January 31, 2001

Ms. Elaine L. Baker
Secretary
Federal Housing Finance Board
1777 F Street, N.W.
Washington, D.C. 20006

Re: ' Supplemental Information pursuant to Section 907.12(d)

Dear Ms. Baker:

The Federal Home Loan Bank of Dallas (the "Dallas Bank" or "this Bank") has requested approval of the membership of Washington Mutual Bank, FA ("WMBFA") in the Dallas Bank (the "Petition"). This letter supplements the Petition in response to the requests in the letter dated January 11, 2001, letter from Mr. James Bothwell (the "Bothwell Letter").

INTRODUCTION

The Dallas Bank wishes to begin its response to the Bothwell Letter by stressing once again that what it is seeking is to preserve the "status quo. To permit WMBFA to step into the shoes of Bank United in the Dallas Bank District is clearly the least disruptive and most appropriate outcome for WMBFA and this Bank.

The Board in considering the Petition does not need to identify, much less resolve, the issues that may come up in connection with any future petition or application for dual membership. Every application of a statutory standard has policy implications, but the appropriate exercise of Board discretion in this particular case does not necessitate a broad policy decision. Just as this Board's predecessor agency did with respect to interstate branching by federal thrifts,' this Board will retain all its policy options even after favorably deciding this application. A decision to approve in this case will only commit the Board to *consider* future applications, and particularly in view of the specific and distinguishing facts of this case, will not significantly limit the Board's discretion to approve or disapprove based on the facts of any other applications. As discussed below, this Bank believes that the policy considerations relevant to this particular Petition strongly favor approval. Although broad policy issues need not be addressed in the context of this Petition, the Dallas Bank has responded to all the matters raised in the Bothwell Letter, including policy matters that have no relevance to the Petition.

Before turning to the specific questions in the Bothwell Letter, we would like to underscore the fundamental point: Under Section 4(b) of the Federal Home Loan Bank Act (the "Bank Act"), the Board has discretion to permit WMBFA to become a member of this Bank while remaining a member of the Federal Home Loan Bank of San Francisco (the "SF Bank").

Nothing in the Bothwell Letter casts doubt on this fundamental threshold principle. Section 4(b) and the Board's own regulation implementing Section 4(b) grant the Board the authority to approve the Petition. In 1989 Section 4(b) was amended (as the Bothwell Letter appears to concede) in a manner that lessened ambiguity and preserved text supporting, on its face, dual membership. As amended, the words of Section 4(b) provide a far clearer indication of the Congressional purpose than the few immaterial witnesses' statements cited in the Bothwell Letter from the drafting process of the original Act more than 65 years ago.

As stated in the Petition and supporting documents, the Dallas Bank believes that the Board has clear legal authority to permit dual district membership and that the facts and circumstances of the present case, and related policy considerations, more than satisfy the statutory "demanded by convenience" standard for Board approval. Moreover, the Board's decision should be dispositive because it is settled law that an agency's interpretation of its own statute is controlling unless plainly erroneous.

Under the Home Owner's Loan Act of 1933, the Federal Home Loan Bank Board ("FHLBB") had statutory discretion to permit *de novo* interstate branching by federal associations, but as a policy matter declined to permit such branching during the first fifty years of operation. With the advent of significant thrift failures in the early 1980's, the FHLBB began to make case-by-case exceptions in order to facilitate acquisitions of failing associations. Under the Home Owner's Loan Act of 1933, the Federal Home Loan Bank Board ("FHLBB") had statutory discretion to permit *de novo* interstate branching by federal associations, but as a policy matter declined to permit such branching during the first fifty years of operation. With the advent of significant thrift failures in the early 1980's, the FHLBB began to make case-by-case exceptions in order to facilitate acquisitions of failing associations. Whether to permit unrestricted *de novo* branching was debated and considered by the FHLBB for a number of years, and only in the 1990s did its successor Office of Thrift Supervision determine to adopt such a policy. See 12 C.F.R. Section 556.5. The FHLBB's decisions in the early 1980's to permit some of the country's largest thrifts to acquire interstate branches in order to address a particular set of problems in no way committed that agency to adoption of unrestricted branching.

A. Technical Responses

1. With regard to **organizational structure, WMBFA** has provided the following information to the Dallas Bank. WMBFA has 61 subsidiaries, which are shown on the chart that is attached as Exhibit 1A. Exhibit 1A shows the organizational structure of WMBFA and its holding company, Washington Mutual, Inc. ("WMHC"). Exhibit 1B shows the organizational structure resulting from WMHC's acquisition of Bank United, prior to the merger of Bank United with and into WMBFA (the "Bank Merger"). Bank United has nine subsidiaries, which are shown on Exhibits 1B and 1C. Exhibit 1C shows the organizational structure resulting from the Bank Merger

In approving, on January 16, 2001, the acquisition of Bank United by WMHC and the Bank Merger, the Office of Thrift Supervision (the "OTS") acted in compliance with the Bank Merger Act, which required that the OTS "take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served." 12 U.S.C. 1828(c). Certain passages in the Bothwell Letter, however, appear to question the reasons for the Bank Merger or the possibility of deferring the Bank Merger. The primary operational reason for the Bank Merger is to consolidate and thus to simplify administration, as indicated in the November 28, 2000, Memorandum from WMBFA as attached to the Petition (the "WMBFA Memorandum"). The Bank Merger will eliminate duplication, such as the need for separate financial reporting, separate but overlapping branch networks, and separate compliance with OTS regulatory capitalization requirements.

