Federal Home Loan Bank of San Francisco

February 23, 2001

Elaine L. Baker
Secretary to the Board
Federal Housing Finance Board
1777 F Street, N.W.
Washington, D.C. 20006-5210

Dear Ms. Baker:

The Federal Home Loan Bank of San Francisco is submitting to the Federal Housing Finance Board this Request to Intervene in the Finance Board's consideration of the Petition for Case-by-Case Determination filed by the Federal Home Loan Bank of Dallas on December 11, 2000,* for Finance Board approval of an application for membership in the Dallas Bank by Washington Mutual Bank, FA ("WAMU"), a member of the San Francisco Bank.

Grounds for Proposed Intervention

Under 12 C.F.R. Sec. 907.8, the San Francisco Bank is entitled to file a Request to Intervene in the consideration of the Petition if the San Francisco Bank believes its rights may be affected by the issues raised by the Petition. The San Francisco Bank believes its rights will be immediately and significantly affected if WAMU is permitted to become a member of the Dallas Bank because the dual membership will affect the San Francisco Bank's relationship with WAMU and the Dallas Bank.

Under 12 C.F.R. Sec. 907.11(b), the Managing Director of the Finance Board may grant the San Francisco Bank leave to intervene if this filing complies with the requirements of 12 C.F.R. Sec. 907.11(a) and the Managing Directors determines, in his judgment, that (i) the presence of the San Francisco Bank "would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties" and (ii) the San Francisco Bank "may be adversely affected by a Final Decision on the Petition." The San Francisco Bank also believes these requirements have been met.

In support of the San Francisco Bank's Request to Intervene, following is the information required by 12 C.F.R. Sec. 907.11(a)(2) and 12 C.F.R. Sec. 907.10(b):

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*Notice of the Finance Board's Receipt of the Petition for Case-by-Case Determination was published by the Finance Board on December 27, 2000 (65 FR 81861).

Requesting Party:

Federal Home Loan Bank of San Francisco
600 California Street
San Francisco, California 94108

Requesting Officer:

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Applicable Provisions of the Federal Home Loan Bank Act ("Act"); Applicable Rules and Regulations, Policies or Orders of the Federal Housing Finance Board

- Federal Home Loan Bank Act: Section 3 (12 U.S.C. Sec. 1423); Section 4(b) (12 U.S.C. Sec. 1424(b))

Determination or Relief Requested

The San Francisco Bank asks the Finance Board not to approve the Petition of the Dallas Bank to allow WAMU to become a member of the Dallas Bank for two reasons. First, although we believe that there is significant doubt whether Section 4(b) of the Bank Act permits the Finance Board to allow a member of one Federal Home Loan Bank to become a member of another Federal Home Loan Bank at the same time, even if Section 4(b) gives the Finance Board that authority under certain conditions, the dual membership proposed for WAMU does not meet the statutory requirement that it be "demanded by convenience."

Second, even if dual membership is permitted and the statutory standard is met in this case, the Finance Board should not address the issues presented by the Petition in a Case-by-Case Determination applicable only to the Dallas Bank and WAMU. Instead, the Finance Board should address the issues presented and all related issues (including Federal Home Loan Bank membership, concentration, competition, and consolidation, among others) in a comprehensive rulemaking that would apply to all Federal Home Loan Banks and all System members at the same time, with special attention to the legislative changes that might be necessary for appropriate resolution of the issues.

In the alternative, if the Finance Board approves the Petition and allows WAMU to become a member of the Dallas Bank, the San Francisco Bank requests that the Finance Board first issue orders and guidelines addressing in advance the policy and operational issues that might be encountered by the two Banks in dealing with the first-ever dual Bank membership. These issues would include intercreditor issues; collateral issues; stock purchase and maintenance allocation issues; AHP competition issues; voting and director representation issues; antitrust issues; information sharing, tracking and reporting issues; safety and soundness issues; and other issues. We believe that the two affected Banks could face significant legal and other risks if they are left to identify and resolve all of these issues on their own without specific legal and policy guidance from the Finance Board before the dual membership takes effect.

Statement of Facts and Circumstances

WAMU, a member of the San Francisco Bank, applied for membership in the Dallas Bank in November 2000. At the time, WAMU was planning to acquire Bank United, a Dallas Bank member and the Dallas Bank's largest borrower. If WAMU had chosen to acquire Bank United and retain its separate charter (as a subsidiary of WAMU's holding company), Bank United could have retained its separate membership in the Dallas Bank without question under current Finance Board rules. Instead, WAMU elected not to retain Bank United's separate charter, but instead to cancel the charter, merge Bank United into WAMU, and seek dual Bank membership for the combined institution.'

In a memo to the Dallas Bank that was filed as part of the Petition, WAMU indicated that the purpose of applying for membership in the Dallas Bank was to allow WAMU "to step into the shoes of Bank United within the Dallas district" while still retaining its membership in the San Francisco Bank. The Dallas Bank approved WAMU's membership application and filed the Petition with the Finance Board, seeking approval of the dual membership under Section 4(b) of the Bank Act. Noting that the San Francisco Bank and Dallas Bank districts are adjoining districts, the Petition asserts that WAMU's membership in the Dallas Bank is "demanded by convenience;" and that the Finance Board is therefore authorized by Section 4(b) of the Bank Act to approve the dual membership.

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* We understand that the acquisition and merger and the cancellation of Bank United's charter were completed as of February 13, 2001.

Arguments in Support of the San Francisco Bank's Position

As the Finance Board acknowledged in its published notice of the Petition, the Petition raises "fundamental legal, political and policy issues of first impression that are critical to the structure and function of the Bank System. . . :" These are complicated and significant issues, which deserve thoughtful analysis and comment by all interested parties.

No institution with a single charter has ever simultaneously been a member of more than one Federal Home Loan Bank (although many holding companies, including WAMU's holding company, have subsidiaries that are members of different Federal Home Loan Banks, based on the principal place of business of each of the respective institution's charters). Section 4(b) of the Federal Home Loan Bank Act says:

An institution eligible to become a member under this section may become a member only of, or secure advances from, the Federal Home Loan Bank of the district in which is located the institution s principal place of business, or of the bank of a district adjoining such district, if demanded by convenience and then only with the approval of the [Finance Board]. 12 U.S.C. Sec. 1424(b).

The Finance Board (and its predecessor, the Federal Home Loan Bank Board) and the Federal Home Loan Banks have until now taken the position that the statutory language means that each member can belong to only one Bank. Now, however, the Dallas Bank suggests that the word "or" in the middle of the section (in bold) means that a member in one Federal Home Loan Bank district can also join the Federal Home Loan Bank in an adjoining district "if demanded by convenience" and if the Finance Board approves.

In the Petition, the Dallas Bank has provided (i) legal arguments supporting this interpretation of Section 4(b) of the Bank Act; (ii) factual information explaining how the "demanded by convenience" standard is met in WAMU's case; and (iii) additional policy and other arguments why the Finance Board should allow WAMU to become a member of the Dallas Bank even while it continues to be a member of the San Francisco Bank.

