

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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<i>In re</i>	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC., <u>et al.</u> ¹	:	Case No. 08-12229 (MFW)
	:	
Debtors.	:	(Jointly Administered)
	:	
	:	Proposed Hearing Date:
	:	November 23, 2010 at 10:30 a.m. (EDT)
	:	
	:	Proposed Objection Deadline:
	:	At the Hearing
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**MOTION OF TRICADIA CAPITAL MANAGEMENT, LLC
PURSUANT TO SECTIONS 105(a) AND 362 OF THE BANKRUPTCY
CODE FOR ORDER ESTABLISHING NOTICE AND HEARING
PROCEDURES FOR TRADING IN CCB GUARANTEE CLAIMS**

Various funds managed by Tricadia Capital Management, LLC (“Tricadia”), a creditor and party-in-interest in the chapter 11 cases (the “Chapter 11 Cases”) of Washington Mutual, Inc. (“WMI”) and WMI Investment Corp. (together with WMI, the “Debtors”) hereby moves (the “Motion”) pursuant to Sections 105(a) and 362 of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 3001 and 3002 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) for entry of an order authorizing the Debtors to establish notice and hearing procedures as set forth herein to protect the potential value of certain consolidated net operating tax loss carry-forwards and certain other tax attributes. In support of this Motion, Tricadia respectfully represents as follows:

¹The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.



PRELIMINARY STATEMENT

1. As described further in this Motion, the Debtors have significant Tax Attributes (as defined below) that potentially could generate billions of dollars in value for the Debtors' estates and their creditors. However, the Debtors' ability to monetize these Tax Attributes depends on the availability of certain exceptions under Section 382 of the Internal Revenue Code (the "Internal Revenue Code" or "I.R.C."). While it appears that the Debtors have concluded that only one of these exceptions, which severely limits annual usage of the Tax Attributes, is available, Tricadia submits that the other, more valuable exception, which allows for utilization of the Tax Attributes without annual limitations – the so-called "Section 382(l)(5) safe harbor" – is also available, provided that the Debtors take immediate action to monitor the trading of CCB Guarantee Claims (as defined below).

2. Specifically, Tricadia has reason to believe that, as of one (1) day prior to the date of filing of this Motion, at least sixty-nine (69) percent of the CCB Guarantee Claims were owned by original par investors (the "Original Par Holders") who acquired their CCB Guarantee Claims at least eighteen (18) months prior to the Commencement Date and therefore should be "qualified creditors" under the exception specified in Section 382(l)(5) of the Internal Revenue Code. Section 382(l)(5), if utilized by the Debtors, could enable the Debtors to avoid severe annual limitations of valuable Tax Attributes and thereby preserve significant value for the Debtors and their creditors in these Chapter 11 Cases. Tricadia has no information that would lead it to conclude that the Original Par Holders referenced above as holding at least sixty-nine (69) percent of the CCB Guarantee Claims do not continue to hold their CCB Guarantee Claims as of the date of the filing of this Motion, and therefore concludes that there is a strong

possibility that they still do. Clearly, to the extent billions of dollars in estate value hinge on trading in CCB Guarantee Claims, monitoring of such trading is eminently justified.

3. Although the Court has scheduled a confirmation hearing for December 1, 2010, it is not clear that the Plan is confirmable, and it is at least possible that the Plan, as in any Chapter 11 case, will be modified as a result of discussions between the Debtors and their stakeholders going forward. Given this uncertainty, it is critical that the Debtors retain the utmost flexibility to maximize the value of their estates for the benefit of their creditors. As described in greater detail below, the Debtors may be able to utilize the Section 382(l)(5) exception and potentially generate billions of dollars in additional value for their estates. Unless trading in CCB Guarantee Claims is restricted, however, it is almost certain that the Debtors will not have this option, at considerable cost to the Debtors and their creditors. As a result, Tricadia submits that the Court should enter a narrowly drawn order that establishes notice and hearing procedures with respect to trading in CCB Guarantee Claims so as to preserve this optionality for the benefit of the Debtors while preserving the rights of holders of current CCB Guarantee Claims to dispose of their interests in accordance with the hearing and notification procedures described below.

4. It does not appear to be in dispute that the ability to utilize the Tax Attributes without annual limitations is preferable to the current state of affairs. The Examiner's Report (as defined below) estimates that the annual limitation under the current Plan is likely to be approximately \$6.2 million and concludes that "[i]f the Effective Date occurs on or before December 31, 2010 ... the value to the Debtors of the Retained NOLs and the Stock Loss would not be very substantial ... The remaining unutilized Retained NOLs and the realized Stock Loss ... would both be subject to a very severe Section [382] annual limitation after the Effective Date such that

they would effectively no longer be available.” See Examiner’s Report, at p. 148. Tremendous value may be created for the estates to the extent that these limitations can be avoided altogether.

5. Based on information recently acquired, Tricadia believes that prior to purchasing its current holdings of CCB Guarantee Claims, greater than ninety-seven (97) percent (and potentially one hundred (100) percent) of CCB Guarantee Claims were held by Original Par Holders. Had a trading restriction been placed upon the CCB Guarantee Claims more than a year into the Chapter 11 Cases, the current plan as presently drafted likely would have allowed for the possibility of utilizing the I.R.C. 382(l)(5) exception. For example, had a trading restriction been imposed, and if pursuant to the Plan the CCB Guarantee Claims had received Reorganized Common Stock (as defined in the Plan) equal to their full claim, the I.R.C. 382(l)(5) exception likely would have been available. Under the current draft of the Plan, this flexibility has now been destroyed because of the prior inaction of the Debtors with respect to monitoring trading in the CCB Guarantee Claims. Fortunately for the Debtors’ estates and all stakeholders, all hope is not lost. As described above, Tricadia believes that greater than sixty-nine (69) percent of the CCB Guarantee Claims are original par holders and to the extent the current plan is ultimately amended or rejected, there are several alternative plan structures that would still enable utilization of the I.R.C. 382(l)(5) exception. Whether the Debtors ultimately should amend the Plan in order to exercise this option is a collective decision that must be thoughtfully considered and weighed by all interested parties. But to be clear, it is a choice and not an obligation, and preserving a choice to use one of the largest net operating losses in history without annual limitations is wise, especially when it comes at no cost.

6. In fairness to the Debtors, they may not have been aware of the composition of the holder base in the CCB Guarantee Claims, and therefore may not have been aware that the

I.R.C.382(l)(5) exception was available, but now that they are, we hope they will take steps to preserve value that remains.

7. In addition, we appreciate that the relief requested in this Motion will preserve potential value that can only be realized by the Debtors if the Plan is amended. However, this in itself is not a sufficient reason to deny the Motion. It is certainly possible that the Plan is ultimately confirmed. But the Debtors need to prepare for all outcomes, some of which may involve significant revisions to the Plan. In the event this occurs, no one will regret having preserved the valuable I.R.C. 382(l)(5) exception, and some or all parties may be materially better off. In Tricadia's view, free insurance that may prove to be highly valuable is never a bad thing to have, and that is what the monitoring of CCB Guarantee Claims amounts to.

