World Savings

February 21, 2001

Ms. Elaine Baker
Secretary to the Board
Federal Housing Finance Board
1777 F Street, NW
Washington, D.C. 20006

Re: Member's Request to Intervene

World Savings Bank, FSB (World Savings) hereby requests to intervene in the Federal Home Loan Bank of Dallas' Petition for Case-by-Case Determination (Petition), the notice of which Petition was published in the Federal Register on December 27, 2000 (Notice). We make this request because (a) the issues raised by the Petition have very substantial long-term impact on the Federal Home Loan Bank System that require far more analysis before action is taken, (b) the legal underpinnings of the Petition are wrong, (c) the relief requested in the Petition and the FHLB of Dallas' letter of January 31, 2001 (Supplement) will adversely affect us and other FHLB members, and (d) all members of the FHLB System should be treated alike.

Simply because an entity is large should not be sufficient reason to disregard the basic structure of the FHLB System, especially when so much else is at stake. Nor, as we will show below, is the merger of Washington Mutual Bank, FA (WMBFA) and Bank United sufficient reason. Indeed, were this reasoning to be accepted, the same case could be made for Bank of America, which is nearly four times as large as the combined WMBFA and Bank United, retaining membership in two or more Federal Reserve Banks after the Bank of America/NationsBank merger; so far as we know, such a parallel concept is unheard of and would not even be entertained.

If we have reached a point where membership in the Federal Home Loan Banks should be revamped, then we should take the time to do the necessary analysis and seek the necessary legislation. In the meantime, Washington Mutual has a number of very viable options. One is to have a separately chartered entity be a member of the FHLB of Dallas, even if that entity has only a single office. Another is to move the principal office of one of its existing chartered entities into the geographic region covered by the FHLB of Dallas.

1. Specific Regulation Applicable to the Meter

Contrary to the indication in the Notice, the Petition does not raise a legal issue "of first impression." The parties apparently have overlooked the Federal Housing Finance Board regulation that actually controls the subject of the Petition, FHFB Regulation 925.24. FHFB Regulation 925.24(b)(1) provides as follows:

"Upon consolidation of two member institutions which are members of different Banks into one institution operating under the charter of one of the consolidating institutions, the disappearing institution's membership terminates upon cancellation of its charter, except that if more than 80 percent of the assets of the consolidated institution are derived from the assets of the disappearing institution, then the consolidated institution shall continue to be a member of the Bank of which the disappearing institution was a member prior to the consolidation and the membership of the other institution terminates upon consummation of the consolidation." *(emphasis added)*

This regulation leaves no doubt: when two members of different FHLBs merge, the combined entity is a member of, and only of, the surviving member's FHLB. The exception to this rule applies when the assets of the disappearing entity constitute more than 80% of the combined entity, in which case the combined entity becomes a member of, and only of, the disappearing member's FHLB. Therefore, the only outcome under the Finance Board's own regulation is for the combined WMBFA/Bank United to be a member solely of the FHLB of San Francisco.

We recognize the Petition is styled as a request for approval for a new membership in the FHLB of Dallas for the combined WMBFA/Bank United, as opposed to a request for continuation of the Bank United membership. The result under FHFB Regulation 925.24(b)(1), however, should be the same. It would be absurd to allow dual FHLB memberships following the completion of a merger simply based on the distinction between a "new" membership and a "continuing" membership. This is especially true in a situation, such as this one, where the application for dual membership was filed prior to, and would be given effect immediately upon, completion of the merger.

2. Meaning of Section 4(b)

Although FHFB Regulation 925.24(b)(1) disposes of the issue, we comment on Federal Home Loan Bank Act Section 4(b) because the legal memo filed with the Petition dwells upon its interpretation.