We do not believe that the arguments and information provided by the Dallas Bank in each of these three categories provide enough support for the Finance Board to take a step as far-reaching as approving the first-ever dual membership, and establishing the precedent thereby created, without going through a comprehensive rulemaking procedure.

A. Statutory Interpretation

As part of its Petition to the Finance Board, the Dallas Bank submitted a legal memo from WAMU's counsel, Gibson, Dunn & Crutcher (the "Gibson memo") interpreting Section 4(b) of the Bank Act. After reviewing the structure, language and legislative history of Section 4(b), the Finance Board's regulations, and the scope of the Finance Board's discretion, the Gibson memo concludes that "the [Finance Board] has unquestionable discretion to approve an application by an eligible institution to be a member of both its home district and one or more adjoining districts if such multiple membership would be consistent with the mission of the Bank System." We believe, however, that there are significant questions about whether the Finance Board has this discretion, and we urge the Finance Board to explore fully and resolve any legal uncertainties before proceeding on the basis elaborated in the Gibson memo.

As part of this Request to Intervene, the San Francisco Bank is submitting a February 22, 2001, letter to the Bank from Bartly A. Dzivi, counsel to the Bank (the "Dzivi letter," a copy of which is enclosed as Exhibit A), which further elaborates the San Francisco Bank's questions about the analysis in the Gibson memo. As explained in the Dzivi letter, the Petition raises new issues of law for which there is no clear guidance, leaving open a legitimate question as to whether the Finance Board has the authority to approve dual Bank membership. Based on our review of the structure of the Bank Act, the relevant legislative history, and prior regulations of the Finance Board and the Federal Home Loan Bank Board, we agree with Mr. Dzivi that the better reasoned legal view is that the Bank Act permits an institution to be a member of only one Federal Home Loan Bank at a time.

As further explained in the Dzivi letter, we believe that any judicial review of the Finance Board's decision in this case would be guided by a two-step Chevron* analysis. In the first step, the court would have to determine that the language of the statute is ambiguous before any interpretation chosen by the Finance Board would be given deference. Based on our review of the structure and legislative history of Sections 3 and 4(b) of the Bank Act, we believe it would be very difficult for the Finance Board to conclude (and to convince a reviewing court) that the word "or" as used in Section 4(b) is ambiguous and was not clearly intended by Congress to indicate that institutions were only to be allowed membership in a single Federal Home Loan Bank.

As to the second step of the Chevron analysis, if the Finance Board determined and the court agreed that the use of the word "or" in Section 4(b) is ambiguous, the relevant legal standard would then be whether the interpretation chosen by the Finance Board would conflict with any other provision of the Bank Act. We also believe it would be difficult for the Finance Board to convince a reviewing court that dual membership is authorized under this standard, and our concerns in this regard are also set forth in the Dzivi letter.

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* Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984)

B. "Demanded by Convenience" Analysis

Even if the Dallas Bank is correct that Section 4(b) of the Bank Act authorizes the Finance Board to approve dual membership under certain conditions, the Finance Board can only do so if the "demanded by convenience" standard in the statute is met. In a memo from WAMU (the "WAMU memo") that the Dallas Bank submitted as part of the petition, WAMU reviews its own convenience and the convenience of the two Federal Home Loan Banks and the System to demonstrate how the statutory standard is met *. Even if the convenience of any entity other than WAMU is relevant to this question, we disagree that the information provided would support a finding that the standard is met, and we also urge the Finance Board to fully explore and resolve uncertainties in this regard before proceeding on the basis elaborated in the WAMU memo.

Focusing first on the convenience of the Bank System, the WAMU memo says the Finance Board should consider the effect of dual membership on the availability and quality of home financing in the System and the affected districts, and says dual membership "is necessary to prevent interstate expansion and consolidation from causing distortions and imbalances in the Bank System that would impede the expansion of home finance." But to say simultaneous membership is necessary for this purpose ignores the dramatic success of the Bank System in supporting the nation's home financing institutions under a single membership rule since nationwide branching and lending became commonplace.

The WAMU memo also says that dual membership "will allow institutions and Banks to match the lending, affordable housing and other programs of the Bank System to where homebuyers are, not to where institutions happen to have their principal office." We believe, however, that our experience and the experience of the other Federal Home Loan Banks proves that the location of our members' operations, whether local or nationwide, has no effect on our ability to fully support those members' needs.

Turning to the convenience of the Dallas Bank, the WAMU memo says that WAMU is seeking to become a member of the Dallas Bank "to avert an interruption of the business" of the Dallas Bank and to "serve the convenience of the Dallas Bank" by allowing WAMU to step into the place of Bank United. The memo says the loss of Bank United, without the addition of WAMU, "will cause a measurable decrease in the Dallas Bank activities and resources."

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* The statute does not expressly define "convenience" or specify whose convenience is at issue. As discussed in the Dzivi letter, we believe that the very sparse legislative history relating to the phrase supports the argument that the "convenience" referenced 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).

We are particularly puzzled by this aspect of the convenience analysis. The Dallas Bank does not explain why it is "demanded by convenience" for it to avoid losing the presence of the former Bank United following the WAMU merger. We are sympathetic to the Dallas Bank's desire not to lose business in this manner, having lost business to the Dallas Bank through other member transactions. However, no argument is presented to demonstrate how the "convenience" standard in the statute could have been meant to refer to the size, financial position, or economic position of a Federal Home Loan Bank, as the Petition seems to suggest. The basic cooperative structure of a Federal Home Loan Bank is designed to allow it to expand and contract with member business activity with the Bank. Under the current capital rules, each Federal Home Loan Bank's capital account changes proportionally with its assets, so that return on equity and dividends should be minimally affected by a reduction in member advances. What's more, the Federal Home Loan Banks should be able to achieve the same structure under the Finance Board's new capital rules.

We also do not understand the assertion made by the Dallas Bank in the January 31, 2001, supplementary information letter from Dallas Bank President Terry Smith to the Finance Board that "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." To date, no Federal Home Loan Bank has been assured even of its continuing existence, much less that its membership will be maintained at any given level or that the Finance Board will take steps to replace members that disappear as a result of mergers with out-of-district institutions.

The WAMU memo also makes the statement that the Dallas Bank has "a paramount public policy interest in increasing the availability and quality of financing for homes in its district." But on a Systemwide basis, this public policy interest can be perfectly well served even if WAMU is limited to borrowing from just the San Francisco Bank, since funds borrowed from the San Francisco Bank can support the availability and quality of financing for homes in the Dallas district as well as funds .borrowed from the Dallas Bank. WAMU itself, like many other financial institutions, has effectively lent nationwide for many years, even though its separately chartered subsidiaries each belong to only a single Federal Home Loan Bank.

Turning then to the convenience of the San Francisco Bank, even if this factor is relevant to the Finance Board's action on the Petition, we completely disagree that WAMU's dual membership is "demanded by [the] convenience" of the San Francisco Bank.