8. It is possible that the Debtors may oppose the Motion because they worry that endorsing it would be perceived by stakeholders as an admission that the current proposed plan is sub-optimal or that tax planning was imprudent. We hope that they do not. The voting and confirmation process that will unfold in the coming weeks may ultimately validate the strength of the Plan, and in that event granting the relief requested in the Motion will not have created value but will not have destroyed value either. Alternatively, if the Plan is ultimately amended or rejected, the ability to utilize the I.R.C. 382(l)(5) exception and enjoy unhindered use of the Tax Attributes may prove immensely valuable, while the failure to monitor trading in CCB Guarantee Claims and preserve this value could prove catastrophic.

JURISDICTION AND VENUE

9. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper before this Court pursuant

to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are Bankruptcy Code Sections 105(a) and 362. Relief is warranted under Bankruptcy Rule 3001.

BACKGROUND

10. On September 26, 2008 (the "Commencement Date"), the Debtors commenced the Chapter 11 Cases. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. On October 3, 2008, the Court entered an order, pursuant to Bankruptcy Rule 1015(b), authorizing the joint administration of the Chapter 11 Cases. On October 15, 2008, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors' Committee"). On January 11, 2010, the U.S. Trustee appointed an official committee of equity security holders in the Chapter 11 Cases.

11. On October 6, 2010, the Debtors filed the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan") and a related disclosure statement (the "Disclosure Statement"). The Plan contains an Amended and Restated Settlement Agreement, dated October 6, 2010 (the "Global Settlement Agreement") that resolves certain disputes among the Debtors, JPMorgan Chase, the Federal Deposit Insurance Corporation and certain other parties in interest.

12. By orders, dated July 22, 2010 and July 28, 2010, the Court approved the appointment of Joshua R. Hochberg as examiner (the "Examiner") to investigate (a) certain claims and assets that may be property of the Debtors' estates that are proposed to be conveyed, released or otherwise compromised and settled under the Plan and the Global Settlement Agreement, including all Released Claims (as defined in the Global Settlement Agreement) and certain claims and defenses of third parties thereto and (b) such other claims, assets and causes of action

which will be retained by the Debtors and/or the proceeds thereof, if any, distributed to creditors and/or equity interest holders pursuant to the Plan, and the claims and defenses of third parties thereto. On November 1, 2010, the Examiner published a report (the “Examiner’s Report”) concluding that the consideration to be paid to the Debtors’ estates pursuant to the Global Settlement Agreement, in the form of assets or releases to the Debtors, is reasonable. See Examiner’s Report, at pg. 1.

13. Tricadia is a party-in-interest and creditor in these Chapter 11 Cases and owns economic interests in greater than a majority of the outstanding face amount of CCB-2 Guarantee Claims (Class 15) under the Plan. In connection with the acquisition by Washington Mutual Bank (“WMB”) of Commerce Capital Bancorp and Hawthorne Financial Corporation, WMB ultimately became the successor issuer under a series of debt financings involving HFC Capital Trust I, CCB Capital Trust IV, CCB Capital Trust V, CCB Capital, Trust VI, CCB Capital Trust VII, CCB Capital Trust VIII, and CCB Capital Trust IX (collectively, the “Capital Trusts”). The Capital Trusts comprise approximately \$68,580,000 in aggregate principal amount of indebtedness. In connection with a merger and restructuring of WMI, on November 1, 2007, WMI entered into separate guarantees relating to each of the Capital Trusts. Upon the commencement of the Chapter 11 Cases, the holders of indebtedness issued by the Capital Trusts became the holders of unsecured guarantee claims against the Debtors (the “CCB-1 Guarantee Claims” and the “CCB-2 Guarantee Claims” and, collectively, the “CCB Guarantee Claims”).

BASIS FOR RELIEF

A. **Tricadia Seeks Limited Emergency Relief In Order to Preserve the Debtors' Ability to Utilize the Section 382(l)(5) Exception**

14. To preserve appropriate flexibility to maximize the use and value of the Debtors' Tax Attributes, Tricadia seeks *limited* relief that will enable the Court and the Debtors to closely monitor certain transfers of CCB Guarantee Claims against the Debtors and thereby retain the ability, if necessary, to preserve the Tax Attributes. Thus, Tricadia requests that the Court enter an order immediately, thereby preserving the status quo in this regard. Tricadia submits that if notice and hearing procedures regarding CCB Guarantee Claims against the Debtors are not imposed, unrestricted trading or transfers of CCB Guarantee Claims may severely limit the Debtors' ability to use their Tax Attributes, which are valuable assets of the Debtors' estates.

15. The Tax Attributes are of considerable value to the Debtors and their estates because the Debtors can carry forward their significant net operating losses (the "NOLs") to offset their future taxable income for up to twenty (20) taxable years², thereby reducing their future aggregate tax obligations and freeing up funds to meet everyday cash needs or make add-on acquisitions. Such NOLs may also be utilized by the Debtors to offset any taxable income generated by transactions completed during the Chapter 11 Cases.

16. Specifically, unrestricted trading of the CCB Guarantee Claims could adversely affect the Debtors' Tax Attributes if the beneficial ownership of any such claims currently held by "Qualified Creditors"³ is transferred, prior to consummation of a plan, and those claims (either

² See 26 U.S.C. §172.

³ Based on the Plan, it is possible but unlikely that a majority of common stock of the reorganized Debtors will be distributed to CCB Guarantee Claims. More importantly, because the Plan has not been confirmed and may be materially amended by the Debtor or a new plan of reorganization with substantially different terms than the Plan

alone or when accumulated with other claims currently held by non-qualified creditors) would be converted under a plan of reorganization into a five (5) percent or greater block of the stock of the reorganized Debtors.

B. The Debtors' Tax Attributes

17. The Debtors have incurred significant NOLs for U.S. federal income tax purposes. According to the Examiner's Report, the Debtors' current retained NOLs "include approximately **\$17.74 billion** of 2008 NOL carryforwards (remaining after the 2008 partial utilization of the approximately \$32.5 billion NOL for 2008 pursuant to the prior 2008 five-year refund claims), and a 2009 NOL carryforward of around **\$88 million**" (the "Existing NOLs") and, to the extent a worthless stock deduction is taken by the Debtors and the Effective Date occurs on or before December 31, 2010, as the Plan currently contemplates, "the WaMu Group would *again* be expected to report a **several billion dollar NOL** for 2010" (the "Future NOLs"). See Examiner's Report at p. 148. To the extent the Existing NOLs and Future NOLs can both be utilized (as the Examiner's Report suggests), the potential NOLs available to the Debtor could reach approximately \$23.0 billion. To the extent they cannot, the potential NOLs could range from approximately \$5.0 billion to \$18.0 billion. In any event, these numbers are enormous, and preservation of these retained NOLs (collectively, the "Tax Attributes") without annual limitations could translate into potential future tax savings for the Debtors of approximately \$1.8 billion to \$8.0 billion based on a federal income tax rate of thirty-five (35) percent. If these Tax Attributes are severely limited, however, the potential future tax savings amounts to a much

may ultimately be confirmed by the Court, it is entirely possible that all or a substantial portion of the common stock of the reorganized Debtor will ultimately be distributed to CCB Guarantee Claims.

lower \$120.0 million based on the Examiner Report's estimate of an annual \$6.2 million limitation (as described below).

