total assets less the daily average of its advances, for the quarter immediately preceding the date of the calculation.

(c) *Adjustment to the REM.* For reasons of safety and soundness, the Finance Board may establish a REM for a Bank that is higher than the amount calculated under paragraph (b) of this section.

**§ 934.3 Dividend limitations if retained earnings are below the Retained Earnings Minimum.**

(a) *Initial limitation.* Until a Bank initially reaches or exceeds its REM, the Bank may not declare or pay a dividend that exceeds 50 percent of its current net earnings without the prior approval of the Finance Board, if, as of the close of the quarter and after deducting the amount of the intended dividend for that quarter, the Bank's retained earnings would be below its REM.

(b) *Limitation thereafter.* After a Bank first complies with its REM, the Bank may not declare or pay a dividend without the prior approval of the Finance Board, if, as of the close of the quarter and after deducting the amount of the intended dividend for that quarter, the Bank's retained earnings would be below its REM.

**§ 934.4 Additional limitations on dividends.**

(a) *Timing of declaration.* A Bank may declare and pay a dividend only after the close of the quarter to which the dividend pertains and the Bank's earnings for that quarter have been calculated, and may not declare or pay a dividend based on projected or anticipated earnings.

(b) *Other limitations.* In addition to any applicable limitations set forth in the Act or elsewhere in this chapter, at no time may a Bank declare or pay a dividend if the par value of the Bank's stock is impaired or is projected to become impaired after paying such dividend.

Dated: March 8, 2006.

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

**Ronald A. Rosenfeld,**  
*Chairman.*

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 158 and 172**

[EPA-HQ-OPP-2004-0415; FRL-7767-2]

**Pesticides; Data Requirements for Biochemical and Microbial Pesticides Proposed Rule; Notice of Public Workshops**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; notice of public workshop.

**SUMMARY:** The EPA is convening two public workshops to explain the

provisions of its recently proposed rule updating and revising the data requirements for registration of biochemical and microbial pesticides in 40 CFR part 158. These workshops are open to the public.

**DATES:** The first public workshop will be held on March 30, 2006 from 1 p.m. to 4 p.m. in the Washington, DC area. The second public workshop will be held on April 11, 2006 from 1 p.m. to 4 p.m. in the Sacramento, CA area.

**ADDRESSES:** The March 30, 2006 public workshop will be held at the EPA Office of Pesticide Programs, Crystal Mall #2, Room No. 1126, 1801 S. Bell St, Arlington, VA.

The April 11, 2006 public workshop will be held at the UC-Davis Extension, Sutter Square Galleria, Room No. 209, 2901 K St., Sacramento, CA. Visitor information for the April 11, 2006 location may be found at: <http://www.metrochamber.org>.

**FOR FURTHER INFORMATION CONTACT:** Nathanael Martin, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: 703-305-6475; fax number: 703-305-5884; e-mail address: [martin.nathanael@epa.gov](mailto:martin.nathanael@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this Action Apply to Me?*

You may be affected by this notice if you are a producer or registrant of a biochemical or microbial pesticide product. This proposal also may affect any person or company who might petition the Agency for new tolerances for biochemical or microbial pesticides, or hold a pesticide registration with existing tolerances, or any person or company who is interested in obtaining or retaining a tolerance in the absence of a registration, that is, an import tolerance for biochemical or microbial pesticides. The following is intended as a guide to entities likely to be regulated by this action. The North American Industrial Classification System (NAICS) codes are provided to assist you in determining whether or not this action applies to you. Potentially affected entities may include, but are not limited to:

- Chemical Producers (NAICS 32532), e.g., pesticide manufacturers or formulators of pesticide products, importers or any person or company who seeks to register a pesticide or to obtain a tolerance for a pesticide.
- Crop Production (NAICS 111).
- Animal Production (NAICS 112).