



# Federal Housing Finance Board

May 15, 1992

## MEMORANDUM

TO: **Alan Simpson**  
Administrative Officer

Through: **Beth L. Climo** 1396  
General Counsel

FROM: **Arnold Intrater** A7  
Deputy General Counsel

SUBJECT: **Applicability of Executive Order 11478 to the Federal Home Loan Bank System**

By memorandum dated May 8, 1992 you requested the advice of this office whether section 1216 of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) makes the Federal Home Loan Banks (FHLBanks) subject to all of the provisions of Executive Order 11478. For the reasons set forth below, it is the opinion of this office that section 1216 does have that effect,

Section 1216 provides in part as follows:

### Section 1216 Equal Opportunity.

(a) **IN GENERAL.** For purposes of this Act, Executive Order number & 11478 providing for equal employment opportunity in the Federal Government shall apply to:

- (1) the Comptroller of the Currency
- (2) the Director of the Office of Thrift Supervision
- (3) the Federal Home Loan Banks;
- (4) the Federal Deposit Insurance Corporation
- (5) the Oversight Board of the Resolution Trust Corporation and
- (6) the Resolution Trust Corporation

(b) **Affirmative Program for Equal Employment Opportunity.** For purposes of this Act, sections 1 and 2 of Executive Order Numbered 11478, providing for the adoption and implementation of equal employment opportunity, shall apply to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. (Emphasis Added).

On its face, section 1216(a) specifically provides that Executive Order 11478 is to apply to the FHLBanks. This language is in stark contrast to section 1216(b) which specifies that only section 1 and 2 of Executive Order 11478 are applicable to the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC).

The presence of section 1216(b) which clearly excludes FNMA and FHLMC from the procedural provisions of Executive Order 11478, makes it difficult, if not impossible, to argue that Congress intended to treat the FHLBanks in the same fashion as it treated FNMA and FHLMC. All Congress had to do if it wanted to limit the application of Executive Order 11478 to the FHLBanks was to have included the FHLBanks in section 1216(b) rather than 1216(a).

This analysis gains further support by reference to the legislative history of section 1216(b), which shows that FNMA and FHLMC were originally intended to be included in section 1216(a). That analysis is very well set forth in the August 25, 1989 memorandum from the firm of Kirkpatrick & Lockhart ("Kirkpatrick opinion"), which you forwarded to this office.

Having reached the conclusion that section 1216(a) imposes the full scope of Executive Order 11478 responsibilities on the FHLBank system, we nevertheless acknowledge that section 1216 creates some anomalies, if not problems, in terms of application. Section 1216(a) lists five Federal agencies and the "Federal home loan banks", but does not list the Federal Housing Finance Board. That seems a strange grouping." The legislative history analysis which is highlighted in the Kirkpatrick opinion suggests that the FHLBank System is subject to the procedural requirements applicable to both federal agencies and the private sector. That can lead to some confusion and additional cost. Also, the application of the Federal equal employment procedures to the FHLBank System appears inconsistent with the provision of section 702 of FIRREA which specifies that, "Notwithstanding any other provision of the Act, no officer or employee or agent of a Bank or joint office shall be a Federal officer or employee under any definition of either term of Title 5, United States Code." (12 U.S.C. 1422b)

These anomalies suggest that there is room to approach Congress with a request that section 1216(a) be revisited and perhaps clarified. However, in the meantime, the FHLBanks must operate as if all of the provisions of Executive Order 11478 are applicable to the FHLBanks. Both a plain reading of the statute and the legislative history dictate this result.<sup>2</sup>

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1. The Finance Board is nevertheless subject to Executive Order 11478 because it is a Federal agency and Executive Order 11478 applies by its terms to all Federal agencies.

2. The attorney who prepared the August 25, 1989 Kirkpatrick opinion states in the last paragraph of that opinion that he was preparing a further analysis to argue that Congress made a mistake in making the Banks fully subject to section 1216(a). I checked with counsel to the FHLBank of New York, who received the original Kirkpatrick opinion, and according to their files there was no legal opinion issued.