18. Sections 39(a), 59(e) and 172(b) of the Internal Revenue Code permit corporations to carry forward Tax Attributes to offset future taxable income and tax liability, thereby significantly improving such corporations' cash position in the future. Thus, the Debtors' Tax Attributes are a valuable asset of the estates, and their availability could facilitate the Debtors' successful reorganization and serve to improve creditor recoveries. The Debtors' ability to use their Tax Attributes, however, could be severely limited under Section 382 of the Internal Revenue Code ("Section 382") as a result of the trading and accumulation of CCB Guarantee Claims against the Debtors prior to consummation of a plan of reorganization. The restrictions of Section 382 and their implications for the Debtors' value under the current Plan are described below.

C. The Section 382 Ownership Change Limitation

19. The general purpose of Section 382 is to prevent a company with taxable income from reducing its tax obligations by acquiring control of a company with tax losses. To achieve this objective, Section 382 limits the corporation's ability to use its NOLs and certain other Tax Attributes to offset future taxable income following an "ownership change". Generally, an "ownership change" occurs if the percentage (by value) of the stock of a corporation owned by one or more five-percent shareholders has increased by more than fifty percentage points over the lowest percentage of stock owned by such shareholders at any time during the three-year testing period ending on the date of the ownership change. Following an "ownership change," Section 382 limits the amount of a corporation's income that may be offset by its "pre-change losses" to an annual amount equal to the value of the equity of the corporation prior to the

ownership change multiplied by the long-term tax-exempt rate. See I.R.C. § 382(b). “Pre-change losses” would include (i) NOLs and (ii) any net unrealized built-in loss of the corporation (as defined in Section 382(h)(3)). Unfortunately, this formulaic limitation under Section 382 can severely restrict the ability to use “pre-change losses” because the value of the stock of a distressed company may be quite low.

20. For a corporation (or consolidated group) in bankruptcy that undergoes an ownership change pursuant to a confirmed bankruptcy plan, the fair market value of the stock of the corporation is generally determined immediately after (rather than before) the ownership change after giving effect to the discharge of creditors’ claims, but subject to certain adjustments. In no event, however, can the stock value for this purpose exceed the pre-change gross value of the corporation’s assets.

D. The Section 382(l)(5) Safe Harbor

21. Specifically, Section 382(l)(5) provides that a corporation that has not previously undergone an ownership change is not subject to the limitations imposed by Section 382 with respect to an ownership change resulting from consummation of a Chapter 11 plan, provided that under the plan, the debtor’s pre-change shareholders (i.e., persons or entities who owned the debtor’s stock immediately before the relevant ownership change) and/or Qualified Creditors (as described below) emerge from the reorganization owning at least fifty (50) percent of the total value and voting power of the debtor’s stock immediately after the ownership change (the “Section 382(l)(5) Safe Harbor”). See I.R.C. § 382(l)(5)(A).

22. Under I.R.C. § 382(l)(5)(E) and Treas. Reg. § 1.382-9, a creditor whose claim is exchanged for stock under a Chapter 11 plan should be a “Qualified Creditor” for Section 382

purposes if such claim either (i) has been owned by such creditor for eighteen (18) or more months prior to the date of filing of the bankruptcy petition or (ii) arose in the ordinary course of the Debtors' business and was at all times beneficially owned by such creditor. Creditors may also be classified as "Qualified Creditors," despite not satisfying the continuous ownership requirements under either (i) or (ii) of the preceding sentence, if such creditors meet the criteria set forth in the "de minimis" rule described below.

23. Under Treas. Reg. § 1.382-9(d)(3) (the "De Minimis Rule"), a debtor may, for purposes of the Section 382(l)(5) Safe Harbor, "treat indebtedness as always having been owned by the beneficial owner of the indebtedness immediately before the ownership change if the beneficial owner is not, immediately after the ownership change, either a five percent shareholder or an entity through which a five percent shareholder owns an indirect ownership interest" in the corporation. Such a claimholder will always be regarded as a Qualifying Creditor under the Section 382(l)(5) Safe Harbor unless the particular claim(s) that it holds both (a) did not arise in the ordinary course of the Debtor's business and (b) did not exist since a date that was eighteen (18) months before the filing of the bankruptcy petition.

E. The Debtors Assume That An Ownership Change Will Occur and That the Section 382(l)(5) Safe Harbor Will be Unavailable

24. Based on the Debtors' current and projected financial condition, it is anticipated that the Plan will distribute substantially all of the common stock of the reorganized Debtors to certain creditors of the Debtors in exchange for all or part of their claims. Accordingly, under any realistic plan scenario, the Debtors would as a result of the reorganization likely experience an "ownership change" for purposes of Section 382 because the percentage of stock that will be owned by creditors will have increased by more than fifty (50) points over the lowest percentage

of the stock of the Debtor held by such persons during the three-year testing period. See I.R.C. § 382(g)(1).

25. This conclusion appears to be confirmed by the Disclosure Statement. In the Disclosure Statement, the Debtors state that they expect to undergo an “ownership change” for purposes of Section 382, and consequently that the annual usage of Existing NOLs and the “pre-change” portions of Future NOLs will be severely limited using the Section 382(l)(6) exception. As noted above, the Examiner’s Report estimates that the annual limitation is approximately \$6.2 million and concludes that “[i]f the Effective Date occurs on or before December 31, 2010 ... the value to the Debtors of the Retained NOLs and the Stock Loss would not be very substantial ... The remaining unutilized Retained NOLs and the realized Stock Loss ... would both be subject to a very severe Section [382] annual limitation after the Effective Date such that they would effectively no longer be available.” See Examiner’s Report, at p. 148.

26. The Disclosure Statement makes clear that a certain exception to the “annual limitation rules generally applies where qualified (so-called ‘old and cold’) creditors of a debtor receive, in respect of their Claims, at least 50% of the vote and value of the stock of the reorganized debtor ... pursuant to a chapter 11 plan.” See Disclosure Statement, Part IX. The Debtors appear to be referring to the Section 382(l)(5) exception, as described below in more detail. Unfortunately, the Disclosure Statement concludes that “the Debtors do not anticipate that they would qualify for this exception.” Id., Part IX.