Exhibits 2A through 2B-2 (in the "Confidential" binder of exhibits) provide additional information relating to the applicable regulatory capitalization requirements. These exhibits concern the financial effect of alternative business plans of WMHC. WMHC has requested that the Dallas Bank keep these exhibits confidential. Accordingly, these exhibits, under Finance Board regulations at 12 C.F.R. § 910.5, are separated and identified as "CONFIDENTIAL." These exhibits contain "commercial or financial information obtained from a person and privileged and confidential", as these standards are established in Section (b)(4), of the Freedom of Information Act, 5 U.S.C. § 552(b)(4). Specifically, the items contain confidential financial or other information, which is proprietary in nature, competitively significant, and not otherwise available to the public from any other source. Accordingly we hereby request confidential treatment for these exhibits.

Whereas all of WMHC's previous acquisitions of large savings institutions, including WMBFA in 1996, Great Western Bank, a Federal Savings Bank ("GWB") in 1997, and Home Savings of America, FSB ("HSA") in 1998, were treated as poolings of interests for accounting purposes, WMHC's acquisition of Bank United will be treated as a purchase for accounting purposes according to generally accepted accounting principles ("GAAP"). Therefore, the values of the assets and liabilities of Bank United will be adjusted to their fair market values for accounting purposes. The pro forma effect of these adjustments on Bank United's Tier 1 risk-based capital ratio (if Bank United were to remain a separate institution) would differ from the effect of the transaction on WMBFA's Tier 1 risk-based capital ratio (when Bank United merges into WMBFA) because WMBFA's core capital base is much larger than Bank United's. As exhibit 2B demonstrates, Bank United currently is well capitalized according to OTS regulatory capital requirements. WMHC believes that the capitalization shown in Exhibit 2B-1, however, would raise significant concerns for the OTS from a supervisory standpoint and that, therefore, the retention of Bank United as a separate institution under these circumstances is not an economical alternative. (WMHC has not provided Exhibit 2B-1 to the OTS because WMHC did not file an OTS H(e)-2 application to hold Bank United as a separate subsidiary of WMHC, but WMHC will provide Exhibit 2B-1 to the OTS upon request.) As the retention of Bank United as a separate institution is not an economical

alternative, then the information on Exhibit 2B-1 demonstrates that the Bank Merger is the necessary economic consequence of WMHC's acquisition of Bank United.

Much as the Dallas Bank would like to maintain Bank United as a member, it has been informed that, for the reasons stated above, such separate membership is not an option. As a result, the Dallas Bank ultimately faces the complete disruption of all its ties to the home finance operations now carried on in the offices of Bank United, if WMBFA is not allowed to become a member of the Dallas Bank.

2. With regard to exempt multiple holding company status, WMHC and WMBFA has provided the following information to the Dallas Bank. WMHC currently is not subject to certain restrictions on business activities (the "Multiple HC Restrictions") under Section 10(c) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. 1467a(c), because all but one of WMHC's savings institution subsidiaries were initially acquired under certain supervisory acquisition provisions of federal law (the "Supervisory Provisions"). Similarly, Bank United was initially acquired under the Supervisory Provisions, and its holding company, Bank United Corp. ("BUHC") is not subject to the Multiple HC Restrictions. Under the most recent amendment of Section 10(c) of HOLA, paragraph 10(c)(9), 12 U.S.C. 1467a(c)(9), as enacted in 1999, WMHC and BUHC are both grandfathered as holding companies that remain exempt from the Multiple HC Restrictions and will remain exempt unless they are acquired by a company that is not thus grandfathered. Accordingly, WMBFA has reported to the Dallas Bank that WMHC,

Z In this respect, WMBFA has advised the Dallas Bank, HOLA 10(c)(9) as enacted in 1999 is entirely consistent with OTS precedent dating back to December 1989, under which a holding as the survivor of the merger of these two grandfathered companies, should not be subject to the Multiple HC Restrictions.

3. With regard to the agreements for the acquisition of Bank United, WMBFA has provided the following information to the Dallas Bank. The Agreement and Plan of Merger (the "Merger Agreement") dated as of August 18, 2000, by and between WMHC and BUHC, providing for the merger of BUHC with and into WMHC, does not contain any contingencies or default provisions related to the elimination of the Bank United charter or the maintenance of membership in the Dallas FHL Bank. The Merger Agreement does not have any default provisions that will be triggered if the currently scheduled February 13, 2001, date for the merger of Bank United with and into WMBFA is missed.

4. As a result of the OTS governing regulations (12 C.F.R. Section 552.13(1)), the obligations and duties of Bank United under the outstanding agreements between the Dallas Bank and Bank United will become the obligations and duties of WMBFA. Thus, WMBFA will become obliged to repay, according to their terms, the advances made by the Dallas Bank to Bank United. Following the Bank Merger, the Dallas Bank proposes that increases in advances by the Dallas Bank to WMBFA would be proportional to the on-going operations of WMBFA in the Dallas district. The Dallas Bank is currently considering procedures for the administratively convenient measurement of such ongoing operations. The Dallas Bank recognizes that the Bank Merger will affect its ties to the home finance operations now carried on in the offices of Bank United. In this sense, some change in the status quo is unavoidable. The membership of WMBFA in the Dallas Bank, however, would greatly ameliorate the impact of the disappearance of Bank United as a member of the Dallas Bank. In view of Bank United's extensive involvement in the Dallas Bank, as discussed in the Petition, the Dallas Bank submits that limiting the extent of changes resulting from the Bank Merger is among the standards that the Finance Board should consider in reviewing the Petition.

company that is the survivor of the merger of two exempt holding companies is not subject to the Multiple HC Restrictions. In February 1999 the OTS issued a notice of proposed rulemaking (the "2-99 Proposal"), casting doubt on the continuing validity of this well-established precedent. Following the enactment of the Gramm-Leach-Bliley Act in late 1999, which reaffirmed that the survivor of the merger of two exempt holding companies is not subject to the Multiple HC Restrictions, however, the OTS withdrew the 2-99 Proposal.