WAMU's memo cites a concern about increased demands on the San Francisco Bank from increased advance volumes, stockholding, and operational burdens if the dual membership is not permitted. The Dallas Bank has not contacted the San Francisco Bank about this aspect of the "convenience" analysis. If we had been asked, we would have replied that we are completely confident that we could easily handle any increased demands related to WAMU's increase in size or use of Bank services as a result of the merger with Bank United.

The WAMU memo also cites concerns about the need for the San Francisco Bank to review applications WAMU might submit for AHP projects located in the Dallas district, and also to have to take over monitoring the projects for which the Dallas Bank previously made AHP awards to Bank United. As to the first point, the San Francisco Bank routinely reviews AHP applications from members for projects nationwide; in fact, we make no scoring distinctions based on the location of a project within or outside the district. We have made many AHP awards for projects in other parts of the country, in keeping with and in support of the community lending activities of our members that have nationwide business activities, and we are monitoring those projects successfully. As for monitoring the Dallas Bank/ Bank United AHP projects, we believe it is appropriate and consistent with the Finance Board's AHP rules for the Dallas Bank to retain the monitoring obligation for those projects, even if WAMU has no other relationship with the Dallas Bank, so that there would be no effect on the San Francisco Bank in either cases

Finally we turn to the convenience of WAMU. As noted above, we believe that the strongest argument under the statute is that only the convenience of WAMU is relevant to the "demanded by convenience" standard. In this regard, we find much of the information provided in the WAMU memo to be surprising and believe it is inadequate to support a Finance Board finding that dual membership is appropriate in this case *.

In this section, the WAMU memo says that dual membership is necessary to avoid constricting its participation in the AHP, noting that WAMU always has more AHP project applications than it can submit to the San Francisco Bank because of the per member dollar limit San Francisco imposes in each AHP round. But, it is important to understand that the overall amount of AHP funds awarded by the System each year is fixed as a percentage of income, and limits on AHP awards are consistent with the regulatory framework of the program. Allowing WAMU to have access to the AHP competitions in two different Banks, by allowing WAMU to have dual membership with one charter, simply means that more System AHP funds may be directed to WAMU. While this result would provide an economic benefit to WAMU and the projects supported by WAMU, it does not, in our view, support the notion that WAMU's membership in both districts is "demanded by convenience."

We also do not understand how Mr. Smith could assert in his January 31, 2001, letter that "the San Francisco Bank has not been willing in the past to devote additional

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*The San Francisco Bank currently has in place agreements with three other Federal Home Loan Banks (including the Dallas Bank) whereby the San Francisco Bank monitors AHP projects originally approved for San Francisco Bank members that were subsequently acquired by members of those Federal Home Loan Banks.
resources to the increased demands and operational burdens required to support proportionate growth in [WAMU's] AHP programs:' We believe that nothing could be further from the truth, and we would appreciate understanding from Mr. Smith the foundation for this assertion.

C. Policy and Other Arguments

The Finance Board has acknowledged that the Petition raises "numerous fundamental legal, political and policy issues of first impression that are critical to the structure and functioning of the Bank System." The WAMU memo and Gibson memo touch on several of them. The Gibson memo says, for example, that "interstate expansion and consolidation are increasingly causing distortions and imbalances in the Bank System." Casual observation would indicate that Federal Home Loan Bank assets roughly correlate to population in the respective Bank districts. There do not seem to be significant distortions and imbalances. However, even if distortions and imbalances did exist, we do not believe that allowing a single member to join two Banks is the way to address these issues. Instead, as discussed above, if the Finance Board intends to address these issues, we believe it should undertake a rulemaking to consider all aspects and solutions, which could range from legislative to regulatory to policy solutions.

Should the Finance Board commence a broader consideration of these issues, numerous issues should be explored. For example, the Petition makes the argument that allowing multiple district membership in the case of acquisitions addresses the structural issues presented by advances and capital in a district becoming out of proportion with mortgages in a district, through the acquisition of mortgage lenders by out-of-district acquirers. The Dallas Bank asserts that this dynamic will create inequality among the districts, resulting in winners and losers among the Banks. The multi-district membership of a single charter is presented as a solution for this problem. This does not appear to be a solution for at least these reasons:

- The proposed solution only addresses adjoining districts. If an acquirer is not in an adjoining district, this is no solution at all. Mergers do not always occur between institutions in adjoining districts. Hence, there will continue to be winners and losers, if those terms have any meaning in this context. However, the winners and losers will be determined by the irrational criterion of geographic location in adjoining districts, rather than mortgage assets in a district or some other criterion.

- This solution is inherently unfair. It creates a separate class of members that will be permitted to have mufti-district memberships, and the resulting economic efficiencies (which are recognized in the Petition and used in the convenience of the member argument), based on the acquisition of a financial institution in an adjoining district and a favorable Case-by-Case Determination. All others will have one membership per charter.

- This solution does not expand a Federal Home Loan Bank's ability to control what happens to its membership base, but does give the member that ability. Nothing requires a member to join the second Bank, therefore the feared dislocations will occur, or not, entirely at the option of the member.

- To summarize: IF the merger occurs between institutions in adjoining districts, and IF the acquirer chooses to join the Bank in the district of the acquired institution, and IF the member of the two Banks chooses to spread its borrowings in a ratio similar to the previous ratio of borrowings between the two districts, then the "distortions and imbalances" will not occur. This is not a solution.

Another policy argument concerns the cooperative structure of the System. There are many examples of the implementation of attractive parts of free market competitive structures in previously regulated enterprises, while maintaining the also attractive parts of the regulated structure. They do not work very well. A current example is the California energy supply and demand system, in which wholesale costs were deregulated and consumer rates were capped by regulation. An obvious problem resulted when wholesale costs increased instead of decreasing. An old but familiar example in the thrift industry is the deregulation of rates paid on deposits while usury limits on mortgage rates were preserved.

Those mistakes produced predictable results. Granting this Petition and similar petitions, or allowing mufti-district membership to become the norm, raises significant questions about how competition between districts would be conducted and what the results would be. Competition is a good thing in a model that is designed to have the checks and balances inherent in a market system. In such a system the market rewards success through increases in the value of the enterprise's equity. It punishes imprudent behavior by reducing the value of the equity. If an entity fails in the market system, the employees and the investors in the enterprise lose their jobs and their investments.

Those concepts do not describe the Federal Home Loan Bank System. The Federal Home Loan Banks are jointly and severally liable for all debt that is issued by the System. They will not have, and do not have, equity that is priced at market. Investors buy stock at par and get that same par value when they redeem the stock. Therefore the Banks will be competing against each other, but will be jointly and severally liable for the debts of the losers in the competition. To win such a competition may mean that the winner loses as the debts of the losers of the competition become due and must be paid by the winner.

Furthermore, the competition will not occur in pricing past a certain common point, because all Banks share the same ability to raise funds at agency rates. Each Bank could employ the same funding strategies and there would be no substantial difference in the cost of funds among Banks. At that point competition would have to occur in matters of credit and collateral. Lessening credit or collateral standards would make borrowing less costly for the members, but would increase risks for the System.