27. In addition, based on Exhibit C of the Disclosure Statement, it appears that (i) the Settlement Note Holders (as defined in the Plan) together owned, as of October 5, 2010, the vast majority of the Senior Subordinated Notes Claims (Class 3 of the Plan) and the PIERS Claims (Class 16 of the Plan). Moreover, based on the First Supplemental Verified Statement of Fried,

Frank, Harris, Shriver & Jacobson LLP Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure filed with the Court on May 17, 2010, it appears that none of the Settlement Note Holders' holdings in Class 3 and Class 16 under the Plan were acquired more than a few days prior to the Commencement Date. Taken together, these facts strongly suggest that to the extent a significant portion of value and voting power of the stock of the reorganized Debtor is provided to the Senior Subordinated Notes Claims and/or the PIERS Claims pursuant to a confirmed plan of reorganization, the Debtor is correct in assuming that the "old and cold" creditors test under Section 382(l)(5) will not be satisfied, the applicable Section 382(l)(5) exception will not be available and Tax Attributes will be severely limited as described above.

F. In Reality, the Section 382(l)(5) Safe Harbor May Still Utilized

28. Tricadia anticipates that to the extent a substantial portion of the stock of the reorganized Debtor is received by the CCB Guarantee Claims pursuant to a confirmed plan of reorganization, the Debtors will be exempt from the annual limitations set forth in Section 382 and outlined in the preceding section.

29. By establishing procedures for continuously monitoring trading in claims against the Debtors, the Court and the Debtors can preserve their ability to seek substantive relief at the appropriate time, particularly if it appears that trading of CCB Guarantee Claims against the Debtors may jeopardize the use of their Tax Attributes.

30. As noted above, on information and belief⁴, as of one day prior to the date of filing of this Motion, at least sixty-nine (69) percent of the CCB Guarantee Claims were owned by Original Par Holders who acquired their claims at least eighteen (18) months prior to the Commencement Date and therefore should constitute "Qualified Creditors" under the Section 382(l)(5) exception.

⁴ Which includes, among other things, direct conversations with certain holders of CCB Guarantee Claims.

Tricadia has no information that would lead it to conclude that the Original Par Holders do not continue to hold their CCB Guarantee Claims as of the date of the filing of this Motion, and therefore concludes that there is a strong possibility that they still do.

31. To the extent that the Plan, a modified version of the Plan or an entirely new plan of reorganization proposed by the Debtors, Tricadia or another party is ultimately confirmed and allocates a substantial portion of the value and voting power of the stock of the reorganized Debtor to the CCB Guarantee Claims, there is a strong likelihood that the Section 382(l)(5) Safe Harbor will be available to the Debtors and that the Debtors will be able to utilize all or a substantial portion of the Tax Attributes, subject to adjustments and deductions, free and clear of the severe annual limitations described above. Given the foregoing, Tricadia believes that preserving the availability of the Section 382(l)(5) exception is necessary to maximize the value of the Debtors' estates for the benefit of all stakeholders.

32. Although there can be no assurance that the section 382(l)(5) exception ultimately will be available to the Debtors, it is important that the Debtors preserve the *ability* to effect a plan of reorganization that would take advantage of the exception. Because the determination of whether a creditor is a "Qualified Creditor" under Section 382 depends on whether such creditor has held its claim until the effective date of the plan of reorganization, transfers of CCB Guarantee Claims by creditors before the effective date of a plan of reorganization in these Chapter 11 Cases pose an immediate threat to the Debtors' ability to satisfy the requirements of the Section 382(l)(5) exception.

33. Nevertheless, in such an event, as described more fully below, the Debtors may avail themselves of one of the special relief provisions applicable to an ownership change resulting from a confirmed Chapter 11 plan: Section 382(l)(5). Pursuant to this exception, Tricadia

anticipates that to the extent a substantial portion of the stock of the reorganized Debtor is received by CCB Guarantee Claims pursuant to a plan of reorganization, the Debtor will be exempt from the annual limitation set forth in Section 382. Tricadia believes that preserving this valuable option at this juncture is critical in maximizing the value of the estates.

34. The problem facing the Debtors, and the reason for this Motion and the request for emergency relief, is that the Debtors may not qualify for the special “in bankruptcy” rules of Section 382(l)(5) if too many CCB Guarantee Claim holders transfer their CCB Guarantee Claims prior to the effective date of a plan of reorganization. The Court and the Debtors need the ability to monitor, and possibly object to, changes in ownership of claims against the Debtors to preserve flexibility in implementing a plan of reorganization that qualifies under one of the special bankruptcy provisions and, thus, maximizes the Debtors’ ability to reduce federal income taxes by offsetting their income earned after reorganization with their existing Tax Attributes.

RELIEF REQUESTED

35. By this Motion, Tricadia requests, pursuant to Sections 105(a) and 362 of the Bankruptcy Code, entry of an order (the “Order”) authorizing the Debtors to establish notice and hearing procedures as set forth herein to protect and preserve the potential value of the Debtors’ Tax Attributes. The notice and hearing procedures would apply with respect to the CCB Guarantee Claims only, and the requirements would be effective *nunc pro tunc* to the date of the filing of this Motion. Parties would be notified through (i) publication of a notice, substantially in the form annexed hereto as Exhibit A (the “Procedures Notice”), which notice shall describe the notification requirements established in the Order. A copy of the Debtors’ proposed Order is annexed hereto as Exhibit B.

36. The relief requested herein has been narrowly tailored to impose the notice and hearing procedures *only* on CCB Guarantee Claim holders that own an aggregate dollar amount of claims that could be expected to fall outside of the De Minimis Rule and, thus, could jeopardize the Debtors' ability to satisfy the requirements of the Section 382(l)(5) Safe Harbor.

37. Although there can be no assurance that the Section 382(l)(5) Safe Harbor ultimately will be available to the Debtors, it is important that the Debtors preserve the ability to effect a plan of reorganization that would take advantage of that safe harbor. Because the determination of whether a creditor is a "Qualified Creditor" depends on whether such creditor has held its claim until the effective date of the plan of reorganization, transfers of claims by creditors before such date pose a threat to the Debtors' ability to satisfy the requirements of the Section 382(l)(5) Safe Harbor. The requested relief will ensure that the Debtors have maximum flexibility to implement a plan of reorganization that meets the requirements of Section 382(l)(5), and thereby preserve the Debtors' Tax Attributes to the fullest extent possible.

A. The Requested Relief Is Narrowly Tailored

38. The requested relief does not bar all trading of CCB Guarantee Claims against the Debtors. Specifically, Tricadia seeks to establish procedures enabling the Court and the Debtors to monitor those types of trading in CCB Guarantee Claims that pose a serious risk under the Section 382(l)(5) ownership change test, so as to preserve the Debtors' ability to seek substantive relief if it appears that a proposed trade of CCB Guarantee Claims will jeopardize the use of the Debtors' Tax Attributes. The procedures requested by Tricadia in this Motion would permit claims trading to continue.