B. Convenience of the SF Bank

The convenience of the SF Bank would appear to turn on two considerations. Approval of the Petition will substantially maintain the status quo and thus should be neutral from the standpoint of the SF Bank. The Board may appropriately inquire concerning the effects on the SF Bank of a denial of the Petition, that is, whether the SF Bank would be unable to fund advances for home lending generally in the Dallas district previously provided by Bank United and the Dallas Bank, and the related issue of Affordable Housing Program ("AHP") funding by the SF Bank in the Dallas district.

As the Finance Board is well aware, WMBFA is currently the largest member, in terms of both outstanding advances and stock ownership, of the SF Bank. Neither the Dallas Bank nor WMBFA know the current amount of advances outstanding from the SF Bank to members other than WMBFA (and therefore cannot specify the precise percentage of total SF advances represented by advances to WMBFA), but the Dallas Bank and WMBFA believe that the Office of Finance has relatively current information.

Membership in the Dallas Bank would avoid the need for further expansion of SF Bank advances to further the housing needs of the residents of the Dallas Bank District. Membership in the Dallas Bank also would avoid the need to increase the ownership share of WMBFA in the SF Bank's outstanding stock. In these two most important respects, the Board's approval of the membership of WMBFA in the Dallas Bank would be neutral in its effect on the convenience of the SF Bank.

With regard to AHP activities, the Finance Board already has received the WMBFA Memorandum in which WMBFA asserts that that the SF Bank has not been willing in the past to devote additional resources to the increased demands and operational burdens required to support proportionate growth in WMBFA's AHP programs after WMBFA became the successor of three California institutions in 1997 and 1998.3 WMBFA has informed the Dallas Bank that it estimates that in the future WMBFA would routinely submit AHP project applications in an aggregate amount that is substantially greater than $3 million in each ARP round (there are two AHP rounds per year). Currently, WMBFA must choose between potential AHP projects and attempt to

3 The three California institutions were Great Western Bank, a Federal Savings Bank ("GWB"), Home Savings of America, FSB ("HSA"), and Coast Federal Bank, Federal Savings Bank ("Coast FSB") in 1997 and 1998. In the first SF Bank AHP round of 1997, WMBFA, GWB and Coast FSB applied for a total of $4.89 million in ABP projects, and the four institutions together could have applied for a total of $10.0 million. In contrast, the SF Bank allowed WMBFA to apply for only $3 million in ABP projects in the most recent SF Bank round of 2000. identify the projects that will receive the better scores upon application to the SF Bank. Under its current policies, the SF Bank would be unable to meet the increased demands and operational burdens resulting from merger-related expansions of WMBFA's operations in the Dallas District, for the SF Bank in the past has not been willing to devote additional resources to meet the increased demands and operational burdens resulting from merger-related expansions of WMBFA's operations in the SF district.

The Finance Board has ample basis to conclude that disapproval of the Petition would have a negative effect on the total ability of WMBFA to provide funding for ABP projects in the Dallas and SF districts. In view of the present SF Bank limits on total AHP lending by a single member, denial of the Application would in effect apply that cap to WMBFA's AHP lending in the Dallas District as well. Projects in both districts will have to compete for the same limited pool of funding permitted to WMBFA by the SF Bank.

The Finance Board may approve the Petition without finding that the SF Bank would not be financially able to meet the reasonably expected needs of its member institutions after the Bank Merger-i.e., without finding that the SF Bank (as stated in the Bothwell Letter) "could not devote additional resources to such increased demands and operational burdens" required to support the home finance operations now carried on by Bank United with the support of the Dallas Bank. (Neither WMBFA nor the Dallas Bank has suggested that expansion of the SF Bank's support is impossible). The "demanded by convenience" standard does not require (as suggested by the Bothwell Letter) a finding that the convenience of the SF Bank, considered by itself, demands dual membership. '1 he standard is not so narrow. Like the phrase "convenience and needs of the community" in other Federal banking statutes, it should be applied flexibly in light of the overall statutory purposes of the Bank Act. A finding that the SF Bank would be ***unable*** to fund replacement advances to WMBFA to fund lending in the Dallas District would clearly and strongly support approval of the Petition. If the Board does not make such a finding, the convenience factor with respect to the SF Bank should be neutral.

CA **Convenience of the Dallas Bank**

1. At a minimum, the Section 4(b) "demanded by convenience" standard requires that the Board give significant weight to the effects on the applicant Bank. The most important question presented by the Petition is whether this Bank will be significantly affected if the interstate merger of Bank United into WMBFA is allowed to erode its membership base. Denial would adversely affect this Bank's membership base. .

In some cases, the interests of residents of the district also might appropriately be considered. For example, a finding by the Board that the SF Bank would be financially unable to supply funds for economical home finance to residents of the Dallas District after the Bank Merger would necessitate approval of the Petition, as question C.1 in the Bothwell Letter appears to suggest. Other factors provide ample grounds, however, to support approval of the Petition. It is not necessary to show that WMBFA "would not be able" (as stated in the Bothwell letter) to provide funding using advances from the San Francisco Bank, to further the housing needs of the residents of the Dallas Bank District. The "demanded by convenience" standard does not require any finding on this macroeconomic matter.