The System has competition now among the Banks, by virtue of subsidiaries of holding companies having memberships in various Banks but sharing funding strategies dictated by the holding companies. However, allowing unlimited competition poses a significantly greater potential risk to the System and points out the need to carefully analyze these issues and the structural changes they imply.

D. Additional Issues Not Addressed in the Petition

1. Procedural Issues

According to the Finance Board's procedures, a Case-by-Case Determination is appropriate for a matter that, in the judgment of the Finance Board, is best resolved on a case-by-case basis by a ruling only applicable to the petitioner (the Dallas Bank, in this case) and any party that is permitted to intervene, rather than by adoption of a rule of general applicability (12 C.F.R. Sec. 907.1). As noted above, a favorable ruling on the Petition would apparently permit dual membership for only one institution in the entire Federal Home Loan Bank System. In that case, in the absence of further rulemaking, no other institution would be able to achieve the same result, except by also asking for a Case-by-Case Determination.

One of the most significant questions is whether this is an appropriate procedure for the Finance Board to use in addressing the fundamental legal, political and policy questions it acknowledges have been raised by the Petition. As noted at the beginning of this letter, we believe that if the Finance Board intends to address these issues, it should identify all of the fundamental issues raised by the circumstances (which would include Federal Home Loan Bank membership, competition, concentration, and consolidation issues, among others) and address them in a rulemaking procedure that would ensure an opportunity for complete deliberation and complete input from all of the System's constituents.

In this regard, it is important to note that several of the arguments the Dallas Bank and WAMU put forth in support of the Petition could support dual Bank membership for other System members in circumstances similar to those presented by WAMU's acquisition of Bank United, both in situations where the districts in question adjoin and where they do not. The WAMU memo states, "Significant imbalances are likely to develop within the Bank System as previously independent institutions disappear in mergers. If simultaneous membership is unavailable, imbalances will develop according to the happenstance of where the surviving institution's home office is located." But many independent institutions have already disappeared in mergers affecting more than one Federal Home Loan Bank. Furthermore, these transactions do not always occur in adjoining districts. Either the imbalances noted in the Petition have not developed, which does not support the result sought by the Dallas Bank, or they have occurred and will occur in the future, and the Finance Board should address all of them by adopting a rule of general applicability.

2. Political Issues

Some observers have taken the position that the largest System members should not have access to Federal Home Loan Bank borrowings because they are well positioned to obtain market-rate funding elsewhere. Political forces associated with those views may particularly object to WAMU, the largest member in the System, being given even greater access by having membership in two Banks, especially if that option is not available to any other member (or is available only to large members with multistate operations). This may be especially problematic if the Finance Board addresses in a Case-by-Case Determination (or even addresses by regulation) matters that some believe should be addressed by Congress in legislation affecting the entire System.

3. Operating Issues

In the Petition, the Dallas Bank states that "an additional matter to be resolved is the scope of WAMU's membership in the Dallas Bank." The Dallas Bank goes on to propose structuring the dual membership "in a manner to maintain the status quo with regard to the economic impact of Bank United on the Dallas Bank" by limiting WAMU's ability to borrow from the Dallas Bank to the amount outstanding at the time the merger transaction closes, with the amount to be increased "only by the amount required to fund ongoing operations of the acquired Bank United entity." Since we understand that Bank United has been completely merged into WAMU, it is not clear what is meant by the "ongoing operations of the acquired Bank United entity," or how (or by whom) such a transactions limit would be interpreted or enforced over time. As noted above, if the Finance Board opts to approve dual membership for WAMU in this case, we request that the Finance Board first issue orders and guidelines addressing in advance this issue and the other policy and operational issues that might be encountered by the two Banks in dealing with the first-ever dual Bank membership.

Relevant Authorities

In addition to the sections of the Bank Act listed above in the category "Applicable Provisions of the Federal Home Loan Bank Act-," in this letter we have also referred to Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), as well as to the Dzivi letter (submitted as part of this Request to Intervene) and the citations included therein.

Authorization of the Board of Directors of the San Francisco Bank

By resolution dated January 26, 2001, the Board of Directors of the San Francisco Bank authorized the Bank to file and concurred in the substance of this Request to Intervene (including the Request to Appear). A copy of the resolution is enclosed as Exhibit B.

Request to Appear

The San Francisco Bank also requests that an officer or attorney for the Bank designated by the Bank be permitted to make a personal appearance before the Board of Directors of the Finance Board in any meeting conducted under Finance Board procedures to consider the Petition. Facts that may be in dispute include the extent to which WAMU's membership in the Dallas Bank is "demanded by [the] convenience" of the San Francisco Bank. Assuming that factor is relevant to the Finance Board's determination, only the San Francisco Bank is qualified to provide that information. In addition, only the San Francisco Bank is qualified to provide information about its ability to support WAMU's needs if the dual membership is not approved and to address other specific issues relating to the San Francisco Bank that were raised by the Dallas Bank and WAMU or that are subsequently raised by the Finance Board.

Agreement to Be Bound

If leave to intervene is granted under this request, the San Francisco Bank will be bound expressly by the Final Decision of the Board of Directors of the Finance Board, as described in 12 C.F.R. Section 907.13(b), subject only to judicial review or as otherwise provided by law.

Certification

I hereby certify that the statements contained in this Request to Intervene are true and complete to the best of my knowledge.

Sincerely,

Dean Schultz
President and Chief Executive Officer

EXHIBIT A

LETTER TO THE
FEDERAL HOME LOAN BANK OF SAN FRANSICO
FROM BARTLY A. DZIVI

February 22, 2001

February 22, 2001

Lisa MacMillen, Esq.
Senior Vice President and General Counsel
Federal Home Loan Bank of San Francisco
600 California Street
San Francisco, California 94108

Dear Lisa:

We have reviewed the issue of one institution belonging to multiple Federal Home Loan Banks as raised by the memorandum of the Gibson, Dunn & Crutcher, LLP law firm dated November 28, 2000 ("Gibson memo").* Such memorandum concludes "the FHFB has unquestionable discretion to approve an application by an eligible institution to be a member of both its home district and one or more adjoining districts if such multiple membership would be consistent with the mission of the Bank system."

We disagree. Our view is that the issue presented by the application of the Federal Home Loan Bank of Dallas ("Dallas Bank") seeking the approval of the Federal Housing Finance Board ("FHFB" or "Finance Board") of the membership application of Washington Mutual Bank, FA ("Wamu") raises completely novel issues of law for which there is no authoritative case law. We believe that there is a legitimate question as to whether the FHFB has the authority to permit a single entity to be a member of multiple Federal Home Loan Banks ("FHLBs") at the same time. In the current situation, Wamu is presently a member of the Federal Home Loan Bank of San Francisco ("FHLBSF"). Wamu has acquired Bank United, a member and the largest borrower of the Dallas Bank, in such a manner that there will be one surviving charter. Wamu is requesting to become a member of the Dallas Bank while remaining a member of the FHLBSF. There is no prior example, of which we are aware, of a member of one FHLB simultaneously being a member of another FHLB.