B. Immediate Relief Is Necessary To Avoid Irreparable Harm To The Debtors

39. Tricadia requests that the Court enter an order granting the relief requested on an expedited basis. Once a Tax Attribute is limited under Section 382, its use is limited forever. Accordingly, the relief sought herein is necessary to avoid the potential irrevocable loss of the Tax Attributes and the irreparable harm which would be caused by unrestricted trading in CCB Guarantee Claims against the Debtors and the Debtors' resulting inability to offset taxable income freely with their Tax Attributes.

40. Moreover, absent granting the relief requested herein on an expedited basis, the Debtors could be irreparably harmed by the mere filing of this Motion. If Tricadia filed this Motion in accordance with the usual notice procedures set forth in the Bankruptcy Rules, Tricadia believes it is likely that a flurry of trading in CCB Guarantee Claims against the Debtors could immediately follow. Parties holding such claims might rush to transfer their claims before the restrictions on such trading are imposed by this Court. Such trading would put the Tax Attributes in jeopardy, as described above, and would therefore be counterproductive to Tricadia's objectives in seeking this relief. Accordingly, Tricadia requests that the procedures described herein be approved on an expedited basis.

41. Responses or objections, if any, to the relief requested in the Motion, may be made at the hearing noticed in the Notice of Motions and Hearing filed by Tricadia with the Court contemporaneously with this Motion.

42. Within three (3) business days of entry of the Order, the Debtors shall send the Procedures Notice to the Notice Parties (as defined below).

43. Until the Court enters the Order, any acquisition, disposition or other transfer of CCB Guarantee Claims as of the date of the Motion in violation of the procedures set forth herein shall be null and void *ab initio* as an act in violation of the automatic stay prescribed by Section 362 of the Bankruptcy Code and pursuant to this Court's equitable power prescribed in Section 105(a) of the Bankruptcy Code.

C. NOLs Are Property of the Debtors' Estate Entitled To Court Protection

44. Courts have uniformly held that a debtor's NOLs constitute property of the estate protected by Section 362 of the Bankruptcy Code and, as such, courts have the authority to implement certain protective measures to preserve the NOLs. The seminal case articulating this rule is *Official Committee of Unsecured Creditors v. PSS Steamship Co. (In re Prudential Lines, Inc.)*, 107 B.R. 832 (Bankr. S.D.N.Y. 1989), *aff'd*, 119 B.R. 430 (S.D.N.Y. 1990), *aff'd*, 928 F.2d 565 (2d Cir. 1991), *cert. denied* 502 U.S. 821 (1991). In *Prudential Lines*, the Bankruptcy Court for the Southern District of New York enjoined a parent corporation from taking a worthless stock deduction with respect to its wholly-owned debtor subsidiary on the grounds that allowing the parent to take such a deduction would destroy its debtor-subsubsidiary's NOLs. *Id.*, at 842. In issuing the injunction, the court held that "a debtor's potential ability to utilize NOLs is property of an estate" and that "the claiming of a worthless stock deduction is an exercise of control over a debtor's NOLs" and thus was properly subject to the automatic stay of Section 362 of the Bankruptcy Code. *Id.*, at 838-842.; see also *In re White Metal Rolling & Stamping Corp.*, 222 B.R. 417, 424 (Bankr. S.D.N.Y. 1998) ("It is beyond peradventure that NOL carrybacks and carryovers are property of the estate of the loss corporation that generated them."); *In re Southeast Banking Corp.*, No. 91-14561 BKC PGH, 1994 WL 1893513, at *3 (Bankr. S.D. Fla. July 21, 1994) (debtors' interest in their NOLs "constitutes property of the estate within the

scope of 11 U.S.C. § 541(a)(1) and is entitled to the protection of the automatic stay”). Since the Debtors’ NOLs are property of their estates, this Court has the authority under Section 362 of the Bankruptcy Code to enforce the automatic stay by restricting the transfer of debt securities in the Debtors that could jeopardize the existence of this valuable asset.

D. Provisions of the Proposed Order

45. To preserve the potential value of the Tax Attributes, Tricadia proposes the following notification requirements applicable to an acquisition or disposition of CCB Guarantee Claims effective *nunc pro tunc* to the date of filing of this Motion (the “Motion Date”):

- (a) Any person or entity (as defined in Treasury Regulations Section 1.382-3(a)) who qualifies, at any time on or after the filing date of this Motion, as a Substantial CCB Guarantee Claimholder shall file with the Court, and serve on the Debtors and counsel to the Debtors, a notice of such status, in the form attached to the Order as Exhibit B-1, on or before (A) five (5) calendar days after the date of entry of the Order or (B) five (5) calendar days after becoming a Substantial CCB Guarantee Claimholder.
- (b) Prior to effectuating any acquisition or other transfer of CCB Guarantee Claims that would result in (i) an increase in the dollar amount of CCB Guarantee Claims beneficially owned by a Substantial CCB Guarantee Claimholder, or (ii) a person or entity becoming a Substantial CCB Guarantee Claimholder (each a “Proposed CCB Guarantee Claims Acquisition Transaction”), such person, entity, or Substantial CCB Guarantee Claimholder (each a “Proposed CCB Guarantee Claims Transferee”) shall file with this Court, and serve on the Debtors and counsel to the Debtors, advance written notice (a “Notice of Proposed Transfer”), in the form attached to the Order as Exhibit B-2, of the intended transfer of CCB Guarantee Claims.
- (c) The Debtors shall have five (5) calendar days after receipt of a Notice of Proposed Transfer to file with this Court and serve on such Proposed CCB Guarantee Claims Transferee an objection to any Proposed CCB Guarantee Claims Acquisition Transaction described in the Notice of Proposed Transfer on the grounds that such transfer may adversely affect the Debtors’ ability to utilize their Tax Attributes. If the Debtors file an objection, such transaction will not be effective unless approved by a final and non-appealable order of this Court. If the Debtors do not object within such five (5) calendar day period, such transaction may proceed solely as set forth in the Notice of Proposed Transfer. Further transactions within the scope of this paragraph must be the subject of additional

notices as set forth herein, each with an additional five (5) calendar day waiting period.

- (d) Effective as of the Motion Date, and until further order of the Court to the contrary, any acquisition, disposition or other transfer of CCB Guarantee Claims in violation of the procedures set forth herein shall be null and void *ab initio* as an act in violation of the automatic stay under sections 362 and 105(a) of the Bankruptcy Code.
- (e) For purposes of this Motion and the Order, the following definitions shall apply:
 - (i) “Beneficial Ownership” of CCB Guarantee Claims shall be determined in accordance with applicable rules under Section 382 of the Internal Revenue Code and regulations promulgated thereunder, as if such rules applied to CCB Guarantee Claims in the same manner as they apply to equity except to the extent inconsistent with rules and regulations specifically applicable to the ownership of CCB Guarantee Claims.
 - (ii) “CCB Guarantee Claim” shall mean a guarantee claim against WMI as guarantor of the obligations of WMB as successor issuer under a series of debt financings involving HFC Capital Trust I, CCB Capital Trust IV, CCB Capital Trust V, CCB Capital, Trust VI, CCB Capital Trust VII, CCB Capital Trust VIII, and CCB Capital Trust IX.
 - (iii) “Substantial CCB Guarantee Claimholder” means a person or entity that beneficially owns, with respect to any CCB Guarantee Claims, a dollar amount of CCB Guarantee Claims of more than the Threshold Amount (as defined below).
 - (iv) “Threshold Amount” means \$3,000,000; and it is further
- (f) The Debtors, in consultation with the Creditors’ Committee (with a reasonable opportunity to consider a request), may waive, in writing, any and all notification procedures contained in this Motion.