Neither WMBFA nor the Dallas Bank has suggested that expansion of WMBFA's funding from the SF Bank is humanly impossible. Under Federal law, however, the Dallas Bank has a strong interest in participating in the funding of economical home finance in the Dallas District, regardless of the willingness or ability of the SF Bank to take on greatly increased responsibility for funding through WMBFA in the Dallas District. The Dallas Bank recognizes that dual membership is the exception, not the rule. In most cases, the home district Bank bears primary responsibility for the funding of economical home finance by its members throughout the nation. In this particular case, however, a failure by the Finance Board to approve the Petition would deprive the Dallas Bank of its largest partner in achieving this statutory goal, without providing any replacement. Approval of the Petition would provide WMBFA as a substitute partner in meeting the needs of Dallas district residents.

2. The Dallas Bank expects to continue to be financially strong even if WMBFA does not continue its membership in the Dallas Bank following the merger of Bank United into WMBFA. However, that outcome will likely cause the Bank to make adjustments to its current operations that will be felt most immediately by the Bank's large pool of smaller financial institution members and in communities that benefit from the Bank's Affordable Housing Program (AHP) and other targeted community lending programs.

Bank United currently accounts for approximately 25 percent of the Bank's total advances and 18 percent of the Bank's capital stock. As part of its strategic planning process that took place following the announcement of WMBFA's acquisition of Bank United, the Bank analyzed the impact of Bank United's withdrawal from membership, repayment of existing advances at maturity and redemption of capital stock on the Bank's operations.

Holding all other factors constant, by the time the majority of Bank United's existing advances would be repaid in 2008, the Bank's total assets would be reduced by about $8.0 billion and its capital by about $360 million. The reduction in assets represents the advances expected to be repaid, plus the reduction in existing mortgage securities investment authority tied to the Bank United capital stock.

These changes in the Bank's balance sheet would reduce the Bank's projected net income for 2008 by about $35 million. Because Bank United's capital stock investment declines in proportion to the reduction in advances outstanding, the decrease in the Bank's return on capital is relatively smaller than the decline in absolute earnings. However, the reduction in net income would translate to a reduction in members' return on invested capital stock of about 0.69 percent. While this reduction in return on capital can be dealt with, it presents real challenges.

As indicated in the enclosed pages from the Bank's strategic business plan (attached hereto as Exhibit C), the Bank intends to reduce the impact of Bank United's departure would have on members' return on invested capital through the following initiatives:

1. Reducing overhead;
2. Replacing Bank United advances assets through expanded member

participation in the MPF Program;

3. Building advances to other members by implementing the new collateral

provisions of the 1999 modernization legislation, enhancing membership recruitment efforts, and emphasizing business development among other relatively large borrowers; and

4. Generating fee income through the development of an asset exchange over

which members would buy and sell assets among themselves.

As also discussed in the Bank's strategic business plan, the Bank's profitability will improve further in 2004 with the maturity of a large block of high cost debt.

1 f these efforts are not sufficient to ensure the Bank's earnings are adequate to maintain a sufficient dividend, the Bank will also adjust its pricing for advances to remaining members. The Bank's long standing policy has been to make advances available to all members at the same rates regardless of the size of the member or the

transaction in question. Large volumes of advances to larger borrowers have helped provide sufficient earnings to allow the Bank to price all advances very competitively. If the Bank must adjust pricing to maintain profitability (i.e., dividend paying capacity), those price increases will be absorbed by the Bank's remaining members, most of which are smaller community financial institutions.

In addition to the impact on members' return on invested capital and advances pricing, the projected decrease in earnings will reduce the Bank's financial support for affordable housing and other community lending initiatives. The projected reduction in net income for 2003, for instance, would reduce that year's contribution to the ABP by $3.9 million (about 27 percent). In addition, the Bank will have less money available to provide pricing incentives for members to meet special identified community lending needs in the Ninth District.

3. In addition to averting the financial impact that is described above, the Bank Merger would "result in administrative simplification and operational efficiencies," as described in the Petition. To the extent possible following the Bank Merger and the necessary disappearance of Bank United as a member of the Dallas Bank, membership of WMBFA in the Dallas Bank would allow WMBFA seamlessly to step into the place of Bank United. As noted in Item A.4 above, the Dallas Bank recognizes that the Bank Merger will have an impact on its ties to the home finance operations now carried on in the offices of Bank United. The membership of WMBFA in the Dallas Bank, however, would ameliorate this impact.

D. Convenience of the Bank System

The ongoing trend toward nationwide interstate bank mergers since the 1994 amendment of Federal banking law has been significantly reshaping the very membership foundation on which the Bank System rests. The Dallas Bank recognizes that these trends have a long history and may call for further Board consideration in other contexts. In the narrow context of this Petition, the Section 4(b) "demanded by convenience" standard allows the Board to consider implications for the Bank System without requiring the Board at this time to make broad policy determinations that will apply to all cases. Accordingly, in this section, we discuss considerations pertinent to the Bank System pertinent to the Petition.

Most fundamentally, the convenience of the Bank System as a whole has been, and will continue to be, well-served if each district Bank has a membership base parallel to the size and scope of the housing finance needs of its district and if that membership base is affected over time as little as possible by the vagaries of mergers, consolidations and other changes in the specific corporate entities that happen to be based in that district. The capital, governance and other reforms in recent years have strengthened the Banks as institutions and made them more market-driven, but a strong membership foundation is essential. As discussed herein, dual district membership is a necessary and flexible tool for the Board to ensure such an enduring foundation.

1. From the creation of the Bank System, a core concept of its regional system was that the home finance institutions located *and* doing all their business in a Bank district would be the pool of institutions eligible to become its members. (The Section 4(b) exception does not change the core concept, but does build in flexibility.) Before multistate operations by financial institutions, reality very closely matched the core concept. Consistent with this concept, the goal in the 1930s was to match the proportion of home finance lending by the members in a district to the proportion of home finance borrowing done by residents of that district, with the corollary that the capital and advances business of the Bank in that district would correspond to these proportions.