FHLB Act Section 4(b) provides:

"An institution eligible to become a member under this section may become a member only of, or secure advances from, the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district, if demanded by convenience and then only with the approval of the board." *(emphasis added)*

The legal memo assumes Section 4(b) applies to WMBFA. Just as we cannot explain why the Petition makes no mention of FHFB Regulation 925.24(b)(1), we cannot explain why the legal memo skips over the first clause in Section 4(b) that makes it applicable to *"[a]n" institution eligible to become a member under this section ...."*

Section 4(b) specifies the FHLB to which each applicant to the FHLB System must apply for its initial membership. This is a gateway provision that has no further application to an entity once it becomes a member. The distinction between applicants (that is, institutions "eligible to become a member") and members of the system is plainly evident in the implementing regulations. FHFB Regulation 925.18(a)(1) contains separate and distinct provisions for both applicants (specifying district membership) and members (requiring notice of a change in principal place of business). If the choice of FHLB district made available in Section 4(b) had been intended to apply to existing members, the statute and regulation would have been so drafted. For example, FHFB Regulation 925.18(c)(1) was drafted to apply both to "a member or an applicant for membership."

By giving effect to the first clause of Section 4(b), the section provides that an entity not yet a member of the FHLB System may become a member of, but only of, either (a) the FHLB for the district where the non-member institution has its principal place of business, or (b) the FHLB of an adjoining district, if membership in that FHLB is more convenient and if the Finance Board approves such membership.

The FHLB of Dallas cannot confer membership upon WMBFA, since WMBFA is a member of the FHLB of San Francisco and is, therefore, no longer "an institution eligible to become a member." Section 4(b) simply has no application to WMBFA and cannot be relied upon for membership in the Dallas or any other FHLB district.

This is not to say that WMBFA forever must be a member of the FHLB of San Francisco. A number of actions expressly described in the FHFB Regulations could lead to membership in a different (but not more than one) FHLB. For example, a member may designate a new principal place of business in a different FHLB district, as provided in FHFB Regulation 925.18(c)(1), which designation results in the mandatory transfer of membership, as provided in FHFB Regulation 925.18(d).

Limiting our discussion to non-member institutions, we return to the question of whether the adjoining district provision of Section 4(b) allows an institution to have more than one FHLB membership. The materials in the Petition interpret the adjoining district provision as an allowance for membership in one or more adjoining FHLBs.

If we were to accept this interpretation, the result to the FHLB System would be that the number of adjoining FHLBs a non-member entity could join varies widely, depending upon the entity's choice of home district. With reference to a map of the FHLB System, one can see that an entity located in the FHLB of Cincinnati's district could apply to six additional "adjacent" FHLBs, whereas an entity located in the FHLB of Boston's district could apply to only one additional "adjacent" FHLB. It is ridiculous to conclude the drafters of Section 4(b) in 1932 intended any such uneven results.

The arguments made in support of multiple memberships are based on the finding of "a fundamental ambiguity embedded in the structure of Section 4(b)." To the extent there is any ambiguity, it comes from several factual inaccuracies and omissions in the legal submissions, and not from the statute itself. There is, for example, the erroneous claim that, in 1932, "if thrifts had branches at all, they were in-state." As a matter of fact, prior the creation of the FHLB System, there were a number of thrifts that had branched into other states.

The legal memo states the petitioners are "aware of no explanation" why the drafters of Section 4(b) would have included the adjoining district provision in the statute. In fact, there is a very obvious explanation. The FHLB Act was enacted in 1932, a time when transportation and communication were very different from what exists today. Then it was possible for an institution to have easier transportation to an FHLB in an adjoining district - for example, where an institution might be in a remote corner of its home district and the FHLB in the adjoining district was more accessible by train or automobile. It would have been considerably more convenient, for example, for an institution in western Maryland to join the FHLB of Pittsburgh, which is only 100 miles or so away, than to join the FHLB of Atlanta, which is at least 650 miles away and, especially in 1932, would have been far more difficult to reach by rail or road.

There also is an assertion about "the lack of a contemporaneous" explanation for the "demanded by convenience" standard. This idea of convenience was likely borrowed from the Federal Reserve Act on which the FHLB Act was based, at least in part. Just as with the FHLB Act, the Federal Reserve Act requires a non-member bank to apply for membership in the Reserve Bank in the district in which "it is located." 12 USC 222; 12 CFR 209.2(a). There is an exception in the FRB Regulations when membership in the home district Reserve Bank "would impede the ability of the bank to operate efficiently." 12 CFR 209.2(c)(2). Under this exception, a bank whose functional location is different than the location specified in its charter may be deemed "located" instead in the Reserve Bank district where it has its head office or "performs its business." But in the end, it may be a member of only one Reserve Bank.