46. Following entry of the Order, Tricadia proposes that the Debtors send the Procedures Notice, describing the authorized notification and hearing requirements (including the requested nunc pro tunc relief) to the following parties (the “Notice Parties”): (i) the United States Trustee for the District of Delaware; (ii) each of the Debtors’ twenty (20) largest unsecured creditors; (iii) the Office of Thrift Supervision; (iv) the Federal Deposit Insurance Corporation; (v) the Securities and Exchange Commission (the “SEC”); (vi) the Internal Revenue Service; (vii) counsel to JP Morgan Chase; (viii) counsel to Bank of New York Mellon; (ix) all parties who have requested notice in these Chapter 11 Cases; (x) counsel to Wilmington Trust Company

("WTC"), as Guarantee Trustee for CCB IV Capital Trust, CCB V Capital Trust, CCB VII Capital Trust and CCB VIII Capital Trust (collectively, the "WTC Capital Trusts"); (xi) counsel to Deutsche Bank Trust Company Americas ("DBTCA"); (xii) DBTCA, as Guarantee Trustee for CCB Capital Trust VI, CCB Capital Trust IX, HFC Capital Trust I and CCB IV Capital Trust (the "DBTCA Capital Trusts"); (xiii) any statutory committee appointed in the Chapter 11 Cases; and (xiv) all parties who file notices of transfers of claims under Bankruptcy Rule 3001.

47. Upon receipt of the Procedures Notice, the Debtors shall send the Procedures Notice to holders of CCB Guarantee Claims relating to the WTC Capital Trusts and DBTCA Capital Trusts. Upon receipt of the Procedures Notice, any person or entity, or any broker or agent acting on behalf of a holder of CCB Guarantee Claims who sells CCB Guarantee Claims against the Debtors in an aggregate principal amount of at least \$3,000,000 to another person or entity would be required to provide notification of the existence of the Order or its contents to such purchaser or any broker or agent acting on their behalf of such claims to the extent reasonably feasible. The Procedures Notice shall be posted on the website of the Debtors' claim agent, Kurtzman Carson Consultants, LLC, at <http://www.kccllc.net> (the "Website").

48. The above procedures constitute a sufficient and cost-effective way of providing notice of the procedures described above.

49. The foregoing notice procedures satisfy due process and the strictures of Bankruptcy Rule 9014 by providing the counterparties with notice and an opportunity to object and be heard at a hearing. See, e.g., In re Drexel Burnham Lambert Group, 160 B.R. 729, 733 (S.D.N.Y. 1993); In re Colo. Mountain Cellars, Inc., 226 B.R. 244, 246 (D. Colo. 1998). Furthermore, the proposed notice procedures protect the due process rights of the parties-in-interest without

unnecessarily exposing the Debtors' estates to unwarranted administrative expenses. Similar notice and objection procedures were approved in the cases cited above.

50. Entry of an order granting the relief requested herein shall be without prejudice to any person or entity that believes it is unjustifiably aggrieved by these restrictions and desires to transfer CCB Guarantee Claims from requesting relief from this Court at any time.

NOTICE

51. Notice of this Motion has been provided by facsimile, electronic transmission, overnight delivery or hand delivery to (i) the United States Trustee for the District of Delaware; (ii) each of the Debtors' twenty (20) largest unsecured creditors; (iii) the Office of Thrift Supervision; (iv) the Federal Deposit Insurance Corporation; (v) the SEC; (vi) the Internal Revenue Service; (vii) counsel to JP Morgan Chase; (viii) counsel to Bank of New York Mellon; (ix) all parties who have requested notice in these Chapter 11 Cases; (x) counsel to WTC, as Guarantee Trustee for CCB IV Capital Trust, CCB V Capital Trust, CCB VII Capital Trust and CCB VIII Capital Trust; (xi) counsel to DBTCA; (xii) DBTCA, as Guarantee Trustee for CCB Capital Trust VI, CCB Capital Trust IX, HFC Capital Trust I and CCB IV Capital Trust; (xiii) statutory committees appointed in these Chapter 11 Cases; and (xiv) all parties who file notices of transfers of claims under Bankruptcy Rule 3001. The Debtors submit that under the circumstances no further notice is necessary.

CONCLUSION

52. For the reasons set forth above, Tricadia respectfully submits that the relief requested herein will potentially play an integral role in the Debtors' success upon emergence from these Chapter 11 Cases, and there is an immediate need to establish the notice and hearing provisions

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

----- X	:	
<i>In re</i>	:	Chapter 11
	:	
	:	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., et al. ¹	:	
	:	(Jointly Administered)
Debtors.	:	
	:	Proposed Hearing Date:
	:	November 23, 2010 at 10:30 a.m. (EDT)
	:	
	:	Proposed Objection Deadline:
	:	At the Hearing
----- X	:	

NOTICE OF MOTIONS AND HEARING

PLEASE TAKE NOTICE that on November 16, 2010, various funds managed by Tricadia Capital Management, LLC (“Tricadia”), a creditor and party-in-interest in the chapter 11 cases (the “Chapter 11 Cases”) of Washington Mutual, Inc. (“WMI”) and WMI Investment Corp. (together with WMI, the “Debtors”) filed the **Motion of Tricadia Capital Management, LLC Pursuant to Sections 105(a) and 362 of the Bankruptcy Code For An Order Establishing Notice and Hearing Procedures For Trading in CCB Guarantee Claims** (the “Motion”) with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 (the “Court”).

PLEASE TAKE FURTHER NOTICE that Tricadia contemporaneously filed a Motion to Shorten with respect to the Motion (the “Notice Motion”) with the Court. The hearing date and the objection deadline set forth herein are consistent with the dates proposed in the Notice Motion. In the event the Court does not approve the dates proposed in the Notice Motion, Tricadia will file and serve a separate notice notifying all parties-in-interest of the revised hearing date and objection deadline.