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*Such memorandum was submitted as an exhibit to the application of the Federal Home Loan Bank of Dallas noticed in the Federal Register on December 27, 2000. We have also subsequently reviewed the request for supplemental information by the FHFB in a letter dated January 11, 2001 ("Bothwell letter"), and the response thereto dated January 31, 2001, by Terry Smith of the Dallas Bank ("Dallas letter").

Our review of the structure of the FHLB Act, the relevant legislative history, and prior regulations issued by the FHFB, and its predecessor in interest the Federal Home Loan Bank Board ("FHLBB"), causes us to believe that the better reasoned legal view is that the Federal Home Loan Bank Act ("FHLB Act") permits an institution to be a member of only one FHLB at a time. However, in the context of reviewing a decision by the FHFB on this matter, the relevant legal standard is whether an interpretation. by the FHFB permitting multiple FHLB memberships would conflict with the FHLB Act. Given the applicable rules of administrative law, we cannot conclude that it is more likely than not that a court would reverse a decision by the FHFB permitting multiple FHLB memberships. On the other hand, our review of the case law leads us to believe that a court would sustain a FHFB interpretation restricting members to membership in one FHLB at a time.

The ultimate legal conclusion of whether an interpretation by the FHFB permitting multiple FHLB memberships would be overturned rests on the question of whether section 4(b) of the FHLB Act contains an ambiguity (in which the case the FHFB is then free to interpret the ambiguity in any manner that does not conflict with another section of the FHLB Act), or whether its meaning is plain on its face (in which case the reviewing court will not defer to the interpretation of the FHFB).

I. Section 4(b) of the FHLB Act and the FHFB Regulations

The language in question, currently codified at 12 U.S.C. § 1424(b), is as follows:

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

The Finance Board adopted regulations codified at 12 C.F.R. §§ 925.18 and 925.24 that implemented section 4(b).*

Our review of the relevant regulatory history reveals one significant item in addition to those matters set forth in the Gibson memo. When adopting the final rule addressing the consolidation of members of two different FHLBs, the Finance Board made the following statement in response to a specific comment that a consolidating member should be allowed to retain stock in the FHLB of the disappearing institution:

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*As discussed in the Gibson memo, 12 C.F.R. § 925.18 closely parallels section 4(b) of the Act. It should also be noted that 12 C.F.R. 925 has been amended by the new capital regulation, but our review does not indicate any changes or statements by the FHFB in such amendment that conclusively resolve the issue at hand. 66 Fed.Reg. 8262 (tan. 30, 2001).

> Since the consolidated institution is already a member of another FHLBank, it may not become a member of the disappear-rig institution's FHLBank (unless that FHLBank is the appropriate FHLBank for the consolidated institution pursuant to the 80 percent standard described above). Accordingly, the consolidated institution has no right to continue to hold stock in the FHLBank of the disappearing institution (unless that F>-ILRank is the appropriate FHLBank for the consolidated institution pursuant to the 80 percent standard described above); except as required to support advances outstanding from such FHLBank. 58 Fed. Reg. 43522, 43537 (Aug. 17, 1993).

We believe that such statement by the Finance Board indicates that not only does Bank United's membership in the Dallas Bank extinguish pursuant to the express provisions of 12 C.F.R. § 925.24(b), but also that the Finance Board's prior view was that an institution engaged in such a transaction would be precluded from obtaining a new membership in the Dallas Bank unless the Dallas Bank is "the appropriate FHLBank." While the Finance Board is not barred from reversing its prior interpretation of the statutory language at issue if such language is deemed to be ambiguous, case law indicates that courts apply less deference to an agency decision that reverses a prior held view suddenly, without adequate explanation, or without consideration for legitimate reliance on the prior view. *

II. The two step analysis under the Chevron. doctrine.

The judicial review of a FHFB decision on the Dallas Bank application would be the review of an agency order, and the substantive interpretation of section 4(b) most likely would be guided by the two-step Chevron analysis*. The specific test set forth by the Supreme Court for evaluating agency interpretations of a statute is as follows:

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*Smiley v. Citibank, 517 U.S. 735, 742 (1996). An agency can suggest that different interpretations are possible without forfeiting the Chevron level of deference. Huls America, Inc. v. Browner, 83 F.3d 445, 450 (D.C. Cir. 1996) ("Since the EPA has never adopted any different interpretation of section 302, although it has suggested it could reconsider its EHS list revision methodology, it merits traditional Chevron deference. Cf. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987) (less deference due where agency had adopted three different interpretations of statutory provision over time).").

*Such deference is afforded to regulations interpreting statues and certain other orders representing final agency action. For example, the Finance Board was afforded Chevron level deference in its approval of the application of the Federal Home Loan Bank of Chicago to participate in the MPF pilot program. Texas Savings and Community Bankers Association v. FHFB, 201 F.3d 551, 556 (5t` Cir. 2000).

When a court reviews an agency's construction of a statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984).

The Supreme Court has reaffirmed that it is the courts, not the agency, that make the critical first step review of the statutory language to determine if Congress has left any gaps or ambiguities that reveal the need for agency expertise. NCUA v. First National Bank & Trust, 522 U.S. 479, 499-500 (1998) (holding that the agency's interpretation of "common bond" was impermissible and not entitled to deference under the second step of the Chevron analysis because the court determined under the first step of Chevron that the statute itself revealed the unambiguous intent of Congress).

In this instance, the first question is whether section 4(b) of the FHLB Act is ambiguous. A reviewing court will not give deference to the-FHFB's views on the preliminary issue of whether section 4(b) contains an ambiguity. If, however, the court determines that the language of section 4(b) is ambiguous, then it will defer to any interpretation of section 4(b) by the FHFB that does not otherwise conflict with the FHLB Act. We do not find the analysis of the Gibson memo persuasive on the point that the language is necessarily ambiguous.

III. The lack of a clear general Tale in federal administrative law on the issue of whether the word "or" placed between two clauses is plain or ambiguous.

The symbolic logic of the relevant language may be phrased as "only A or B." The question presented by the Dallas Bank application is whether "only A or B" should be interpreted either as "A, or B, or both", or as "A, or alternatively B."

Our research reveals no hard and fast rule as to whether the usage of the term "or" is inherently ambiguous or plain. Courts have reviewed the term in a variety of statutory and other contexts and have reached both conclusions. In particular, courts reviewing decisions by federal agencies interpreting the word "or" have come to different conclusions based on the context in which it is used.

In Duggan v. Bowen, 691 F.Supp. 1487 (D.D.C. 1988), the court determined that the word "or" was unambiguously disjunctive, and gave the agency no deference. The court reviewed a challenge to the Department of Health and Human Services applied interpretation of the Medicare Act. The agency interpreted the phrase "part-time or intermittent" as if it were written "part-time and intermittent." Id. at 1496. The district court. gave the following analysis for its conclusion that the agency's attempt to apply the word "or" in a conjunctive sense violated the plain meaning of the language as indicated by the language and the legislative history:

> [The Medicare Act] is written in the disjunctive. It must be applied in the disjunctive unless such a reading `would be demonstrably at odds with the will of Congress.' . . . Here, reading the word `or' in its usual disjunctive connotation furthers Congress' intent of excluding only `more or less full-time nursing care' from home health coverage. S.Rep. No. 404, 89th Cong., 1st Sess. (1965). 1d at 1511.

