

# Rules and Regulations

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## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2608

RIN 3209-AA23

#### Testimony by OGE Employees Relating to Official Information and Production of Official Records in Legal Proceedings

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Final rule.

**SUMMARY:** The Office of Government Ethics is adopting as final a proposed rule, with certain minor changes based primarily on comments received, that sets forth procedures that requesters have to follow when making demands on or requests to an OGE employee to produce official records and information, and provide testimony relating to official information, in connection with a legal proceeding in which OGE is not a party. This final rule establishes procedures to respond to such demands and requests in an orderly and consistent manner. The rule, among other benefits, will promote uniformity in decisions, protect confidential information, provide guidance to requesters, and reduce the potential for both inappropriate disclosures of official information and wasteful allocation of agency resources.

**EFFECTIVE DATE:** June 20, 2002.

**FOR FURTHER INFORMATION CONTACT:**  
William E. Gressman, Senior Associate General Counsel, Office of Government Ethics, telephone: 202-208-8000; TDD: 202-208-8025; FAX: 202-208-8037.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Office of Government Ethics occasionally receives subpoenas and requests for OGE employees to provide evidence in litigation or other legal proceedings in which OGE is not a

party. Typically, these subpoenas and requests are for OGE records that are not available to the public under the Freedom of Information Act (FOIA). Also, OGE sometimes receives subpoenas and requests for OGE employees to appear as witnesses in litigation in conjunction with a request for nonpublic records. Requesters have sought information, for example, on a particular filer of a financial disclosure report, a particular nominee or incumbent or former employee and for any ethics advice that OGE may have given to that individual, or concerning the nature of ethical advice that OGE gave to another agency and how OGE arrived at that advice.

Responding to such demands and requests sometimes results in a significant disruption in an OGE employee's work schedule. The result is that employees may be diverted from performing their official duties in order to respond to requests from parties in litigation. In order to address this problem, many agencies over the years have issued "Touhy" regulations that are similar to this final regulation, governing the circumstances and manner in which an employee may respond to demands for testimony or for the production of documents. Such a regulation was upheld by the United States Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

In *Touhy*, the Supreme Court held that a Department of Justice (DOJ) official, acting on order of the Attorney General, could not be held in contempt for declining to produce records in response to a subpoena. The employee's refusal was based upon a DOJ regulation that prohibited disclosure of agency files, documents, records, or information without the express approval of the Attorney General. The Court upheld the validity of the DOJ regulation, reasoning that it was appropriate for the Attorney General to prescribe regulations not inconsistent with law for the custody, use, and preservation of records, papers, and property pertaining to DOJ.

On September 24, 2001, OGE published in the **Federal Register** its own proposed *Touhy* regulation, for codification in a new part 2608 of 5 CFR. See 66 FR 48824-48828, which provided for a 60-day public comment period. The Office of Government Ethics

received suggestions on the rule as proposed from two commenters. As noted below in the summary of this final rule, we are adopting several minor changes in this final rule from the rule as proposed, based primarily on those comments. Moreover, in order to clarify the application of this rule, OGE has decided to revise the proposed part heading to make express that it applies to testimony by OGE employees "relating to official information" (as opposed to private matters), as well as to the production of official records in legal proceedings. In addition, OGE has determined to add a reference to 31 U.S.C. 9701 to the new part 2608 authority citation. This statute authorizes agencies to issue regulations providing for fair and cost-based fees and charges.

Briefly summarized, this final rule prohibits disclosure of nonpublic official records or testimony by OGE employees unless there is compliance with the rule (§§ 2608.201 and 2608.203). Based on a suggestion of one of the commenters, OGE is dropping the word "recorded" before the term "interviews" in the list of types of testimony covered by this regulation. The rule identifies the factors that OGE will consider in making determinations in response to such requests and what information requesters must provide (§§ 2608.202 and 2608.203). In response to a comment, OGE has added "otherwise protected information" to the types of sensitive information enumerated in paragraph (i) of § 2608.202; on its own initiative, OGE is adding the term "demand," in addition to request, to the text of paragraph (d) of that section. The rule also specifies when the request should be submitted (§ 2608.203), the time period for review (§ 2608.205), potential fees (§ 2608.301), and, if a request is granted, any restrictions that may be placed on the disclosure of records or the appearance of an OGE employee as a witness (§§ 2608.207 and 2608.208). As suggested by one of the commenters, OGE is deleting proposed subparagraph (c)(2) of § 2608.207, which concerned denial of authorization by the General Counsel for fact testimony if contrary to the best interest of OGE or the United States, as unnecessary given the overall requirement for authorization for such testimony in paragraph (c). The Office of Government Ethics is adopting in this

