April 24, 2001

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

Re: Response to Requests To Intervene in Petition for Case By Case Determination -Washington Mutual Bank Application for Membership in Federal Home Loan Bank of Dallas

Dear Ms. Baker:

On December 8, 2000, the Federal Home Loan Bank of Dallas ("Dallas Bank") submitted to the Federal Housing Finance Board ("Finance Board" or "Board") an Application for a "Demanded by Convenience" Membership Eligibility Approval for Washington Mutual Bank, FA ("WMBFA"). The Finance Board has chosen to treat the application as a Petition for a Case by Case Determination pursuant to Section 907.8 of the Finance Board Regulation ("Petition"). By letter dated January 31, 2001, the Dallas Bank filed supplemental information in support of the Petition and in response to a Finance Board request for further information ("Supplemental Submissions").

The Finance Board has now received seven Requests to Intervene in the Petition proceeding and one letter of support for the Petition. The Requests to Intervene by the Federal Home Loan Bank of San Francisco ("SFBank") and World Savings Bank, FSB, ("WS") referred to herein as "the Requestors," are the only ones filed that raise substantive arguments opposing the Petition. We file this Response in order to establish that the arguments raised in the Requestors' letters, referred to herein as "the Requests," are without merit.

## INTRODUCTION

In view of the extremely broad arguments in the Requests, we must begin by reiterating the limited nature of our Petition. As stressed in our earlier submissions, the limited membership sought by WMBFA in the Dallas Bank is merely meant to preserve the status quo by allowing WMBFA to step into the shoes of former Dallas Bank Member, Bank United, which was recently acquired by WMBFA. As a result, the general policy arguments raised by the Petition are misplaced. They relate more to Finance Board consideration of the issue of how the System should serve large mufti-Bank District Members than the issues raised in the Petition. In this regard, as discussed more fully below, a grant of the Petition will not cause a significant incremental increase in interBank competition nor otherwise adversely affect the Federal Home Loan Bank System (the "Bank System").

The principal assertion of the Requests is the suggestion that the Finance Board may not have the legal authority to approve the Petition. In our earlier submissions we have established that the Finance Board has such authority. In this Response, we will demonstrate that the Requests have not overcome our earlier arguments. As a result, the Finance Board is free to pass upon the Petition.

In particular, this Response will address the following individual points:

- **Ambiguity and Meaning of the Bank Act.** The Requests make several legal arguments suggesting that the Board should not approve the Petition. None of these arguments discuss the actual words of the present statute, as recodified in 1989, and thus do not address the legal position supporting the Dallas Petition.

  The SF Bank submitted a legal memorandum that concedes that Section 4(b) of the Federal Home Loan Bank Act (the "Bank Act") is ambiguous and then tries to use general case authority and the 1932 hearings on the Bank Act to argue that the statute and its history preclude the Board from approving the Petition. To concede statutory ambiguity also concedes the Board's authority to approve, as well as disapprove, the Petition. The cited legislative history is not entitled to any legal weight but, if considered, the

history indicates no more than the existence of a general expectation of single district membership in the minds of some people who testified at a legislative hearing. Perhaps, if the committee members who were present listened to this testimony, their lack of expression of disagreement with the testimony indicates they shared the same general expectation. The legislative history provides no authoritative support, however, for the proposition that Congress made a decision to deny the agency the discretion to permit a dual-district membership. Likewise, nothing in the legislative history of the 1989 amendments, which put the statutory provision in its present form, suggests there was a Congressional decision to limit the Board's discretion to permit a dual-district membership.

WS makes the additional arguments that the provision in Board rules requiring automatic termination of the membership of a member that merges into another member is dispositive and that Section 4(b) applies only to new members. Both these arguments must fail because they read out of the statute the discretion of the Board to permit an adjoining district membership for both new and old members.

- **Legislative History.** Further, both Requests attempt to draw on legislative history to cast doubt on the Board's ability to approve the Petition. To do so, the Requests focus upon shreds of specific testimony from hearings, but completely ignore the underlying purposes to avoid money center concentrations and diffuse home finance through a 12-district Bank System structure. If the Board chooses to look to legislative history, these considerations, which go to the heart of the System's structure, should provide the reference point.

- **"Demanded by Convenience."** Both Requests also address the meaning of the "demanded by convenience" standard in Section 4(b), arguing that it was intended to address primarily the geographic convenience of the applicant. If accepted, this view argues strongly in favor of approval since membership in the Dallas Bank will unquestionably allow WMBFA to better serve its customers in the Dallas district.

- **Effects on the Bank System.** At a number of points, the Requests urge the Board to deny the Petition in order to avoid one or more adverse effects on the Bank System, such as inter-Bank competition that undermines the cooperative nature of the system or legal/operational matters that they assert represent significant legal or policy obstacles. In light of the fact that 98 organizations (including WS) currently have affiliated depository institutions that belong to two or more Banks and can lawfully pass on to all depository affiliates funding offered by any of these Banks, their argument is primarily one of form, not substance. In reality, the important issues of competition and cooperativeness have already been raised by these 98 organizations. The Bank System's experience with affiliated members' memberships in multiple districts demonstrates that all the operational issues identified in the Requests with regard to a single member's membership in multiple districts are in fact manageable. Moreover, this limited Petition can be approved without addressing these basic issues.