The first chairman of the Board's predecessor described the drawing of the Bank districts as an effort to provide for a diffusion of capital for mortgage lending throughout the country and, quite consciously, to avoid the concentration of mortgage lending in a few financial money centers. Before determining the number and

make-up of Banks in the new Bank System, it prepared a map showing the volume of mortgage *held* by lenders and the locations of such lenders' principal place of business. As he then reported:

"Clearly this reflected a lack of distribution of mortgage-lending capital in the United States.

"Our function, as we visualized it, was to correct that, as far as we could, by projecting the capital of these banks not exclusively upon the basis of mortgages held within the district, but upon the basis of the need for the strengthening of the capital structure of the district. It is not sound Americanism to permit further draining of the capital of the United States into small and concentrated territories. Consequently, we tackled the matter of laying out districts with a view to an effort to diffuse capital ....

"We found another thing, and that was that in some sections of the country there would be one or two strong states in point of financial structure, and one or two states which had been starved for want of capital. When we found such a condition we deliberately endeavored to arrange our district boundaries so that in every district there should be some states with adequate resources in order that the weaker states in financial structure should siphon out of the stronger the credit which they needed for their advancement. Applying these principles within the straightjacket upon us by the law, --that we must also consider primarily the convenience of the institutions likely to and eligible to subscribe to stock, - - we set up the districts of our system for the purpose so far as may be of reconstituting the financial map of the United States in the directions of which I have spoken."

Multi-state operations have significantly changed the parallelism among these three elements: district home finance needs, the volume of home finance lending done anywhere by institutions based in the district, and the capital base/volume of business of the district Bank. The result is that the original match of concept and reality has been distorted to a greater or lesser extent in each district. That is, in "net gain" districts the national market share of home lending by institutions located in the district has gone up as their volume of business through branches and offices situated in another Bank's district has increased. In net gain districts the total national home finance lending by in-district institutions will exceed the total home finance borrowing done by all residents of that Bank's district (regardless of the location of the lender), and the Banks in net gain districts will have levels of capital and advances greater than would be the case if all home finance business in the district were done exclusively with member institutions in that district.

Conversely, in "net loss" districts, the total home lending (including interstate) by members institutions in that district will be less than the total home borrowing done by all the residents in that district. The Banks in such districts will have less capital and advances than would be the case if all home finance business in the district were done exclusively with member institutions in that district.

The distortion and imbalance referred to in the application refers to the effects on individual Banks of the fact that the institutions gaining total national market share in home finance are located only in "net gain" districts, and that in a single district membership system, Banks in "net loss" districts face the risk of a persistently eroding membership base. Systemwide, the greater the gap between "net gain" and "net loss" districts, the greater the distortion in the System's fundamental regional concept and balance.

4 Franklin W. Fort, "Federal Home Loan Bank System," *1932* Building and Loan Annals at *2-3, quoted in* David A. Bridewell, Assistant to the General Counsel, Horace Russell, of the FHLBB, A History Of The Facts Surrounding The Passage Of The Creating Legislation, The Establishment And Organization Of The Federal Home Loan Bank Board And The Bank System, The Savings And Loan System, The Home Owners' Loan Corporation, And The Federal Savings And Loan Insurance Corporation. (May *14, 1938).*

As long as national policy embodied in the Bank Act is based on a regional system, as it clearly still is, we believe Board policy and actions should promote the strength of each district Bank by ensuring the stability of its membership base. Dual district membership will allow interstate institutions to become a member of the Bank in a district where it is an active lender and thus will reduce the gap between net gain and net loss districts. Dual membership will allow the Board to ensure that the membership base in every district -and thus the capital and business base of the Bank - more nearly corresponds to the volume of home finance lending done in the district.

This question also asks about effects on housing finance. In macro-economic terms, the application has not suggested that dual district membership will have any particular effect on the overall availability of home finance in the country.

On the other hand, we do believe that dual district membership will further specific types of home finance, most notably the overall number and total volume of AHP projects that will be conducted in each affected district. As discussed in the Petition, for example, the limitations imposed by the SF Bank on the expansion of WMBFA's AHP proposals in proportion to the AHP projects that could be proposed by GWB, Coast and HSA, as described in the Petition and in Item B above, demonstrate that consolidation has already impeded the expansion of this particular home finance activity by WMBFA. Although institutions other than WMBFA have increased their participation in AHP, the community groups served by WMBFA have no place to go if another member turns down their AHP proposals. It is this Bank's belief that WMBFA is committed to increasing its mortgage lending in the Dallas District, that WMBFA's membership in the Dallas Bank will make that increase substantially more convenient, and that WMBFA as a Dallas member will participate to the maximum extent in the Dallas AHP program.

2. As the Bothwell Letter notes, the Finance Board has authority under Section 3 of the FHLB Act, 12 U.S.C. § 1423 ("Section 3)") to adjust the boundaries of Federal Home Loan Bank districts to move states from one district to another so long as the number of districts is no less than eight and no more than twelve, and no district contains a fractional part of any State. Such an adjustment has never occurred, and by statute any change would require that at least one state, and all Bank members in that state, to move from one district to another district (unless the Finance Board permitted dual membership for some or all of them). This Bank respectfully suggests that moving a state from one district to another district, or consolidating one or more Banks into a single Bank, under Section 3 would be more radical that adjusting for systemic imbalances through case-by-case approval of applications for dual membership under Section 4(b). The availability of the Section 3 broad brush option in no way undercuts the desirability and utility of the more targeted, case-by-case Section 4(b) dual membership option. In addition, it would be difficult if not impossible to truly address the problems caused by multi-state operation in this manner since it appears that most large multi-state financial institutions will ultimately be operating from only a handful of states. r

3. Approval of the present limited application will, in our view, at a minimum maintain, and indeed should enhance, the cooperative nature of the Bank System. First, approval of the **WMBFA application will maintain the status quo and thus** have no adverse effect. WMBFA will step into to shoes of the institution that is at present the Bank's largest member.