In Northwest Airlines v. FAA, 14 F.3d 64 (D.C. Cir. 1994), the court found that the word "or" was ambiguous, and deferred to the agency's disjunctive use. The court reviewed a decision by the Federal Aviation Administration on an -application to impose certain fees, a passenger facility charge ("PFC"), on airline passengers. The court upheld an agency's interpretation that the word "or" should be applied in the usual disjunctive sense, but did not rely on the plain meaning. Rather, the court left open the possibility that if the agency had reached a different conclusion, the agency might still be entitled to deference:

> We defer to the FAA's interpretation. As with all cases of statutory interpretation, `our starting point must be the language employed by Congress.' . . . . In this case, Congress chose to join the three criteria for PFC approval with the word `or' which is `normally . . . to be accepted for its disjunctive connotation.' . . . . Thus, the most natural reading of the statute is the one proposed by the FAA ....
>
> We acknowledge that it might be possible to read the statute as Northwest suggests-requiring that the agency consider each of the criteria .... See, Holyoke Water Power Co. v. FERC, 799 F.2d 755, 761 (D.C. Cir. 1986) (MacKinnon, J., dissenting) (noting that the word `or' may sometimes be read to mean `and'). However, `as we must defer to an agency's reasonable interpretation of an ambiguous statute, we need not pass on whether there are valid alternative readings' of the PFC statute .... [W]e find it eminently reasonable for the agency to adopt the most natural reading of the statute. Id. at 69.5

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. The court relied on prior. consistent interpretations by the agency and stated its reasoning as follows:

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*See also, Huls America, Inc. v. Browner, 83 F.3d 445, 451-452 (D.C. Cir. 1996) (The court cited Northwest Airlines with approval, and came to the following conclusion: "Huls argues that section 302 represents one of those occasions where an "or" should be construed conjunctively to avoid defeating the plain purpose of the statute or producing an unreasonable result .... We think that reading "or" in accordance with its normal disjunctive meaning --as the EPA has done--comports with the structure and purpose of EPCRA as a whole.")

> Under the second step of Chevron, a reviewing court must give effect to an agency's regulation containing a reasonable interpretation of art: ambiguous statute .... Initially, the Court notes again that the text and legislative history of the Gun Control Act indicates that the Secretary was given discretion to determine what firearms would meet the sporting purpose criteria .... Plaintiff claims that because the statute reads `particularly suitable for or readily adaptable to' . . ., each must be given separate and distinctive weight. The Court recognizes that `canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless context dictates otherwise.' . . . Here, however, the Secretary has historically considered `particularly suitable for or readily adaptable' as one standard .... The Court finds the Secretary's decision to consider `particularly suitable or readily adaptable to' as one standard to be reasonable considering the impact dividing the standard would have on the effectiveness of the Gun Control Act. Id. at 88-89.

We note that none of the above cases addresses the situation in which the possible conflicting interpretations are "A, or B, or both", or "A, or alternatively B." The cases do, however, provide a general guide as to the uncertainty of the law in this area. The decisions appear to be based on the specific statutory context in which the word "or" is used. It is easy to conclude that as a matter of federal administrative law, courts generally are willing to uphold federal agency statutory interpretations based on the normal disjunctive use of the word "or" (based on either the plain meaning, or an ambiguity in which the court defers to the agency). It is much more difficult to state a general rule of federal administrative law regarding the likelihood of a court upholding a statutory interpretation of federal agency that abandons such disjunctive usage of the word "or", especially, as is the case here, where there is no long standing practice by the agency for the court to rely upon.

IV. Relevant Legislative History of the FHLB Act.

We do not think anyone reasonably can argue that the word "or" has an unambiguous conjunctive meaning as used in section 4(b). At best; proponents for multi-FHLB membership can argue that the word "or" is ambiguous as used therein, allowing for the possibility of a financial institution being a member of more than one FHLB. If the starting point of their argument is an assumed ambiguity of the statutory phrase, then legislative history of the statute becomes legally relevant.* Although legislative history is often subject to conflicting interpretations, a majority of the Supreme Court still relies upon the relevant legislative history when a federal agency's interpretation of an ambiguous statutory term is subjected to judicial review to determine its reasonableness.* We have reviewed the entire legislative history of the original enactment of the FHLB Act, and there are some statements, as set forth below, evidencing that the intended meaning of the word "or" in section 4(b) was disjunctive; there are, however, no statements in such legislative history evidencing any intent by Congress of a conjunctive meaning of the word "or" in section 4(b).

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*Japan Whaling Ass'n v American Cetacean Society, 478 U.S. 221, 233 (1986) ("Furthermore, if a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the `executive department's construction of a statutory scheme it is entrusted to administer,' Chevron, supra, at 844, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress.").

*Holly Farms Corp. v. NLRB, 517 U.S. 392, 402-203 (1996).

A. Relationship between sections 3 and 4 of the FHLB Act.

Section 4(b) of the FHLB Act must be read in context of the entire FHLB Act. The purpose of section 4(b) cannot be fully appreciated without reference to other provisions of the FHLB Act, and an understanding of the intent of Congress in light of the then existing application of the Federal Reserve Act of 1913, upon. which the FHLB Act was partially modeled.* Section 3 of the FHLB Act as-adopted provided that the Federal Home Loan Bank Board was to divide the United States into different FHLB districts, not less than 8 and not more than 12*. Section 3 of the FHLB Act also provided:

> Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created maybe readjusted and new districts may from time to time be created by the board, not to exceed twelve in all.

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*The Federal Home Loan Bank System was modeled after both the Federal Reserve System and the Federal Land Banks. Creation of a System of Federal Home Loan Banks, Hearings before a Subcommittee of the House Committee on Banking and Currency on H.R. 7620, 72"d Cong., 1 ` Sess. (the "House Hearings") (March 16, 1932), p. 14.

*Act of July 22, 1932, Ch. 522

Such language was drafted with an express restriction on not dividing states because the Federal Reserve Act had no such language.* The Federal Reserve districts had been drawn in such a manner that states were divided into different districts, and a representative of the banking industry testified about the usefulness of such division. l t Later, however, a representative of the real estate industry testified in favor of a statutory restriction on the FHLBB's power to create a district that divided a state.* Thus, when Congress directed the FHLBB not to divide any state when creating a district, it addressed the issues raised by opponents to that provision by creating an exception allowing members to join a geographically adjacent district.*

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*The relevant section of the original Federal Reserve Act contained the following provision: Sec. 2. As soon as practicable, . . . `The Reserve Bank Organization Committee," shall designate not less than eight nor more than 12 cities to be known as Federal reserve cities, and shall divide the continental United States, excluding Alaska, into districts, each district to contain only one of such Federal reserve cities .... [T]he districts shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States .... When the organization committee shall have designated the cities in which Federal reserve banks are to be organized, and fixed the geographical limits of the Federal reserve districts, every national banking association within that district shall be required within thirty days after notice from the organization committee, to subscribe to the capital stock of such Federal reserve bank . . . ." The Federal Reserve Act, Ac:-of December 23, 1913, ch. 6.