- **Case-by-Case Petition Procedure.** Both Requests further question the Board's selection of a Case-by-Case Petition procedure and argue that the Petition raises policy issues that require the use of a rulemaking, or perhaps a legislative amendment instead of this Case-by-Case Petition procedure. These arguments ignore both the Board's discretion to choose the procedure and the fact that the Board regards the Petition approach as an alternative to rulemaking as the Petition allows the Board to decide a particular case while taking account of broader policy considerations. Moreover, the Requests' argument that the Petition should not be approved because Section 4(b) does not provide a total "solution" to the issues raised for the Bank System by expanding interstate institutions goes too far. Agencies would be largely paralyzed if they could not address current problems individually under existing statutory authority, e.g., by using Section 4(b) to address the particular needs of the Dallas Bank and WMBFA. Indeed, the Dallas Bank continues to believe that an application process under Subpart B of the codified procedural rules, 12 C.F.R. § 907.2-.7, would have been more appropriate than the more litigation-like procedures of under Subpart C, 12 C.F.R. § 907.8-.15 (see Sections E.1-2 below), but acquiesced in the selection of the Subpart C procedures by the staff of the Board. To require

> a rulemaking for every application that requires fleshing out the scope and contours of an existing statutory standard (such as the existing "demanded by convenience" standard for adjoining district membership) would hamstring the Board. Our Petition may be approved now and the more global questions raised by mufti-district operations should be considered separately.

The arguments in the Requests boil down to the contention that the Board ought not to have the flexibility to interpret an ambiguous statutory provision in response to a limited request by a Bank to address the consequences for that Bank of the disappearance by merger of the Bank's largest member. We submit that the Board must have the necessary authority under the existing statutory standard in the Bank Act, and should exercise its discretion to approve the Dallas Petition, due to the uniquely compelling facts of this application.

The facts of this case are unique and compelling. The Dallas Bank has lost its largest member due to the merger of Bank United, into WMBFA. The Dallas Bank is far from the largest Federal Home Loan Bank (indeed, the Dallas Bank is the sixth smallest Bank) and the loss of its largest member has a substantially larger effect on the Dallas Bank that such a loss would have on a larger Bank.

In the face of these unique and compelling facts, the Board's exercise of its discretion to approve the Petition is the outcome most consistent with the structure and policies of the regional Bank System as created by Congress and implemented under the Federal Home Loan Bank Act. Moreover, in view of the limited nature of the Petition, its approval would not prejudice any future Finance Board study of mufti-district membership matters.

## A. The Board Has Authority to Approve the Dallas Petition Under Section 4(b)

The SF Bank Request ("SFR") asserts at the outset that "we believe there is significant doubt whether Section 4(b) of the [Federal Home Loan] Bank Act permits" approval of the Dallas Petition (SFR at 1), while the WS Request ("WSR") asserts that

"Section 4(b) simply has no application to WMBFA and cannot be relied upon for membership in the Dallas or any other FHLB district." (WSR at 3). In support of its position, the SF Bank submitted a legal memorandum prepared by The Dzivi Law Firm ("Dzivi"), dated February 22, 2001. These submissions take issue with the legal memorandum by Gibson, Dunn & Crutcher LLP, dated November 28, 2000 (the "GD&C Memorandum") and submitted with the Dallas Petition. We will first address the SF/Dzivi position.

**1. The 1989 Recodification Underscores the Board's Discretion to Approve the Dallas Petition**

None of the SF Bank or WS submissions make reference to the fact that the relevant passage in Section 4(b)[1] was amended and recodified in 1989. As discussed fully in the materials accompanying the Petition and the Supplemental Submissions, the language as recodified in 1989 is unavoidably ambiguous and therefore is subject to Board interpretation. There is no legislative history discussing this passage at the time of this recodification, so analysis must proceed solely on a parsing of the words themselves.

As discussed in the GD&C Memorandum (pp. 5-6), the ambiguity in the current language centers on the meaning of the second "or." In brief, the first use of "or" in Section 4(b) ("or secure advances") necessarily has a conjunctive meaning. Given that unquestionable usage, the second use of that word in the same sentence ("or of the bank of a district adjoining") also may be conjunctive. The Board has discretion to determine otherwise, but the attempts in the SF Bank (SFR at 5) and WS (WSR at 3) submissions to rule out the possibility of a conjunctive construction ignore the actual words of the statute.

[1] In pertinent part, 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 ...." (Emphasis added.)