While it is quite likely the drafters of Section 4(b) borrowed the "demanded by convenience" standard from the Federal Reserve System, an important change was made to the concept. The drafters added the requirement that any alternative membership be in an "adjoining" FHLB. This change makes perfect sense if the drafters were concerned, as we believe, about the geographic convenience of entities that could belong only to one FHLB. This change makes little sense in the case of multiple FHLB memberships, because (a) it would be of uneven benefit to all the members within the FHLB System, some of which could join over half of the FHLBs and others of which could join only two FHLBs, and (b) it ignores the fact that the most convenient FHLB may not be the FHLB in an adjoining district, as might be the case for an entity with its head office, branches and operations spread over several states. For example, an entity headquartered in California and having branches nationwide but with its back-office operations in Georgia might find membership in the FHLB of Atlanta to be more convenient operationally, but still could not join because the San Francisco and Atlanta districts do not adjoin geographically. Thus, the pairing of *convenience* with *adjoining* in Section 4(b) actually argues against multiple memberships.

Nevertheless, the Petition presses for a new interpretation of the statute, based upon the concept of an "apparent ambiguity" in the use of the words *only* and *or* as found in Section 4(b):

"... may become a member only of ... the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district ...." *(emphasis added)*

The legal memo suggests that, if Congress had intended to create and enforce a system of single FHLB membership, the drafters would have used the word *either* in place of the word *only.* While it cannot be known for certain, it is not likely the drafters ever imagined that somebody later would assert that *only* was an ambiguous term.

For the reasons stated above, we think a properly interpreted Section 4(b) does not apply to an existing member such as WMBFA and, in any event, mandates single FHLB membership for every member of the FHLB System.

3. Impact

The Supplement posits that "the retention of Bank United is not an economical alternative" because Washington Mutual believes the capital position of Bank United "would raise significant concerns for the OTS." Surely any capital issues can be addressed by a capital contribution from the parent holding company. Washington Mutual also remains free to access the benefits of membership in the FHLB of Dallas through a different charter located in the district served by the FHLB of Dallas.

The FHLB of Dallas believes it will be adversely affected by the loss of its largest member; however, FHFB Regulation 925.24(b)(1) is dispositive without regard to the effect on the FHLB losing its member. The regulation considers the effect of the merger on the members, not the FHLBs to which those members belong. The fact that the FHLB of Dallas finds the loss of Bank United to be inconvenient is not relevant to the consideration of the Petition. The statutes and regulations governing the FHLB System are generally indifferent to the size of the institutions that belong to each FHLB and allow, by design, for each FHLB to expand and contract with its membership base.

Moreover, the FHLB of Dallas states in the Supplement that it "expects to continue to be financially strong" even without the continued Bank United membership. The majority of outstanding advances will not mature until 2008, providing the FHLB of Dallas significant time to implement its strategic business plan to reduce the impact of the merger. Assuming the successful implementation of this plan, the entire membership of the FHLB of Dallas actually may be better off with a leaner and more diversified bank.

As for the FHLB of San Francisco, the Supplement concludes that granting the Petition "would be neutral in its effect on the convenience of the SF Bank." Just as the FHLB of Dallas found Bank United's advances to be profitable, we assume the FHLB of San Francisco will find similar profitability. Thus, even assuming for the sake of argument that the "convenience" standard were to apply to FHLBs, this appears to be a zero-sum game, in that it is equally "inconvenient" for the FHLB of San Francisco to lose a portion of its business. It also seems relatively more "inconvenient" for the FHLB of San Francisco to have to work through the myriad of practical issues that would arise from WMBFA's proposed dual membership than to recalculate WMBFA's minimum stock ownership requirement as a result of the merger. We simply do not understand how, "in these two most important respects," granting the Petition could be neutral to the FHLB of San Francisco.

4. Unsuitability of the Petition Process: Defects within the Petition

The Petition raises numerous and complex issues we believe must be considered before the FHLB System is altered. In addition to the issues identified in the Finance Board's January 11, 2001 request for supplemental information, due consideration is needed with respect to the interests of the other members of the San Francisco and Dallas FHLBs. For example:

- How will the FHLB of San Francisco and the FHLB of Dallas determine the minimum investment of WMBFA in each FHLB from a single charter?