final rule two other changes suggested by the commenters. First, OGE is adding the phrase “when necessary” to the procedure provided in § 2608.209 for informing the court or other competent authority and seeking a stay when a decision is not made prior to the time a response is required. This modification from the section as proposed recognizes that at times there can be informal resolution of such matters short of seeking a stay. The second change is that OGE is adding the phrase “unless otherwise advised by the General Counsel” to the procedure provided in § 2608.210 for personal appearance of an OGE employee when a stay of a demand (or, as now added by OGE, a request) is denied. This change likewise recognizes that such denials can sometimes be resolved instead by written response (see the section’s last sentence) or otherwise.

The charges for witnesses are the same as those provided by the Federal courts; and the fees related to production of records are the same as those charged under FOIA. The charges for time spent by an employee to prepare for testimony and for certification of records by OGE are authorized under 31 U.S.C. 9701, which permits an agency to charge for services or things of value that are provided by the agency.

This final rule applies to a broad range of matters in any legal proceeding in which OGE is not a named party. It also applies to former and current OGE employees (as well as OGE consultants and advisers). Former OGE employees are prohibited from testifying about specific matters for which they had responsibility during their active employment unless permitted to testify as provided in the rule. They would not be barred from appearing to testify about general matters unconnected with the specific matters for which they had responsibility.

This final regulation will ensure a more efficient use of OGE resources, minimize the possibility of involving OGE in issues unrelated to its responsibilities, promote uniformity in responding to such requests and subpoenas, and maintain the impartiality of OGE in matters that are in dispute between other parties. It will also serve OGE’s interest in protecting sensitive, confidential, and privileged information and records that are generated in response to the requirements in the ethics laws and regulations.

This final OGE rule is internal (not branchwide), and is essentially procedural, not substantive. It does not create a right to obtain official records

or the official testimony of an OGE employee nor would it create any additional right or privilege not already available to OGE to deny any demand or request therefor. However, any failure to comply with the procedures in this rule would be a basis for denying a demand or request submitted to OGE.

### **Matters of Regulatory Procedure**

#### *Regulatory Flexibility Act*

For purposes of the Regulatory Flexibility Act (5 U.S.C. chapter 6), this final rule will not have a significant economic impact on a substantial number of small entities. The rule addresses only the procedures to be followed in the production or disclosure of official OGE materials and information in litigation where OGE is not a party. Accordingly, OGE has determined that a Regulatory Flexibility Analysis is not required.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

#### *Executive Order 12866*

In issuing this regulation, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation as set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This final rule has not been reviewed by the Office of Management and Budget under that Executive order since it is not a significant regulatory action within the meaning of the Executive order.

#### *Executive Order 12988*

As Director of the Office of Government Ethics, I have reviewed this final regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this final regulation does not contain information collection requirements that require approval by the Office of Management and Budget. The Office of Government Ethics expects the collection of information that is called for by the regulation

would involve fewer than ten persons each year.

#### *Congressional Review Act*

The Office of Government Ethics has determined that this rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and has submitted a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

### **List of Subjects in 5 CFR Part 2608**

Administrative practice and procedure, Conflict of interests, Courts, Government employees, Penalties, Records, Subpoenas, Testimony.

Approved: May 14, 2002.

**Amy L. Comstock,**

*Director, Office of Government Ethics.*

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics hereby adds a new part 2608 to 5 CFR chapter XVI to read as follows:

## **PART 2608—TESTIMONY BY OGE EMPLOYEES RELATING TO OFFICIAL INFORMATION AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS**

### **Subpart A—General Provisions**

Sec.

- 2608.101 Scope and purpose.
- 2608.102 Applicability.
- 2608.103 Definitions.

### **Subpart B—Requests for Testimony and Production of Documents**

- 2608.201 General prohibition.
- 2608.202 Factors OGE will consider.
- 2608.203 Filing requirements for demands or requests for documents or testimony.
- 2608.204 Service of subpoenas or requests.
- 2608.205 Processing demands or requests.
- 2608.206 Final determination.
- 2608.207 Restrictions that apply to testimony.
- 2608.208 Restrictions that apply to released records.
- 2608.209 Procedure when a decision is not made prior to the time a response is required.
- 2608.210 Procedure in the event of an adverse ruling.

### **Subpart C—Schedule of Fees**

- 2608.301 Fees.

### **Subpart D—Penalties**

- 2608.401 Penalties.