**2. The Board Must Construe the Ambiguity in Section 4(b)**

In brief, the Dzivi Memorandum ("DM") analysis on which the SF Bank relies agrees with the essential point of the GD&C Memorandum, that the Board has the legal discretion to approve or disapprove the Dallas Petition. The two legal memoranda agree on the following points:

- Section 4(b) of the Bank Act is not clear on its face: it does not require the Board either to approve or deny the requested dual membership. (Dzivi states: "[T]he first question is whether Section 4(b) . . . is ambiguous . . . [whether the word "or" placed between two clauses is plain or ambiguous] . . . . Our research reveals no hard and fast rule as to whether the usage of the term "or" is inherently ambiguous or plain .... [Courts] have come to different conclusions based upon the context in which it ["or"] is used." [DM at 4; see also DM at 7]);

- It is the Board's responsibility to interpret the Bank Act and thus to determine the meaning of Section 4(b); and

- A reviewing court acting consistent with the *Chevron v. Natural Resources Defense Council* (467 U.S. 837 (1984)) case would be likely to defer to the Board's interpretation, whether the Board grants the Petition or not. As a purely legal matter, the Board can grant the Petition and expect its decision to be upheld if reviewed by a court. (Dzivi agrees: "[W]e cannot conclude that it is more likely than not that a court would reverse a decision by the FHFB permitting multiple FHLB memberships." [DM at 2]).

Further, all three submissions leave the core legal point of the GD&C Memorandum untouched. Neither the SF Bank, the Dzivi, nor the WS submissions actually parse the actual statutory language of Section 4(b) to counter the GD&C

Memorandum's conclusion that the second "or" may be read to have a conjunctive meaning because the first "or" in that provision clearly is conjunctive.2

In view of the pivotal role of the word "or" in Section 4(b), we point out that Dzivi cites case authority supporting the GD&C Memorandum analysis: "In Springfield v. Buckles, 116 F. Supp.2d 85, 88-89 (D.D.C. 2000), the court found that the word 'or' was ambiguous, and deferred to an agency's decision not to use the disjunctive sense." (DM at 6) While in that case the court went on to look at prior interpretations by that agency to support its conclusion, we believe that a court would be equally comfortable deferring to the Board's decision to read the two uses of the word "or" in the same statutory sentence in the same way. Despite rhetorical assertions to the contrary, no legal authority or analysis in the SF Bank or WS submissions supports a different conclusion.[2]

### 3. Adjoining District Determinations Are Solely Governed by Section 4(b)

The WS submission asserts that Board Regulation 925.24(b)(1) "controls the subject of the Petition" and that Section 4(b) applies solely to institutions entering the Federal Home Loan Bank ("Bank") system for the first time. Analysis of Section 925.24(b)(1) in the context of the Bank Act and Board rules as a whole reveals that both of these assertions are erroneous.

Section 925.24(b)(1) provides that when two members merge, the disappearing institution's membership automatically terminates. That point cannot be disputed, and both the Dallas Bank and Washington Mutual are well aware that the membership of Bank United terminated when it merged into WMBFA. At present, there is no question that WMBFA is solely a member of the SF Bank by virtue of this provision.

However, WS goes one step farther, arguing in effect that automatic termination of membership under Section 925.24 forecloses the possibility of applying for membership

[2] The closest any of these submissions comes is the discussion at pages 4-6 of DM, which does not start with the actual statutory language in context but with what it posits as its "symbolic logic." This approach makes the Dzivi analysis basically circular.

under the *discretionary* "demanded by convenience" provisions of Section 925.18 which implements Section 4(b). If the Board had intended Section 925.24(b)(1) to govern, and preclude, all possibility of membership in a second bank, the Board could have expressly so provided. The Board has never done so.

Indeed, as discussed in the GD&C Memorandum, the structure of Section 925.18 supports a reading of Section 4(b) that permits the Board to approve dual membership in adjoining districts at any time. There is no conflict between Section 925.24 and dual membership under Section 925.18. Under Section 925.24, the membership of the disappearing participant in a merger of members of different Banks terminates. Under Section 925.18, the surviving participant may apply for membership in the same Bank of which disappearing participant was a member, if the two Banks' districts adjoin. The reading that best harmonizes Sections 925.18 and 925.24 of the Finance Board Regulations would allow the surviving institution to apply for membership in the Bank of which the disappearing institution was a member under these particular circumstances, as a matter of Board discretion under Section 925.18 following the automatic termination under Section 925.24(b)(1).

WS further attempts to preclude the Dallas Petition by arguing that Section 4(b) can *never* apply to an institution that is already a member of a Bank. ("This [Section 4(b)] is a gateway provision that has no further application to an entity once it becomes a member." [WSR at 3]) In an effort to refute the Dallas Petition, WS has made an argument that would also deny all other member institutions the opportunity to apply to transfer membership to an adjoining district Bank on the basis of a "demanded by convenience" finding by the Board. The exaggerated nature of the WS position is demonstrated by the argument subsequently made by WS that the geographic convenience of member institutions was important, if not dispositive, in the minds of the drafters who wrote Section 4(b). Since geographic convenience may change over time as a member's business evolves, this point is directly contrary to WS's position that Section 4(b) should be treated as a gateway provision. For example, the Finance Board has already permitted an existing member of the Pittsburgh Bank to become a member of the Cincinnati Bank when the member's principal place of business moved to Cincinnati. According to the WS analysis, the Finance Board did not have authority to permit this change of membership.