PLEASE TAKE FURTHER NOTICE that pursuant to the Notice Motion, Tricadia proposes that a hearing with respect to the Motion be held on **November 23, 2010 at 10:30 a.m.**

¹The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

EXHIBIT A

PROPOSED PROCEDURES NOTICE

PLEASE TAKE FURTHER NOTICE that any objections to the Order shall be heard by the Court at the hearing scheduled for November 23, 2010, at 2:00 p.m. (Prevailing Eastern Time). If no objections are made at the hearing, or if all objections made at the hearing are withdrawn or overruled, the Order shall automatically become a final and non-appealable without further order of this Court.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Order, the following procedures have been approved by the Court and shall apply to holding and trading in CCB Guarantee Claims against the Debtors:

- (a) Any person or entity (as defined in Treasury Regulations Section 1.382-3(a) for purposes of this Section 4) who qualifies, on and after the date of filing of the Motion (the "Motion Date"), as a Substantial CCB Guarantee Claimholder shall file with this Court, and serve on the Debtors and counsel to the Debtors, a notice of such status, in the form attached hereto as Exhibit B-1, on or before (A) five (5) calendar days after the date of entry of this Order or (B) five (5) calendar days after becoming a Substantial CCB Guarantee Claimholder.
- (b) Prior to effectuating any acquisition or other transfer of claims that would result in (i) an increase in the dollar amount of CCB Guarantee Claims beneficially owned by a Substantial CCB Guarantee Claimholder, or (ii) a person or entity becoming a Substantial CCB Guarantee Claimholder (each a "Proposed CCB Guarantee Claims Acquisition Transaction"), such person, entity, or Substantial CCB Guarantee Claimholder (each a "Proposed CCB Guarantee Claims Transferee") shall file with this Court, and serve on the Debtors and counsel to the Debtors, advance written notice (a "Notice of Proposed Transfer"), in the form attached hereto as Exhibit B-2, of the intended transfer of claims.
- (c) The Debtors shall have five (5) calendar days after receipt of a Notice of Proposed Transfer to file with this Court and serve on such Proposed CCB Guarantee Claims Transferee an objection to any Proposed CCB Guarantee Claims Acquisition Transaction described in the Notice of Proposed Transfer on the grounds that such transfer may adversely affect the Debtors' ability to utilize their Tax Attributes. If the Debtors file an objection, such transaction will not be effective unless approved by a final and non-appealable order of this Court. If the Debtors do not object within such 5-day period, such transaction may proceed solely as set forth in the Notice of Proposed Transfer. Further transactions within the scope of this paragraph must be the subject of additional notices as set forth herein, each with an additional 5-day waiting period.
- (d) Effective as of the Motion Date, and until further order of the Court to the contrary, any acquisition, disposition or other transfer of CCB Guarantee Claims in violation of the procedures set forth herein shall be null and void *ab initio* as an act in violation of the automatic stay under sections 362 and 105(a) of the Bankruptcy Code.

For purposes of the Order, the following definitions shall apply:

- (i) "Beneficial Ownership" of CCB Guarantee Claims shall be determined in accordance with applicable rules under Section 382 of the Internal Revenue Code and regulations promulgated thereunder, as if such rules applied to CCB Guarantee Claims in the same

manner as they apply to equity except to the extent inconsistent with rules and regulations specifically applicable to the ownership of CCB Guarantee Claims.

- (ii) "CCB Guarantee Claim" shall mean a guarantee claim against Washington Mutual, Inc. as guarantor of the obligations of Washington Mutual Bank as successor issuer under a series of debt financings involving HFC Capital Trust I, CCB Capital Trust IV, CCB Capital Trust V, CCB Capital, Trust VI, CCB Capital Trust VII, CCB Capital Trust VIII, and CCB Capital Trust IX.
- (iii) "Substantial CCB Guarantee Claimholder" means a person or entity that beneficially owns, with respect to any CCB Guarantee Claims, a dollar amount of CCB Guarantee Claims of more than the Threshold Amount (as defined below).
- (v) "Threshold Amount" means an amount of CCB Guarantee Claims equal to \$3,000,000

PLEASE TAKE FURTHER NOTICE that, upon the request of any person, counsel to the Debtors, Weil, Gotshal & Manges LLP, will provide a form of each of the required notices described above.

PLEASE TAKE FURTHER NOTICE that a copy of the Order may be obtained from the Court's electronic filing system or at <http://www.kccllc.com>., or by making request upon Kurtzman Carson Consultants at (866) 381-9100.

FAILURE TO FOLLOW THE PROCEDURES SET FORTH IN THIS NOTICE SHALL CONSTITUTE A VIOLATION OF THE AUTOMATIC STAY PRESCRIBED BY SECTION 362 OF THE BANKRUPTCY CODE. ANY PROHIBITED PURCHASE, SALE, TRADE, OR OTHER TRANSFER OF CCB GUARANTEE CLAIMS AGAINST THE DEBTORS IN VIOLATION OF THE ORDER SHALL BE NULL AND VOID AB INITIO AND MAY BE PUNISHED BY CONTEMPT OR OTHER SANCTIONS IMPOSED BY THE COURT.

Dated: November____, 2010
[DEBTORS' COUNSEL]

EXHIBIT B
PROPOSED ORDER

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

----- X
In re : **Chapter 11**
 :
WASHINGTON MUTUAL, INC., et al.¹ : **Case No. 08-12229 (MFW)**
 :
Debtors. : **(Jointly Administered)**
 :
----- X

**ORDER UNDER 11 U.S.C. §§ 105 AND 362 AND FED R. BANKR. P. 3001
AND 3002 ESTABLISHING NOTICE AND HEARING PROCEDURES FOR
TRADING IN CCB GUARANTEE CLAIMS**

Upon the motion, dated November 16, 2010 (the “Motion”)² of various funds managed by Tricadia Capital Management, LLC for entry of an order (the “Order”) pursuant to Sections 105 and 362 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 3001 and 3002 of the Federal Rules of Bankruptcy Procedure establishing notice and hearing procedures for trading in CCB Guarantee Claims (as defined below); all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to Sections 105 and 362 of the Bankruptcy Code; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. Section 157(b); and venue being proper before this Court pursuant to 28 U.S.C. Sections 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their creditors and all parties in interest; and the Court having

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED that the Motion is GRANTED as set forth in this Order; and it is further

ORDERED that the provisions of this Order shall be effective, *nunc pro tunc*, to the date of the Motion; and it is further

ORDERED that all objections to the Motion not previously withdrawn are overruled; and it is further

ORDERED that any acquisition, disposition or other transfer of CCB Guarantee Claims in violation of the procedures set forth herein shall be null and void *ab initio* as an act in violation of the automatic stay under Sections 362 of the Bankruptcy Code and pursuant to this Court's equitable power prescribed in Section 105(a) of the Bankruptcy Code; and it is further

ORDERED that the following procedures shall apply to trading in CCB Guarantee Claims:

- (a) Any person or entity (as defined in Treasury Regulations Section 1.382-3(a)) who qualifies, on and after the date of filing of the Motion, as a Substantial CCB Guarantee Claimholder shall file with this Court, and serve on the Debtors and counsel to the Debtors, a notice of such status, in the form attached hereto as Exhibit B-1, on or before (A) five (5) calendar days after the date of entry of this Order or (B) five (5) calendar days after becoming a Substantial CCB Guarantee Claimholder.
- (b) Prior to effectuating any acquisition or other transfer of CCB Guarantee Claims that would result in (i) an increase in the dollar amount of CCB Guarantee Claims beneficially owned by a Substantial CCB Guarantee Claimholder, or (ii) a person or entity becoming a Substantial CCB Guarantee Claimholder (each a "Proposed CCB Guarantee Claims Acquisition Transaction"), such person, entity or Substantial CCB Guarantee Claimholder (each a "Proposed CCB Guarantee Claims Transferee") shall file with this Court, and serve on the Debtors and counsel to the Debtors, advance written notice (a "Notice of Proposed Transfer"), in the form attached hereto as Exhibit B-2, of the intended transfer of CCB Guarantee Claims.