**Authority:** 5 U.S.C. App. (Sec. 401, Ethics in Government Act of 1978); 31 U.S.C. 9701; 44 U.S.C. 3101–3107, 3301–3303a, 3308–3314.

**Subpart A—General Provisions****§ 2608.101 Scope and purpose.**

(a) This part sets forth policies and procedures you must follow when you submit a demand or request to an employee of the Office of Government Ethics (OGE) to produce official records and information, or provide testimony relating to official information, in connection with a legal proceeding. You must comply with these requirements when you request the release or disclosure of official records and information.

(b) The Office of Government Ethics intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving OGE in controversial issues not related to our functions;

(3) Maintain OGE's impartiality among private litigants where OGE is not a named party; and

(4) Protect sensitive, confidential information and the deliberative processes of OGE.

(c) In providing for these requirements, OGE does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of OGE. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

**§ 2608.102 Applicability.**

This part applies to demands and requests to employees for factual or expert testimony relating to official information, or for production of official records or information, in legal proceedings in which OGE is not a named party. However, it does not apply to:

(a) Demands upon or requests for an OGE employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of OGE;

(b) Demands upon or requests for a former OGE employee to testify as to matters in which the former employee was not directly or materially involved while at the OGE;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; and

(d) Congressional demands and requests for testimony or records.

**§ 2608.103 Definitions.**

The following definitions apply to this part:

*Demand* means a subpoena, or an order or other command of a court or

other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of an OGE employee that is issued in a legal proceeding.

*General Counsel* means the General Counsel of OGE or a person to whom the General Counsel has delegated authority under this part.

*Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

*OGE* means the U.S. Office of Government Ethics.

*OGE employee or employee* means:

(1)(i) Any current or former officer or employee of OGE;

(ii) Any other individual hired through contractual agreement by or on behalf of OGE or who has performed or is performing services under such an agreement for OGE; and

(iii) Any individual who served or is serving in any consulting or advisory capacity to OGE, whether formal or informal.

(2) Provided, that this definition does not include persons who are no longer employed by OGE and who are retained or hired as expert witnesses or who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with OGE.

*Records or official records and information* mean:

(1) All documents and materials which are OGE agency records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in OGE files; and

(3) All other information or materials acquired by an OGE employee in the performance of his or her official duties or because of his or her official status.

*Request* means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

*Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

**Subpart B—Requests for Testimony and Production of Documents****§ 2608.201 General prohibition.**

No employee may produce official records and information or provide any

testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

**§ 2608.202 Factors OGE will consider.**

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) OGE has an interest in the decision that may be rendered in the legal proceeding;

(d) Allowing such testimony or production of records would assist or hinder OGE in performing its statutory duties or use OGE resources where responding to the demand or request will interfere with the ability of OGE employees to do their work;

(e) Allowing such testimony or production of records would be in the best interest of OGE or the United States;

(f) The records or testimony can be obtained from other sources;

(g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

(h) Disclosure would violate a statute, Executive order or regulation;

(i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;

(j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

(k) Disclosure would result in OGE appearing to favor one litigant over another;

(l) Disclosure relates to documents that were produced by another agency;

(m) A substantial Government interest is implicated;

(n) The demand or request is within the authority of the party making it; and

(o) The demand or request is sufficiently specific to be answered.

**§ 2608.203 Filing requirements for demands or requests for documents or testimony.**

You must comply with the following requirements whenever you issue demands or requests to an OGE employee for official records and information or testimony:

(a) Your request must be in writing and must be submitted to the General Counsel. If you serve a subpoena on OGE or an OGE employee before submitting a written request and receiving a final determination, OGE will oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on OGE to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an OGE employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each OGE employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The Office of Government Ethics reserves the right to require additional information to complete your request where appropriate.

(d) Your request should be submitted at least 45 days before the date that records or testimony is required. Requests submitted in less than 45 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with your request.

**§ 2608.204 Service of subpoenas or requests.**

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917.

**§ 2608.205 Processing demands or requests.**

(a) After service of a demand or request to testify, the General Counsel will review the demand or request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) The Office of Government Ethics will process requests in the order in which they are received. Absent exigent or unusual circumstances, OGE will respond within 45 days from the date that we receive it. The time for response will depend upon the scope of the request.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of OGE or the United States or for other good cause.

**§ 2608.206 Final determination.**

The General Counsel makes the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of an OGE employee.