*"Mr. Monks. We suggest that you strike out `but no such district shall contain a fractional part of any State.' Our reasons for that are that the customary course of business may necessitate the division of a State. For instance, right now Kentucky is divided into two different parts of the Federal Reserve districts in our part of the country." Creation of a System of Federal Home Loan Banks, Hearings before a subcommittee of the Senate Committee on Banking and Currency on S.2959, 72"d Cong., 15` Sess. (the "Senate Hearings") (Feb. 16, 1932), p. 359 (testimony on behalf of the Ohio Bankers' Association).

*House Hearings, (March 17, 1932), p.97 (Testimony of the general counsel of the national real estate boards) ("[Mr. Monks] calls attention to the situation in Kentucky, where the Federal reserve system splits the state in two. We think that is very undesirable. We think that building and loan associations and banks having charters under the laws of the State, should be kept as a unit.").

*If Congress had intended the "demanded by convenience" language in section 4(b) to originally mean anything other than geographical proximity or ease of transportation, why then did Congress limit the alternative districts to districts that were geographically adjacent to the district in which the member's principal place of business was located? If "demanded by convenience" is as broad a standard as the Gibson memo asserts, it seems like a self-defeating choice by Congress to limit a member's alternatives to adjacent Bank districts (or if not self-defeating, then multiple jumps among several districts ending in the right district must be allowed). Indeed, if the states of Arizona and Nevada were in the Federal Home Loan Bank of Seattle District, then Wamu could not be a member of both the Dallas Bank and the FHLBSF regardless of the merits of the Dallas Bank's position.

The debate on the floor of the House of Representative involving several members of Congress, including Mr. Reilly, the chairman of the subcommittee that prepared the legislation, is a significant guide to the intent of Congress with respect to the interplay between. sections 3 and 4(b) of the FHLB Act.

> Mr. Stafford. I invite the attention of the committee to that part of section 3 which provides that these Federal home loan banks shall not contain a fractional part of any State .... I call the gentleman's attention to the fact that in the Federal reserve act we do not ban portions of States from being made a member of a certain district. I can conceive in my home State where it might-be advantageous to have the Upper Peninsula of Michigan and the northwestern part of Wisconsin, which is geographically part of Minnesota, made a part of that Federal home-loan bank district. Before I made the motion I was going to suggest whether it would not be possible to strike out the clause in line 21, page 3 which provides that "No such district shall contain a fractional part of any State.
>
> Mr. Stevenson. There is a provision that will take care of the gentleman's constituents who do not wish to be included in Minnesota but would rather stay in the State of Wisconsin and that is the provision that a member can be a member of a bank outside of his district, provided it is approved by the board and the conditions are such as render it necessary.
>
> Mr. Stafford. Then I will ask-whether it would not be. better to have the districts formed regardless of State lines, based upon economic, financial, and business relations to the territory in which they are located.
>
> Mr. Stevenson. I take it the committee gave very careful consideration to that and I followed the subcommittee which prepared this bill absolutely on that matter and I am going to stay with them.
>
> Mr. Stafford. Then I will ask my colleague what was the idea of having the State territorial lines govern in this matter.
>
> Mr. Reilly. I will say to the gentleman that the bill came to the committee from the administration people who drew it up with the provision in it. My understanding is that the desire is not to separate any part of the State, because it would be **more convenient to administer the law in that way.** The laws governing building and loan associations and other similar organizations are quite different in various States and it was desired to keep the State lines intact in dealing with all the home-loan institutions in the State.
>
> Mr. Reilly. It is not a question of population, it is a question of convenience.
>
> Mr. Stafford. Mr. Chairman, I gave some consideration to the thought advanced by my colleague, and in view of the statement he has made, I shall not press any formal amendment. (emphasis added)

Some might argue that such geographic division of the Federal Home Loan Bank districts must now be interpreted through a different prism because lending occurs on a nationwide basis, and had Congress been faced with such a situation it would have intended "convenience" in both sections 3 and 4 to include a notion that nationwide lenders should have additional flexibility in selecting the district in which such lenders became a member, or allowing such a lender to be a member of more than one district. The fact is, at the time of consideration of the original. legislation, life insurance companies were operating. Nationwide lending businesses, and Congress listened to express testimony and debate regarding section 4(b) and the notion that a nationwide lender should nevertheless be a member of only one' FHLB

> Mr. Monks. Now on page 4, starting in Brie 1-2:
>
> > (b) An institution eligible--to become a member under this section may become a member only of the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district.
>
> Now this takes in life insurance companies. I will use the Metropolitan Life Insurance Co. The Metropolitan Life Insurance Co. places a lot of loans all over the country. For instance, they make mortgages in Ohio and they take those mortgages back to New York. Would they have to make their loan through the New York bank, say, for instance, there was one there, loans could only be made in that district? Or would they have to join 12 districts if there were 12 districts? Where would they make their loan?
>
> Mr. O'Brien. In New York.
>
> Mr. Monks. For mortgages from any State in the Union?
>
> Mr. O'Brien. Yes.
>
> Senator Watson. We will let the legislative drafting agent answer that question.
>
> Mr. O'Brien. The theory of the bill was, at least as outlined by the House committee, that in such case the Metropolitan **would** discount all its mortgages on real property, wherever held, in the New York bank. Now, that might be unduly restrictive, but that is the theory of the bill. So that the California institution which was lending on New England land **would** discount its mortgages in the San Francisco bank, if there was a bank in San Francisco. (emphasis added)*

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*Senate Hearings, (Feb. 16, 1932), p. 359-360. Mr. Monks was testifying on behalf of the Ohio Bankers' Association, and Mr. O'Brien, Assistant Counsel, Office of the Legislative Counsel of the House, was a rearing as the principal legislative drafting agent.
*House Hearings, (March 17, 1932), pp.97-98

This same testimony was discussed in the House committee hearings in an exchange between the chairman of the House subcommittee and a witness:

> Mr. MacChesney. Mr. Monks asked the question as to where institutions doing interstate business would discount .... Will it be in the district bank where the property is located, upon which the mortgage is held, or will it be in the district where the principal is doing business? Now, the act contemplates that the discounting **shall take place** in-New York tinder conditions such as that.
>
> Mr. Reilly. The home of the owner?
>
> Mr. MacChesney. The home of the lender, the lending institution. We think that while there may be some advantage about being able to discount in another place, the act is right as written, because the examining institution some on [sic] reserve bank, should have the necessary credit .facilities to make the investigation and see whether that mortgage is all right and not have the investigation scattered all over the country and perhaps run the risk of improper inspection. (emphasis added)