- What are the respective rights of the two FHLBs in the event WMBFA must be assessed to meet one or more capital calls or in the event of WMBFA's insolvency?

- What are the voting rights of WMBFA for elective directorships of the two FHLBs, which voting rights are determined by stock ownership under 12 USC 1427(b)?

- In which state will WMBFA be deemed to be located within the FHLB of Dallas (when it does not have a "principal place of business" in Texas) for purposes of voting on elective directorships under 12 USC 1427(c)?

- How will the FHLB of San Francisco and the FHLB of Dallas simultaneously exercise the "right to require at any time, when deemed necessary for its protection," additional collateral to secure advances to WMBFA as required by 12 USC 1430(d)?

- How can the security interests of the two FHLBs both have "priority over the claims and rights of any party" as provided in 12 USC 1430(e)?

These questions concerning voting and capital are of paramount importance to the members of each FHLB. Each member's rights are in relation, and in direct proportion (except where limited by the FHLB Act), to each other member. The Petition makes no attempt to explain how the rights of the other members will be affected, particularly if one of the largest members in the system will be able to use its assets twice (for voting power), pro rated (when assessments are due), and possibly in other ways when otherwise convenient.

Moreover, this massive potential change to the FHLB System is being advanced inappropriately through the petition process. Notwithstanding the Finance Board's allowance for public intervention and an extension of time to intervene, the petition process gives too few people too little time to make meaningful comment on the very substantial issues raised by the Petition. The petition process is meant for addressing a member-specific issue, not for a proposal that raises issues of general applicability to the entire FHLB System. Given the vital importance of the FHLB System to home finance and the economy generally, these are the kinds of matters that must be considered pursuant to procedures set forth in the Administrative Procedure Act and/or the legislative process.

The Supplement only serves to demonstrate why deliberate and broadly written rulemaking is required in connection with multiple memberships (assuming one believes that the structure of the FHLB System needs to be changed, which we do not). For example, the FHLB of Dallas asks the Finance Board, on behalf of one of the largest members of the FHLB System, to allow WMBFA to meet the current capital requirements "by holding an aggregate of the stock of two Banks" and to exempt WMBFA from annual FHLB of Dallas stock holding adjustments to equal 1% of its aggregate unpaid loan principal. This would place WMBFA in a special position not enjoyed by any other member in the System and would not, as the FHLB of Dallas claims, "maintain the status quo."

We also bring to the Finance Board's attention certain procedural defects within the Petition itself. The petition process under FHFB Regulation 907.8 should not be invoked where a controlling regulation already exists, in this case FHFB Regulation 925.24(b). The Petition does not present a matter "of first impression" simply because this is the first time the Finance Board has been asked to consider dual membership. The alternative basis for the Petition, FHFB Regulation 907.3, is equally improper. There is no opportunity to grant the requested relief because the Finance Board lacks the statutory and regulatory basis for approving an existing member's application for a second FHLB membership given the unambiguous language of the applicable statute and its implementing regulations, discussed above. Finally, the Petition appears improperly submitted under FHFB Regulation 907.8 because it fails to meet the informational requirements of FHFB Regulation 907.10(b)(8) and (9). The absence of any mention in the Petition of FHFB Regulation 925.24(b) should be deemed a failure by the FHLB of Dallas to supply the relevant authorities as required by subsection (b)(8), and the analysis contained in the legal memo is such that the Petition lacks a reasoned opinion of counsel supporting the interpretation and relief sought as required by subsection (b)(9).

World Savings has a direct interest in the Petition as a member of the FHLB of San Francisco. World Savings will be adversely affected by a Final Decision granting the Petition of the FHLB of Dallas and, therefore, requests to intervene in the consideration of the Petition. If leave to intervene is granted, World Savings agrees to be bound by the Final Decision of the Board of Directors of the Finance Board, subject only to judicial review or as otherwise permitted by law. As a duly appointed officer, the undersigned has the authority to submit this request.

As we still may determine to request to appear at any Board meeting at which the Petition will be considered, we would appreciate prompt delivery of any notice of Board consideration to the attention of the undersigned. A facsimile number and e-mail address are provided below for your convenience.

We hope this analysis will be useful to the Finance Board and its staff. If we may be of additional assistance, please do not hesitate to contact the undersigned.

Respectfully submitted,

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