Further, this Bank believes that the business of large institution members and their active participation in the Bank's programs, committees, and activities are very important and acts to enhance the Bank's ability to meet the need of all its members and the public in the most optimum manner. We do not believe that the limited application at issue raises an issue of undue control. In this regard, since WMBFA is prepared to limit its access to the Dallas Bank to the level of business that Bank United had, it clearly would not dictate to either Bank.

We believe that the limited dual membership at issue is far more likely to enhance cooperation with the Bank System than otherwise.

4. The nature and pricing of the Bank's products and services are fundamentally market driven. Both the Banks and their members operate in an environment of national, indeed global, financial markets. Each should be expected to pursue its own best interests, as is rational in a market-based system. If one Bank is able to offer advances or other products on more favorable terms than another Bank, those differences presumably arise from economic differences, not the desires of members. There is also of course no reason to expect that any such advantage would last indefinitely or that limitless funding could be provided on the more favorable terms. Moreover, today a member in one district can make home loans in another, and thus any member in a district offering more favorable terms can already gain competitive advantage by using its more favorable home district Bank financing to fund loans made in other districts. Today a member in one district also can purchase assets from a member in another and, especially if the members are coordinating their funds management as sister institutions in a holding company structure, the member in a district offering more favorable terms thus can pass on the advantage of its more favorable home district Bank financing to provide funds to the members in other districts. Dual district membership is irrelevant to the capacity of any Bank to offer products or services at more favorable rates.

5. By holding an aggregate of the stock of the SF Bank and the Dallas Bank, WMBFA could satisfy the requirement in the first sentence of paragraph 6(c)(1) of the Act as in effect prior to the effective date of the capital structure plan mandated by the

Gramm-Leach-Bliley Act of 1999 (the "GLB Act"). According to this sentence, the minimum amount of stock to be purchased by a member (without specification as to whether the stock is issued by one Bank or by more than one Banks) "shall be an amount equal to 1 per centum of the subscriber's aggregate unpaid loan principal, but not less than $500." 12 U.S.C. § 1426(c)(1). (See also 12 U.S.C. § 1426(c)(4) (defining "aggregate unpaid loan principal" as the aggregate unpaid loan principal of a subscriber's or member's home mortgage loans, home purchase contracts, and similar obligations.) Thus, the first sentence leaves open the possibility that an institution can satisfy the requirement by holding an aggregate of the stock of two Banks

The second sentence of paragraph 6(c)(1), prior to its conditional repeal by the GLB Act, explicitly empowered the Finance Board to prescribe the "conditions" under which each Bank shall annually adjust the amount of stock held by each member in the Bank. Thus, the Finance Board would have statutory authority under the second sentence to establish a condition of single-district membership for this annual adjustment. Under the facts of this particular case, the establishment of such a condition by the Finance Board would be appropriate. There is no sound reason in law or policy to adjust the amount of stock to be held WMBFA in the Dallas Bank, by itself, to equal 1 per centum of WMBFA's aggregate unpaid loan principal. Accordingly, the Dallas Bank requests that the Finance Board establish such a condition with regard to the adjustment of the amount of stock to be held by WMBFA, in the interim prior to the effective date of the capital structure plan mandated by the GLB Act.

The Board also has general authority to supervise the FHL Banks and to promulgate orders that carry out the provisions of the FHL Bank Act. See 12 U.S.C. § 1422b(a)(1). Accordingly, as a general matter, the Board has authority in the context of an order permitting dual district membership under Section 4(b) to include provisions that implement that decision including concerning the minimum amount of stock to be owned in each Bank to which it will belong.

As shown above, nothing in the Act as in effect prior to the enactment of the GLB Act limits the discretion of the Board in permitting dual membership without requiring a dual member to purchase an amount of stock in each Bank equal to 1 per centum of WMBFA's aggregate unpaid loan principal. Under the Act as amended by GLB Act, this matter may be controlled by the capital plans to be adopted by each Bank under the new version of Section 6.

As a result of OTS regulations (codified at 12 C.F.R. Section 552.13(1)) governing the Bank Merger, the stock in the Dallas Bank now held as an asset of Bank United will become an asset of WMBFA. The Dallas Bank proposes that, following the Bank Merger and prior to the effective date of the capital structure plan mandated by the GLB Act, the stock ownership of WMBFA be adjusted so that the Dallas Bank's advances to WMBFA are limited to 20 times the stock held by WMBFA in the Dallas Bank. In this respect, the stock purchase requirement of paragraph 6(c)(2) of the Act (providing that "the aggregate outstanding advances" by a Bank to a member shall not exceed "twenty times the amounts paid in by such member for outstanding capital stock held by such member") as in effect prior to its conditional repeal by the GLB Act, would apply to WMBFA, as provided in Finance Board regulations (12 C.F.R. Section 925.22). WMBFA therefore would be required to own stock in both the Dallas Bank and the SF Bank, in proportion to the outstanding advances to WMBFA by the Dallas Bank and the SF Bank.

6. As discussed above, the limited "status quo" dual membership at issue will promote stability at both Banks. It should have no impact on either Bank's ability to create a new capital structure.