The mere use of the term "eligible" in Section 4(b) does not mean that Section 4(b) applies only to institutions that have never been members. Concerns with a member's continued eligibility are also pertinent to a change of district proposal.[3] Section 4(b) cannot be read as solely a gateway provision.

Indeed, WS goes too far. If the Finance Board were now to begin to read Section 4(b) narrowly, solely as a gateway provision applicable only to institutions not that are already Bank members, then arguably there would be no statutory restriction at all on membership location for existing members. Accepting the narrow WS analysis of Section 4(b), the Finance Board would be free to approve dual memberships in non-contiguous districts, as the Finance Board saw fit.

## B. Approval Will Better Maintain the Decentralized, Regional Structure Created by Congress to Diffuse Home Finance Credit Throughout the Country

The two Requests both rely on particular details from the Bank Act's legislative history, particularly hearing testimony, in an effort to find some support for their opposition to the Dallas Petition. The cited statements are entitled to no legal weight because they clearly do not reflect the collective view of Congress. But if the cited statements are considered, the most they show is that the general expectation, given the state of the industry at the time of the adoption of the Bank Act, was that one member-one district would be typical at that time. These statements cannot make Section 4(b) unambiguous or remove the Board's authority to interpret this ambiguity in the context of the Petition. We submit that, if the Board chooses to look to history, the Board should

[3] In addition, the eligibility requirements were given great weight as the foundation for the credibility of the Bank System. According to an original member of the FHLBB who had actively worked for passage of the Bank Act: "It [the Section 4(a) membership qualifications] is one of the most significant clauses in the law." Bodfish, "An Analysis of Federal Home Loan Bank System," 1932 Building and Loan Annals, at 16. Continued satisfaction of the eligibility standards thus would seem an appropriate inquiry in a transfer of membership that was "demanded by convenience."

interpret Section 4(b) in light of the public policies to diffuse credit to home buyers through the regional structure of the Bank System

These larger public goals were repeatedly expressed by the Hoover Administration, Congressional leaders, and the Federal Home Loan Bank Board ("FHLBB"). They all agreed on the purpose for creating a decentralized, regional Bank System to ensure that strong regional Banks would be located close to home lenders and borrowers in all parts of the country. It is well established that agencies interpreting statutes should look to the policy goals underlying the statute. In this case, approval of the Dallas Petition will advance the purposes enunciated in 1932 in the context of the conditions of 2001.

An overriding concern to the Hoover Administration and the Congress that created the Bank System was the concentration of credit and finance in money centers and its unavailability to the home buyers and lenders in the towns and villages in large sections of the country. To ensure a decentralization of home finance, the Bank Act authorized the creation of a number of districts (not less than eight or more than twelve) and the original FHLBB created twelve, each with a headquarters city different from any existing money center. The importance of this policy objective is a continuing theme stressed throughout the process that created and established the Bank System.

- **President Hoover:** In the paragraph of his State of the Union Address proposing the creation of a Bank System, President Hoover stated: "I recommend the establishment of a system of home-loan discount banks as the necessary companion in our financial structure of the Federal reserve banks and our Federal land banks .... Such action would *further decentralize our credit structure." 1931* Cong. Rec. (Sen.) *23* (Dec. 8, *1931)* (emphasis added).

- **Secretary of Commerce Lamont:** In floor debate, Sen. Watson reported a conversation with Secretary Lamont: "[W]hen I discussed the matter [of the proper number of Bank districts] with Secretary Lamont, he was very well satisfied that there ought to be *12* banks in order that the benefits accruing from the institution might be universally distributed throughout the country." *1932* Cong. Rec. (Sen.) 14579 (July 5, 1932).

- **House Committee Report:** "The supply of capital for financing home owning and home building . . . has been plentiful in some portions of the country, but scarce and costly in others, particularly in the South, Middle West, and West ... . It is the purpose of this home-loan bank bill, with its system of not less than 8 *hand]* no more than 12 banks, located in different parts of the country, to function as a reserve system supplying short-time and long-time funds to these [home-financing] institutions." H.R. Rept. No. 1418 (72d Cong., 1st Sess.) (May 25, 1932) at 3.