Both committees of Congress reviewing this emergency legislation had testimony in the record that a nationwide lender would be a member of only one FHLB. We note that the Dallas letter attempts to discredit the value of the above cited testimony in the Congressional hearings, which was also referenced in the Bothwell letter, because the person giving the testimony was not a Member of Congress. Although the relative weight of colloquies between witnesses and members at Congressional committee hearings is certainly lower than that of the official committee reports, a recent study found that 14% of all citations to legislative history by the Supreme Court from 1980 to 1998 were references to committee hearings, in which oral' and written. testimony by witnesses is given to Congress.*

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*Michael Koby, The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique, 36 Harvard Journal on Legislation 360, 388 (1999) ("The [data] suggests that Scalia's critique has not led to a substantial decline in the use of any particular document of legislative history. Citations to hearings are references to transcripts of testimony presented to a congressional committee. See, Kunz, The Process of Legal Research 253 (4' Ed 1996) `The hearings, as published, consist of transcripts of testimony before a particular committee or subcommittee, questions by legislators and answers by witnesses . . . . As evidence of legislative intent, hearings rank below committee reports and the variant texts of bills."). For example, in Oregon v. ACF Industries, 510 U.S. 332, 345-346 (1994), the Court rebutted the respondents reliance upon statements of general statements in Congressional reports relevant to the issue with more specific legislative history arising from testimony of industry representatives m committee hearings. ("The excerpts from the legislative record cited by the Carlines do nothing more than manifest Congress' general concern with discriminatory taxation of rail carriers .... The Carlines do not point to a single instance in the legislative record suggesting Congress had any particular concern with property tax exemptions .... In fact, when urging the Senate to adopt subsection (b)(4), industry representatives characterized the provision as prohibiting only discriminatory in lieu taxes and gross receipts taxes; property tax exemptions, in contrast were not mentioned. See Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on Legislation Relating to Rail Passenger Service, 94h Cong., 1S` Sess., pt. 5, pp. 1837, 1883 (1975).").

We think it is clear that the structure of the FHLB Act as originally enacted reflected the expressed intent of Congress in having the administration of the law, the supervision and inspection of the mortgages made by the members (necessary to ensure -the proper credit reserve functioning of a FHLB), located in one FHLB for each member. Although we do not think the Finance Board is bound by such legislative history, we believe it does provide a fair view of the meaning of the language Congress also received testimony that the issue of allowing members to select any FHLB of their choice was considered but rejected because, if one FHLB was ultimately successful, it would become the only FHLB.

> Senator Watson. Mr. O'Brien, in drafting this bill, what was the object on that point.
>
> Mr. O'Brien. I think the theory was something like this: That it was not the desire, say, for members in South Carolina to borrow of a New York bank, because it would mean too great a concentration at the New York bank. If the New York bank happened to do better than a South Carolina bank, all members would go there. 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 bank.
>
> Mr. Lofgren. And it is also impossible for the New York bank to do business in the Carolinas; although it does not say so, l assume that is the situation.
>
> Mr. O'Brien. Of course they are reciprocal. It is possible for one bank to buy advances of another bank.*

Again, such testimony would not control a court's decision upon judicial review of Finance Board action. But surely it cannot be argued that it would be grounds for a court to reverse an agency interpretation if the record revealed that the agency reviewed *such* historical records of legislative intent when formulating its own interpretation of *the* statute.

B. Origin of "demanded by convenience" clause.

The "demanded by convenience" language arose from an amendment suggested by the .United States Building and Loan League in both the Senate Hearings and the House Hearings. The prepared testimony stated as follows:

*Senate Hearings, (Jan. 19, 1932), p. 116-117.

> The provision appearing on page 4, lines 12 to 16, has raised considerable question and comment as to the effect and desirability of the phrase "or of the bank or the district adjoining such district." Building and loan officials have suggested the important possibility of undesirable institutions joining, out of range of those institutions most familiar with their practices. To a certain extent, this outweighs the proximity, or convenience, argument. The following language might be added to the sentence ending line 16, page 4, subsection (b): "if demanded by convenience and then only with the consent and approval of the board."*

Two things are clear from this sparse bit of legislative history. First, the proponents of the language viewed convenience as a synonym for physical proximity. Second, the view was expressed that the proper administration of the credit facilities of the FHLB system
would be best handled by one FHLB familiar with the lending practices through the knowledge brought to the FHLB by the other industry directors. That is not to say that Congress was not aware of the possibility of separate charters being established by one institution that could then access advances from different FHLBs.*

We do not suggest that legislative history controls the disposition of this matter. However, as noted above, courts tend to read the word "or" as unambiguously meaning the disjunctive, unless doing so either leads to an absurd result, or is contrary to the clearly expressed intent of Congress. Certainly, it is fair to say that none of the referenced legislative history suggests a conjunctive interpretation. .

V. Conclusion.

We think the better reasoned legal view is that "or" in section 4(b) means "or", and does not include "both." We cannot conclude that the Finance Board is necessarily bound to such interpretation because the courts have vacillated on whether the meaning of the word "or" is plain or ambiguous depending on the particular statutory context. We can say, however, that a court would uphold a Finance Board interpretation that the word "or" as used in section 4(b) of the FHLB Act should be applied in its normal disjunctive sense, and does not allow a single entity to be a member of multiple FHLBs.

Very truly yours,

Bartly A. Dzivi

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*Senate Hearings, (Feb. 23, 1932) (Prepared statement submitted by Philip Lieber, Vice President, United States Building and Loan League), p.621; House Hearings, (March 21, 1932) (Prepared statement submitted by Morton Bodfish, Executive Manager, United States Building and Loan League), p. 199

*"Mr. Adams. One insurance company in New York could subscribe all the private capital that was allowed, if they wanted to.
Senator Watson. Not under this bill.
Mr. Adams. They could, through dummies out in the district, and they could control the entire system. The could borrow all the money that was available and shift their securities from one bank to another under the provisions of this bill." Senate Hearings, (Jan. 26, 1932), p. 204.

EXHIBIT B

RESOLUTION OF THE BOARD OF DIRECTORS OF THE FEDERAL HOME LOAN BANK OF SAN FRANCISCO

FEDERAL HOME LOAN BANK OF SAN FRANCISCO

RESOLUTION

RESOLVED, that the Board of Directors of the Federal Home Loan Bank of San Francisco hereby authorizes the Bank to file a Request to Intervene and Request to Appear in the Federal Housing Finance Board's consideration of the Petition for Case-by-Case Determination filed by the Federal Home Loan Bank of Dallas on December 11, 2000, for Finance Board approval of an application for membership in the Dallas Bank by Washington Mutual Bank, FA, a member of the Bank; and

FURTHER RESOLVED, that the Board hereby concurs in the substance of the Request to Intervene, that the Finance Board not grant the approval sought by the Petition, but that instead, if the Finance Board intends to address the Federal Home Loan Bank System issues presented by the Petition, that the Finance Board address the issues in a comprehensive rulemaking applicable to all Federal Home Loan Banks and System members.

I certify that this is a true and correct copy of a resolution adopted by the Board of Directors of the Federal Home Loan Bank of San Francisco at its meeting on January 26, 2001.

Lisa B. MacMillen,
Senior Vice President and General Counsel-Corporate Secretary