E. Legal Matters

Before turning to the specific matters of legislative history and interpretation raised in Part E of the Bothwell Letter, we would stress the importance of maintaining focus on the overriding legal issue -- the Board's discretion to interpret Section 4(b) to permit dual district membership. As stated in the November 28, 2000, Legal Memorandum as attached to the Petition ("the Legal Memorandum"), the better legal conclusion remains that Section 4(b) as currently in effect is ambiguous and permits the Board to determine that an eligible institution may be a member of more than one district Bank, upon a finding of "demanded by convenience."5 Further, as discussed in the Legal Memorandum, Section 912.18(c), the current FHFB regulation regarding membership, on its face is consistent with the interpretation of the statute allowing dual membership. 6

The Legal Memorandum, at p. 2, states: "This review demonstrates that the particular statutory language in fact does not convey a Congressional direction limiting eligible institutions to membership in a single district and may be interpreted to allow membership in more than one district." It further states (p. 6): "Taken as a whole, the Section 4(b) structure and words tilt in favor of a reading that provides an eligible institution the ability to seek Bank membership as a matter of right only in its home district, or (with approval) alternatively in the Bank in an adjoining district, or (with approval) both. Since more than one reading of the statute is possible, the task falls to the FHFB to provide authoritative construction."

As stated in the Legal Memorandum at p. 8: "There is no accompanying discussion explaining this 1993 revision [i.e., the current regulation, 12 C.F.R. § 925.18(a)]. While any intent underlying these changes is undisclosed, the face of the regulation in its plain language provides that the FHFB may permit exceptions to the general rule of "only" home district membership by allowing an eligible institution also to become a member of any adjoining

The further examination of the Act's legislative history suggested by the Bothwell Letter casts no doubt on these conclusions. Indeed, as we will demonstrate below, these historical items are in fact not significant for the issue at hand and should be given no weight. The larger and more fundamental point is that Congress has given the

Board stewardship of the Bank System and has not provided definitive direction with respect to dual membership.

We would also note that banking and other regulatory agencies have generally acted on the basis of authority arising from their statute and in applying it to current problems have not felt constrained by specific considerations that may have seemed pertinent when the statute was enacted. Recent history includes many examples in which federal banking agencies have implemented their missions in light of changed economic and market realities by giving life to statutory provisions that had long laid fallow and ignored. One particularly striking example in which authoritative legislative history was not regarded as constraining is the reinterpretation of Section 20 of the Glass-Steagall Act of 1933 during the 1980's by the Federal Reserve Board. Even though the principal architect of this legislation, Senator Glass, had repeatedly stated at the time that Section 20 was intended to "divorce" commercial from investment banking by barring banks from having securities affiliates, the Fed took a fresh look at the statutory language 50 years later and determined that it could permit banking organizations to have securities underwriting affiliates engaged in, *inter alia,* corporate equity underwriting.' The existing statutory and regulatory language, not legislative history, is what really matters.

We will now address the specific legal points raised in the Bothwell Letter:

1. The conjunctive reading of Section 4(b) is more consistent than the disjunctive reading with the later legislative history of this provision. When Congress last amended section 4(b) in 1989, Congress retained the conjunctive "or secure advances" language. The Bothwell Letter suggests that this phrase "likely should have been removed in 1989" but it is apparent that Congress did not agree with position in the Bothwell Letter.8 When

district Bank. Thus, at a minimum the current regulation is consistent with the conclusion that membership in both a home and any adjoining district is permitted under Section 4(b). Indeed deletion of "or" in the current FHFB regulation reinforces the conclusion that it should be read in the conjunctive to permit multiple district membership."

Citicorp, 73 Fed. Res. Bull. 473 (1987), upheld in Securities Industry Association v. Board of Governors, 839 F.2d 47 (2d Cir. 1988), cert. denied, 108 S. Ct. 2830 (1988); J. P. Morgan & Co., Inc., 75 Fed. Res. Bull. 192(1989).

The putative basis for this suggestion in the Letter is the assertion that the phrase was "linked" to language concerning nonmembers that was removed in 1989. Regardless of whether any such linkage existed in the 1930s, however, Congress in 1989 eliminated any such

Congress deleted the reference to nonmembers in 1989, Congress left "or secure advances" in the statute. The only reading of this language today is conjunctive. With the deletion of the nonmember language, any legislative history related to that language became irrelevant.

2. The Bothwell Letter cites three instances of testimony at the 1932 Senate and House hearings by witnesses who spoke of possible issues and concerns with the Section **4(b) language as originally introduced. None of the speakers was a Senator or Representative, and the hearings** give no **indication of the** views of any member of Congress. The witnesses' testimony reflects their consideration of issues concerning how home lenders doing multistate business would participate in the new home loan bank system then under consideration, and awareness of cross-cutting considerations with respect to whether a lender should be able to deal with more than one of the new banks.

Legal principles control the weight to be given to testimony at subcommittee hearings, such as the records cited in the Bothwell Letter. The views of individual people on the interpretation of legislative language, possible amendments, or policy options are accorded no weight by the courts. Witness views at a hearing are disregarded. *See, e.g.,* Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986) (noting that "none of those statements were made by a Member of Congress, nor were they included in the official Senate and House Reports," and therefore "declin[ing] to accord any significance to these statements"). Indeed, the views of a member of Congress spoken on the floor of Congress at final passage of a bill are not given weight by reviewing courts unless there is significant evidence that the expressed views represent the collective position of the Congress. 9 The possibility of multiple membership in more than one Bank may have been

linkage. Congress deleted the reference to nonmembers and left "or secure advances" in the statute. Nonetheless, the Legal Memorandum erred by inadvertently failing to indicate the omission of the nonmember language in the quotation on p. 4. The adoption of the present language in 1989 makes the inclusion of the nonmember language in 1932 beside the point today, however.