- **Senate Floor Debate:** Before leaving the bill unchanged (providing for between eight and twelve Bank districts), the Senate debated at some length whether to reduce the permitted number to four districts, or even to centralize the entire system in a single bureau in Washington. Sen. Borate questioned the need for more than four ("It does not seem to me that the promises offered by this bill justify building so large a system."). In response, Sen. Watson, the floor manager of the bill, summarized the objective of the bill: that the minimum was eight, unless the FHLBB believes "more are essential to carry out its intended purposes .... [L]et us bring this relief within the reach of everybody. If the whole continental United States and [territories] are divided into just four districts it will be long distances from the extremes of the territory, and they will be away from those people who, more than anybody else, w111 need this resuscitation." [Sen. Hebert elaborated: "Under the plan outlined in the bill, with 12 regional banks there would be 108 directors, in the aggregate, all of whom must be chosen from organizations connected with home-financing business. It seemed to me that would form a point of contact between the institutions which needed money to finance borrowers now in distress and the regional banks."] Borate then responded: "As I see it, these banks will be doing business with loan associations principally in the different parts of the country, and if there were any sympathetic administration of this measure toward independent homeowners, it will necessarily have to come from the loan associations with whom they are doing business." [Sen. Hebert: "We have a direct point of contact [through the Bank directors] between the bank and the institution whose members are in need . . . . [The director] knows its [his association's] needs, and, incidentally, he must know the needs of institutions round about within the radius to be covered by a branch bank, and it seemed to me that he could better bring the needs of the several communities to the attention of the bank. . ."] (1932 Cong. Rec.-Sen. 14579-80 (July 5, 1932).

- **FHLBB Implementation:** In 1932 the first Chairman of the FHLBB discussed the design of the Bank System. His statement made plain that the FHLBB's belief that a 12 district system that did not parallel the district lines and headquarters cities of the Federal Reserve System would best advance the Bank System's purpose of diffusing home-finance credit throughout the country and counter the tendency for a concentration of credit in a few money centers. "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 the mortgages held within the district, but upon the basis of the need for the strengthening of the capital base of the district." (Franklin W. Fort, "Federal Home Loan Bank System," in 1932 Building and Loan Annals; see the longer quotation in the filing made on January 31, 2001, by the Dallas Bank in response to questions [the "Dallas Response"] posed by the FHFB).

Approval of the Dallas Petition will advance the fundamental purpose of diffusing capital and credit throughout the Bank System, as Congress and the first FHLBB intended. It will ensure that the funding previously provided by the Dallas Bank to Bank United for home finance within the Dallas district will continue to flow from that Bank to residents in its district. If the Board believes it important to resolve statutory ambiguities by looking to the historical foundations of the Bank System in the 1930's, the legislative purpose to diffuse funding to all parts of the System must be the principal historical guide in its decision making.

## C. The SF Bank and WS Submissions Support the Conclusion that Approval of the Dallas Petition is "Demanded by Convenience"

Both the SF Bank and WS argue that the Section 4(b) "demanded by convenience" test was intended to be applied solely to the applicant institution. (SFR at 6, WSR at 4-5) and support that view with very limited legislative history. As the SF Bank states: "[W]e believe that the very sparse legislative history relating to the phrase supports the argument that the "convenience" references in Section 4(b) is that of the member (and more specifically, that the language was inserted to address geographical convenience, or the proximity of the member to a Federal Home Loan Bank other than the one in its assigned

district." (SFR at 6 n.4; see WSR at 4) The Board need not give any weight to this history, but if it chose to do so, this history supports approval.

**1. Approval of the Dallas Petition Clearly Serves Washington Mutual's Geographic Convenience**

If the SF Bank and WS view is accepted, the geographical interests of Washington Mutual become the major factor, or possibly the only factor, in the Board's decision. That factor strongly supports approval.

When WMBFA acquired Bank United, it made a major ongoing commitment to the areas in Texas served by Bank United. Taking Bank United's place, WMBFA acquired tens of thousands of mortgages on properties located in Texas; assumed relationships with tens of thousands of depositors and borrowing customers in Texas; and assumed approximately $8 billion of existing Dallas Bank advances from the institution that had been that Bank's largest stockholder and customer. The convenience of WMBFA's membership in the Dallas Bank is unquestionable. As a major interstate home finance institution with a major business presence in the Dallas district, WMBFA has a substantial reason to be an active participant in the Dallas Bank. To force WMBFA to choose (or to restructure its corporate organization by chartering an additional institution) is inconsistent with the cooperative philosophy and market orientation of the Bank System.

Furthermore, Washington Mutual's interest in participating directly in the Dallas Bank AHP program draws directly on the original emphasis on providing home finance in all the neighborhoods in each district. As the successor to Bank United, it is entirely appropriate for WMBFA to step into its shoes as a participant in the Dallas Bank AHP for the benefit of the residents of that district.

In an era of major interstate thrift institutions, it is wholly consistent with the fundamental concept of the Bank System to provide a means for those institutions to participate directly in the affairs of the districts in which they engage in substantial home finance. Dual membership is a means for bringing interstate thrifts closer to the communities they are serving. In the 1930's, a major goal of the Bank System was to help

"establish in every such community [that needs home finance funding] community institutions with real financial strength." Fort, supra, at 6. The task in 2001 is to allow the strong multistate institutions, under circumstances that are compelling in the discretion of the Finance Board, to remain close to the communities they serve by stepping into the shoes of the merged member and be an active participant in that district's Bank, and not force it to be an outsider belonging only to a distant Bank. If "demanded by convenience" is to have meaning relevant to today's institutions, it should allow Bank membership to match the geographic areas served by a single mufti-state institution spanning neighboring districts.