**§ 2608.207 Restrictions that apply to testimony.**

(a) The General Counsel may impose conditions or restrictions on the

testimony of OGE employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The Office of Government Ethics may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose confidential or privileged information; or

(2) For a current OGE employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of OGE unless testimony is being given on behalf of the United States (see also § 2635.805 of this chapter).

**§ 2608.208 Restrictions that apply to released records.**

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, OGE may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original OGE records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official OGE records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes (see 28 U.S.C. 1733).

**§ 2608.209 Procedure when a decision is not made prior to the time a response is required.**

If a response to a demand or request is required before the General Counsel can make the determination referred to

in § 2608.201, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand or request is being reviewed, and seek a stay of the demand or request pending a final determination.

**§ 2608.210 Procedure in the event of an adverse ruling.**

If the court or other competent authority fails to stay the demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). A written response may be offered to a request, or to a demand, if permitted by the court or other competent authority.

**Subpart C—Schedule of Fees**

**§ 2608.301 Fees.**

(a) *Generally*. The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to OGE.

(b) *Fees for records*. Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by OGE in its Freedom of Information Act and Ethics in Government Act fee regulations at 5 CFR part 2604, subparts E and G.

(c) *Witness fees*. Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) *Payment of fees*. You must pay witness fees for current OGE employees and any records certification fees by

submitting to the General Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony by former OGE employees, you must pay applicable fees directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Certification (authentication) of copies of records*. The Office of Government Ethics may certify that records are true copies in order to facilitate their use as evidence. If you seek certification, you must request certified copies from OGE at least 45 days before the date they will be needed. The request should be sent to the General Counsel. You will be charged a certification fee of \$15.00 for each document certified.

(f) *Waiver or reduction of fees*. The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(g) *De minimis fees*. Fees will not be assessed if the total charge would be \$10.00 or less.

**Subpart D—Penalties**

**§ 2608.401 Penalties.**

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by OGE or as ordered by a Federal court after OGE has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former OGE employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current OGE employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action. [FR Doc. 02-12552 Filed 5-20-02; 8:45 am]

**BILLING CODE 6345-01P**

**FEDERAL HOUSING FINANCE BOARD**

**12 CFR Part 966**

**[No. 2002-19]**

**RIN 3069-AB10**

**Federal Home Loan Bank Consolidated Obligations—Definition of the Term “Non-Mortgage Assets”**

**AGENCY:** Federal Housing Finance Board.

**ACTION:** Final rule.

**SUMMARY:** The Federal Housing Finance Board (Finance Board) is amending its regulation on Federal Home Loan Bank (Bank) consolidated obligations in order to redefine the term “non-mortgage assets,” as used in the provision on Bank leverage limits. The effect of this amendment would be to allow a Bank to qualify more easily to maintain a 25-to-1 assets-to-capital leverage ratio instead of the general 21-to-1 ratio. In addition, the rule makes several technical changes to the definition of “non-mortgage assets.”

**EFFECTIVE DATE:** This rule will become effective on June 20, 2002.

**FOR FURTHER INFORMATION CONTACT:**

Scott L. Smith, Acting Director, Office of Policy, Research and Analysis (202) 408-2991; Charlotte A. Reid, Special Counsel, Office of General Counsel (202) 408-2510; Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On March 7, 2002, the Finance Board published for notice and comment a proposed rule to amend § 966.3(a) of the Finance Board's regulations, which sets forth the assets-to-capital leverage limit that will apply to each Bank until: (1) That Bank's capital structure plan required under part 933 of the regulations becomes effective; and (2) the Bank is in compliance with the new leverage limit set forth in § 932.2 of the regulations.<sup>1</sup> Under § 966.3(a)(1), each Bank generally is required to maintain a leverage ratio not in excess of 21-to-1. However, § 966.3(a)(2) provides that a Bank may maintain a leverage ratio of up to 25-to-1 if the amount of its “non-mortgage assets” (after deducting deposits and capital held by the Bank) does not exceed 11 percent of the Bank's total assets. Thus, this rule is in a transitory stage because as the Banks' capital plans are approved and implemented, this leverage requirement will yield to the new leverage limit in § 932.2 of the Finance Board regulations.

Under § 966.3(a)(2), “non-mortgage assets” are defined to include a Bank's total assets after deduction of core mission activity (CMA) assets described in § 940.3 of the regulations and assets described in sections II.B.8 through II.B.11 of the Federal Home Loan Bank System Financial Management Policy

<sup>1</sup> See 12 CFR 931.9(b)(1) (governing transition from old to new leverage limit; see also 66 FR 8262, 8280 (Jan. 30, 2001) (transition discussed in preamble to rule adopting new capital regulations).