9 Courts construing statutes are frequently asked to consider statements made by a member of Congress concerning the scope or effect of the statute in question. It is well established that a single member of Congress cannot presume to speak for the entire body about the purpose of an enacted statute and that accordingly in the construction of that statute a court should give no particular weight to that member's views. As the U.S. Supreme Court has stated, "[W]e give no weight to a single reference by a single Senator during floor debate in the Senate." Bath Iron Works Corp. v. Director, 506 U.S. 153, 166 (1993). The U.S. Courts of Appeals, including the Fourth Circuit Court of Appeals, uniformly follow this standard. "The remarks of individual legislators, even sponsors of legislation, however, are not regarded as a reliable measure of congressional intent." Roy v. County of Lexington, 141 F.3d 533, 539 (4th Cir. 1998); accord, U.S. v. Ganaway, 960 F.2d 1227, 1233 (4th Cir. 1991); Marbley v. Bane, 57 F.3d

"rejected" by two witnesses, as the Bothwell Letter asserts, but there is no evidence that it was rejected by either the House or the Senate.

In the Senate hearings in January 1932 (seven months before enactment), Mr. O'Brien, who is identified only as the "legislative drafting agent" for the bill as introduced, was asked by Senator Watson to address the membership issue. O'Brien stated that, "There is the opportunity in the bill for a member whose principal place of business is in one district to belong to a bank in the adjoining district, but outside of that there is no provision. It is impossible under the terms of the bill for a company doing business in New York to belong to a South Carolina [Home Loan] bank."1° This testimony is consistent with the analysis in the Legal Memorandum and the WMBFA Memorandum. The bill always provided for home district or adjoining district membership. The bill did not permit membership in any district other than the institution's home district or an adjoining district.

Later in these hearings, a representative of a nationwide mortgage lender asked whether a Home Loan Bank could take "mortgages from any State in the Union." The witness then rephrased the question, "using the Metropolitan Life Insurance Co.: Would they would have to join the 12 [sic] Federal home loan banks [sic], one in each district, or could they make their loans all through the New York bank if there was one there?" Mr. O'Brien opined that the company "would" deal only with one district bank, mentioning a San Francisco bank in one hypothetical example. Mr. O'Brien added that, "the theory of the bill," as he interpreted it, "might be unduly restrictive".11 Although it may be interesting that Mr. O'Brien thought single district membership might be unduly restrictive for a national lender, his testimony cannot be accorded significance despite his position as a legislative drafting agent. . There is nothing in the subcommittee hearing record indicating that his views were adopted by the subcommittee or the committee, nor were his views included in the official Senate and House Reports.

224, 231 (2d Cir. 1995); Ries v. Amtrak, 960 F.2d 1156, 1161 (3d Cir. 1992). Further, the views of even the sponsor of a bill will be disregarded if there is not material supporting facts showing that the particular statement may be regarded as representing the considered collective views of the body. *See* Chrysler v. Brown, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); accord, West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98 (1993); CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980); Roy v. County of Lexington, supra.

to Senate Subcommittee Hearings, January 1932, at 117.

11 Id. at 360. It is worth noting that the witness before the Committee when this discussion occurred was from a multistate mortgage company that made home loans in many regions of the country.

Another private party appearing as a witness at the later House hearings referred to the earlier Senate dialogue. In the House hearing, a spokesman for the National Association of Real Estate Boards, stated that "while there may be some advantage about being able to discount in another place [i.e., be a member of more than one Home Loan Bank], the act [bill] is right as written," because the Home Loan Bank should be able to "make the investigation and see whether that mortgage is all right and not have the investigations scattered all over the country." In thus assuming that loan servicing centers would be located in the home district, the witness erred as a matter of fact. In any case, however, a statement by a trade association witness about the bill can have no claim to any weight as legislative history, as discussed above.

All the testimony cited in the Bothwell Letter addresses the language prior to the addition of conditions ("demanded by convenience" and approved by the board) to the provision for adjoining district membership. The Bothwell Letter cites no committee report language or statement by any member of Congress concerning the enacted language.

It is an impossible leap to suggest that the views expressed in hearings by witnesses merit any weight whatsoever in the Board's consideration of the fundamental legal issue in the application. That issue is whether Congress enacted a statute that plainly precludes the Board from adopting a particular interpretation. In this case, the Board today has discretion under Section 4(b) to permit dual district membership.

3. The text of Section 3 (providing for adjustment of the boundaries of Federal Home Loan Bank districts by moving states from one district to another) refers only to "the convenience and customary course of business of' of institutions that may become members. On this basis, the Bothwell Letter suggests that the Finance Board, in exercising its authority under Section 3, might disregard the convenience of the affected Federal Home Loan Banks and the Federal Home Loan Bank system as a whole. In this respect, Section 3 differs from Section 4. We agree that the convenience of the applicant member institution should be given significant weight under Section 4, as well as Section 3. However, the brief hearing discussion cited in the Bothwell Letter does not justify a complete disregard for the convenience of the district Banks directly affected or the Bank System as a whole under Section 4. There is no definitive Congressional guidance on whose convenience is to be considered. The Board thus has discretion to consider and give appropriate weight to the implications for all affected entities. Considering all the conveniences - of the member, of the Dallas Bank, of the SF Bank and of the Bank System as a whole - WMBFA's proposal for dual membership is far more convenient than the only alternative, which is that Bank United will disappear and Bank United's membership in the Dallas Bank will terminate, without any compensating membership of WMBFA in the Dallas Bank.

Conclusion

The Dallas Bank has established that the proposed dual membership of WMBFA is "demanded by convenience" and is within the legal authority of the Finance Board to approve. We believe it is in the best interest of all involved parties to have the Finance Board approve this limited "status quo" dual membership as expeditiously as possible.

Thank you for your consideration.

Sincerely,

Terry Smith President