**2. The Board Can Appropriately Interpret "Convenience" to Include the Needs of the Bank System**

Since "convenience" is not defined in the Bank Act, the Board has discretion to take a broader approach to its scope and purpose. Dzivi cites legislative history of Section 4(b) that supports taking Bank System interests also into account. The particular passage cited by Dzivi (DM at 13) suggests that adjoining district membership might be a means for a more proximate Bank to supervise a potentially undesirable member, and thus that it is desirable for each Bank to be directly familiar with the activities of institutions in its district. That consideration further supports the conclusion that it is desirable for multistate institutions to have direct relationships with each institution doing substantial home finance business in its district.

Any contention that the Board should not take systemic matters into account when considering an adjoining district application is unfaithful to the history and purposes of the Board and an unwise narrowing of the Board's responsibility. The founders of the Bank System in Congress and in the original FHLBB certainly believed that the Board had a stewardship role in the development and maintenance of a strong 12-district system. To argue, as the SF Bank does (SFR at 7), that "systemwide" needs can be met by lending from a single Bank denigrates the Bank System's regional structure and its underlying purposes for creating 12 districts, rather than 8 or 4. To suggest that the Board should be indifferent to contraction of a Bank's membership and to long-term changes that may contribute to such contraction, as WS does (WSR at 6), is to support the proposition that

the Board should abdicate its legal responsibility to oversee the well being of the Bank System.

## D. The Requests Overstate the Implications of the Petition by Ignoring the Existence of Many Organizations that Now Have Functionally Equivalent Mufti-District Memberships

Almost 100 banking organizations *already* have the capacity to receive advances from more than one FHL Bank and to use those advances to fund the activities of affiliated institutions located in other Bank districts (or their subsidiaries). The Requests acknowledge such mufti-district organizations, but ignore the fact that the Bank System already accommodates in substance even more than what WMBFA is seeking. In light of these facts, the Requests' concerns about the potential for inter-Bank competition to undermine the cooperativeness of the Bank System cannot arise from the Petition. The Dallas Petition may be novel in the form of mufti-district membership it proposes, but it is far from the first instance in which a member may in effect be funded by more than one Bank. Moreover, since the dual membership sought is limited in nature, it poses none of the risks of inter-bank competition that the current system of multiple memberships based upon multiple charters raises.

### 1. There are a Large Number of Mufti-District Affiliated Organizations Already Funded by More than One Bank

The table below demonstrates 98 holding companies have two or more depository institution affiliates that belong to different banks.

**Holding Companies With Memberships in Multiple Federal Home Loan Bank Districts As Of June 30, 2000**[4]

| Number of Banks in which Affiliates are Members | No. of Members in Each Category |
|---|---|
| 7 | 1 |
| 5 | 2 |
| 4 | 3 |
| 3 | 19 |
| 2 | 73 |

***Total Multiple Memberships = 98***

Under the affiliated transactions rules of Sections 23A and B of the Federal Reserve Act, 12 U.S.C. § 371c-1&2, affiliated banks are subject to only safety and soundness standards with respect to their ability to lend or otherwise fund each other. There is accordingly no legal impediment to a bank belonging to one FHL Bank receiving Advances and transferring them to an affiliated bank that belongs to a different FHL Bank.

Both the SF Bank and WS recognize (and apparently approve of) the ability of Organizations to have multi-bank membership through affiliations (SFR at 4, WSR at 1, functional equivalent of what Washington Mutual is seeking through the Dallas Petition. Thus, the difference between current allowance for affiliated institutions as members of multiple districts and the proposal in the Petition for one institution as a member of multiple districts is nothing more than a difference in form.

[4] Source: FHFB Table [June 2000]

Thus, many, if not most, of the issues with respect to cooperation and competition among Banks, about which the SF Bank and WS express concern, are already present in the current Bank System. If multiple memberships breed inter-Bank competition and undermine the cooperative nature of the Bank System, then those effects should already be quite evident. See Dallas Response at 14. We submit that the concerns expressed in the Requests are exaggerated and that the Bank System and its members in reality have already addressed and accommodated changes related to multi-district membership by one organization. Thus these concerns can hardly be used as grounds to oppose the Dallas Petition.

### 2. Operational Concerns Related to Multiple Membership Are Manageable

The SF Bank and WS submissions cite various operational concerns should one institution have membership and receive advances from two Banks. (SFR at 10-11, WSR at 6-7) However, the Dallas Bank, the SF Bank and WMBFA are already dealing with many of the most difficult issues with respect to collateralization and advances when one institution is booking advances from more than one Bank. These issues are presented in connection with the succession by WMBFA to the outstanding advances on Bank United's books when the two institutions merged. The concerns raised by WS with respect to required stockholding, voting, and the like are soluble by looking to the extent of the business presence of WMBFA in each district and allocating accordingly, and in no case in effect double counting. As discussed in the January 31 Dallas Response to the Board (see pp. 14-16), these matters are manageable and do not provide grounds for denial of the Dallas Petition.

## E. The Board May Appropriately and Expeditiously Decide the Dallas Petition under Its Rules

Both the SF Bank and WS have questioned the Board's use of its Petition procedures for acting on the Dallas Petition, arguing that instead that the Board should proceed by rulemaking, or even seek amending legislation (see SFR at 11, WSR at 6-7).

On the contrary, the Board has properly exercised its discretion within the scope of the Bank Act to determine the procedure to be followed. The federal banking agencies have repeatedly used an application process to address and respond to specific proposals under existing law that raise issues not previously addressed, including issues that may have broad policy implications. The Dallas Bank submissions cite two prominent examples: the use by the FHL,BB of a series of applications and transactions to provide interstate branching on a case-by-case basis during a roughly ten-year period before OTS adopted a general interstate branching policy in its codified regulations (see Dallas Response at 1, In. 1); and the approval of "Section 20" securities underwriting applications by the Federal Reserve Board (see Dallas Response at 17). The scope and significance of the legal and policy issues presented by the Dallas Petition are no broader or more significant than the issues in those FHLBB and Federal Reserve matters. The Board would be on very solid procedural ground in approving the Petition.

**1. The Petition Procedure Is within the Board's Discretion**

In 1999, the Finance Board for the first time adopted codified procedural rules (now Section 907). *See 64 Fed. Reg.* 30880 (June 9, 1999). As described in the preamble in this rulemaking (the "Preamble"), these rules represented a codification of procedures that previously had been developed internally by the Finance Board. Id. These rules include the Subpart B rules (§§ 907.2-.7) ("B Rules"), which are designed to deal with administrative processes, including the review of applications, that entail implementation or interpretation of existing statutory or regulatory standards; and the Subpart C Rules (§§ 907.8-.15) ("C Rules"), which provide procedures for the case-by-case development of standards outside of a rulemaking to fill a perceived gap in existing statutes or regulations.

Although we believe the FHFB in this case might appropriately have followed its B Rules, it chose instead to follow the somewhat more formal C Rules approach. As the Board stated when codifying its rules, the C Rules apply to matters "for which no controlling statutory, regulatory, or other Finance Board standard previously has been established . . . ." 12 C.F.R. § 907.8(a); *see 64 Fed. Reg.* 30880. The *Federal Register* Preamble to this codification states that the Finance Board may decide to follow C Rules procedures when it determines that "the best way to address the matter is to develop

standards on a case-by-case basis prior to or in lieu of promulgating system-wide standards. Case-by-Case Determinations by the Board of Directors are intended to serve as an alternative to rulemaking under these limited circumstances. "5 The C Rules thus are meant to be employed when there is a perceived statutory or regulatory gap. The Board's determination to consider the Dallas Petition under its C Rules is a permissible exercise of its discretion.

**2. Standards for Intervention in a C Rules Proceeding**

Under Section 907.11(b), a Request to Intervene may be granted provided that the requester makes two showings in the Request: (1) that the intervention would "not unduly prolong or otherwise prejudice" the adjudication of the parties rights; and (2) that the Requester "may be adversely affected" by the final decision. If a Request to Intervene is granted, the intervenes then becomes a party to the proceeding. It is plain that an entity should be allowed to intervene only if it has demonstrable interests at stake in the

The section of the Preamble concerning the C Rules states: "Under § 903.1 [now § 907.1], the term 'Case-by-Case Determination' means a Final Decision concerning any matter that requires a determination, finding, or approval by the Board of Directors under the Bank Act or Finance Board regulations, for which no controlling statutory, regulatory, or other Finance Board standard previously been established, and that in the judgment of the Board of Directors is best resolved on a case-by-case basis by a ruling applicable only to the Petitioner and any Intervenes and not by adoption of a rule of general applicability .... "The Finance Board has dealt with most provisions that require a determination, finding, or approval by the Board of Directors in policies or through rulemaking. However, if a matter requiring a determination, finding, or approval affects only a limited number of parties, the Board of Directors may determine that the best way to address the matter is to develop standards on a case-by-case basis prior to or in lieu of promulgating system-wide standards. Case-by-Case Determinations by the Board of Directors are intended to serve as an alternative to rulemaking under these limited circumstances. Under § 903.8(a) [now § 907.8(a)] of the final rule, a Petition for Case-by-Case Determination must be filed in accordance with the requirements of § 903.10 [now § 907.10] of the final rule. Decisions as to whether a matter is best addressed through a Case-by-Case Determination, system-wide rulemaking, Approval, Waiver, or some other procedure, lie solely within the discretion of the Board of Directors." 64 Fed. Reg. 30880, 30882.

outcome. Generalized effects or concerns cannot be enough. Neither is it sufficient that the Requestor has an interest in offering comments.

In view of the fact that a C Rules proceeding may be regarded by the Board as an alternative to rulemaking, it is appropriate for the Board to accept and consider comments from interested persons, even if styled as a Request to Intervene. The SF Bank and WS submissions both clearly fall into this category. They raise issues for the Board to consider, but make no showing of *adverse* effect at all. In view of the relative newness of the Board's codified rules and use of the C Rules Case-by-Case Determination procedure, we respectfully urge the Board to establish clearly the distinction between interested persons and those parties that are actually adversely affected and thus need to participate in the proceeding in order to protect definable interests or rights. Otherwise, the Board will establish a precedent that will haunt the Board whenever the Board wishes to expedite a proceeding under the C Rules in the future.

**(a) A Litany of Legal and Policy Issues is Not a Showing of Adverse Effect**

The SF Bank states that approval of the Dallas Petition "will affect the San Francisco Bank's relationship with WAMU and the Dallas Bank" and that it has met the Board's intervention standards (SFR at 1). The SF Bank's requested relief is denial of the Dallas Petition or, if this petition is approved, a rulemaking to deal with issues raised. (SFR at 2-3) The remainder of its submission is a discussion of the legal issues associated with the interpretation of Section 4(b) (SFR at 4-6), construction of the "convenience" standard (SFR at 6-9), policy and other arguments (SFR at 9-11), and finally procedural, political, and operating issues (SFR at 11-12). It does not discuss any *adverse* effect of approval and accordingly has not made the required *prima facie* showing to support its Request. Indeed, the contents of the SF Bank submission are the kind of comments that are common in a rulemaking.

The Banks are member institutions and thus will be affected by any Board determination regarding membership. The Dallas Petition and Response address possible "convenience" interests of the SF Bank (see Dallas Petition, Exhibit A, p. 8 and Dallas Supplemental Submissions, 6-7), but include a showing that approval of the Petition

would not inconvenience the SF Bank and thus, a fortiori, would not have any adverse effect.

The WS submission states that approval of the Dallas Petition "will adversely affect us and other FHLB members and . . . all members of the FHI..B System should be treated alike." (WSR at 1). It further states that "due consideration is needed with respect to the interests of the other members of the San Francisco and Dallas FHLBs." (WSR at 6; see also WSR at 7). Finally, WS states that WS "has a direct interest in the Petition as a member of the FHLB of San Francisco . . . [and] will be adversely affected by a Final Decision granting the [Dallas] Petition . . . " (WSR at 8). No specific adverse effect is ever alleged. If accepted by the Board, WS's assertion that membership in a Bank is sufficient to meet the C Rule's adverse effect requirement would mean that every member of any Bank could assert that it has a right to be party to every case-by-case proceeding. If that is what the Board intended to allow, then the C Rules should be amended to provide that right expressly. Mere membership cannot be a sufficient showing of potential adverse effect.

Like the SF Bank submission, the WS submission addresses only legal and policy issues. It first raises a series of legal points (WSR at 1-5), addresses the "convenience" standard (WSR at 5-6), argues that a rulemaking would be more appropriate to address issues it raises (WSR at 6-8) and finally raises various procedural matters (WSR at 9). This submission in substance also is a rulemaking comment, not a showing of actual adverse effect sufficient to justify standing to intervene as a party.

**(b) The Requesters' Own View of the "Convenience" Standard Means They Cannot be Affected by Approval**

Both the SF Bank and WS submissions argue, as discussed above, that a "demanded by convenience" membership determination was intended to address the geographical convenience of the institution seeking membership in an adjoining district. Under this view, it is hard to see how an approval of an adjoining district membership can have an adverse effect on any party other than the applicant (and also perhaps the Bank in which the applicant seeks to be a member). Accepting the SF Bank and WS view of "convenience", as expressed in the SF Bank and WS submissions, the Board's

determination with respect to the application of the "demanded by convenience" standard to this Petition cannot adversely affect them.

**3. Resolution of the Dallas Petition Need Not Be a Global Response to the Issues Raised by Multi-District Membership**

Both the SF Bank and WS requests criticize the Dallas Petition under the Section 4(b) adjoining district provision, and urge its disapproval, because approval of the Petition will not be a "solution" for systemic issues discussed in the Dallas Bank submission. (SFR at 9-11; WSR at 7). The simple fact is that Section 4(b) requires three findings: whether the applicant meets eligibility standards, whether the proposed district is adjoining, and whether approval is "demanded by convenience," as determined by the Board. The Petition plainly satisfies the first two requirements and provides ample basis for the determination of "convenience.". The discussion of broader matters and issues in the Petition was intended to show only that approval would be consistent with the traditional policies underlying the Bank System and the present and future needs of the Bank System.

We conclude by stressing as we did in our Introduction that a global solution is not sought by our petition. Our Petition only seeks the maintenance of the status quo. The Bank Act today permits the Board to approve the limited Dallas Petition as an appropriate exercise of its discretion, and we urge the Board to do so expeditiously.

Thank you for your consideration.

Sincerely,

Harvey Simon
General Counsel