- (c) The Debtors shall have five (5) calendar days after receipt of a Notice of Proposed Transfer to file with this Court and serve on such Proposed CCB Guarantee Claims Transferee an objection to any Proposed CCB Guarantee Claims Acquisition Transaction described in the Notice of Proposed Transfer on the grounds that such transfer may adversely affect the Debtors' ability to utilize their Tax Attributes. If the Debtors file an objection, such transaction will not be effective unless approved by a final and non-appealable order of this Court. If the Debtors do not object within such five (5) calendar day period, such transaction may proceed solely as set forth in the Notice of Proposed Transfer. Further transactions within the scope of this paragraph must be the subject of additional notices as set forth herein, each with an additional five (5) calendar day waiting period.
- (d) Effective as of the date of the Motion and until further order of the Court to the contrary, any acquisition, disposition or other transfer of a CCB Guarantee Claim in violation of the procedures set forth herein shall be null and void *ab initio* as an act in violation of the automatic stay under Sections 362 and 105(a) of the Bankruptcy Code.
- (e) For purposes of this Order, the following definitions shall apply:
- (i) "Beneficial Ownership" of CCB Guarantee Claims shall be determined in accordance with applicable rules under Section 382 of the Internal Revenue Code and regulations promulgated thereunder, as if such rules applied to CCB Guarantee Claims in the same manner as they apply to equity except to the extent inconsistent with rules and regulations specifically applicable to the ownership of CCB Guarantee Claims.
 - (ii) "CCB Guarantee Claim" shall mean a guarantee claim against Washington Mutual, Inc. as guarantor of the obligations of Washington Mutual Bank as successor issuer under a series of debt financings involving HFC Capital Trust I, CCB Capital Trust IV, CCB Capital Trust V, CCB Capital, Trust VI, CCB Capital Trust VII, CCB Capital Trust VIII, and CCB Capital Trust IX.
 - (iii) "Substantial CCB Guarantee Claimholder" means a person or entity that beneficially owns, with respect to any CCB Guarantee Claims, a dollar amount of CCB Guarantee Claims of more than the Threshold Amount (as defined below).
 - (iv) "Threshold Amount" means \$3,000,000; and it is further

ORDERED that upon receipt of the Procedures Notice, the Debtors shall send the Procedures Notice to holders of CCB Guarantee Claims relating to the WTC Capital Trusts and the DBTCA Capital Trusts. Upon receipt of the Procedures Notice, any person or entity, or any broker or agent acting on behalf of a holder of CCB Guarantee

Claims who sells CCB Guarantee Claims against the Debtors in an aggregate principal amount of at least \$3,000,000 to another person or entity shall be required to provide the Procedures Notice to such purchaser or any broker or agent acting on their behalf of such claims to the extent reasonably feasible; and it is further

ORDERED that nothing herein shall preclude any person or entity that desires to purchase or transfer any CCB Guarantee Claim from requesting relief from this Order in this Court subject to the Debtors' rights to oppose such relief; and it is further

ORDERED that any person or entity acquiring, disposing of or transferring CCB Guarantee Claims in violation of the notification procedures set forth herein shall be subject to such sanctions as the Court may consider appropriate pursuant to this Court's equitable powers prescribed in Section 105(a) of the Bankruptcy Code; and it is further

ORDERED that the notice substantially in the form annexed hereto as Exhibit B-3 is approved; and it is further

ORDERED that the Debtors, in consultation with the Creditors' Committee (with a reasonable opportunity to consider a request), may waive, in writing, any and all notification procedures contained in this Order; and it is further

ORDERED that the Debtors shall (1) serve notice of the entry of this Order, substantially in the form annexed hereto as Exhibit B-3 (the "Procedures Notice") setting forth the procedures authorized herein on the following parties (the "Notice Parties"): (i) the United States Trustee for the District of Delaware; (ii) each of the Debtors' twenty (20) largest unsecured creditors; (iii) the Office of Thrift Supervision; (iv) the Federal Deposit Insurance Corporation; (v) the Securities and Exchange Commission (the "SEC"); (vi) the Internal Revenue Service; (vii) counsel to JP Morgan Chase; (viii) counsel to Bank of New York Mellon;

(ix) all parties who have requested notice in these Chapter 11 Cases; (x) counsel to WTC, as Guarantee Trustee for CCB IV Capital Trust, CCB V Capital Trust, CCB VII Capital Trust and CCB VIII Capital Trust; (xi) counsel to DBTCA, as Guarantee Trustee for CCB Capital Trust VI, CCB Capital Trust IX, HFC Capital Trust I and CCB IV Capital Trust; (xii) each statutory committee appointed in the Chapter 11 Cases; and (xiii) all parties who file notices of transfers of claims under Bankruptcy Rule 3001 and (2) post the Procedures Notice on the website established by the Debtors' claim agent, Kurtzman Carson Consultants, LLC, at <http://www.kccllc.net>. Notice served pursuant to the preceding sentence shall be via first class mail, postage prepaid. No further notice of entry of this Order need be served by the Debtors; and it is further

ORDERED that notice of the Motion as provided therein shall be deemed good and sufficient notice of the Motion; and it is further

ORDERED that the requirements set forth in this Order are in addition to all applicable securities, corporate and other laws, and do not excuse compliance therewith; and it is further

ORDERED that this Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order; and it is further

ORDERED that the relief granted in this Order is intended solely to permit the Debtors to protect, preserve and maximize the value of their Tax Attributes. Accordingly, except to the extent the Order expressly conditions or restricts trading in CCB Guarantee Claims, nothing in this Order or in the Motion shall or shall be deemed to prejudice, impair or otherwise alter or affect the rights of any holders of CCB Guarantee Claims against the Debtors, including

in connection with the treatment of such CCB Guarantee Claims during the pendency of the Debtors' bankruptcy cases.

Dated: November ____, 2010
Wilmington, Delaware

HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B-1

Proposed Notice of Substantial CCB Guarantee Claimholder Status

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

	X		
	:		
<i>In re</i>	:		Chapter 11
	:		
WASHINGTON MUTUAL, INC., et al. ¹	:		Case No. 08-12229 (MFW)
	:		
Debtors.	:		(Jointly Administered)
	:		
	X		

NOTICE OF SUBSTANTIAL CCB GUARANTEE CLAIMHOLDER STATUS

PLEASE TAKE NOTICE that [Name of Filer] (the “Filer”) hereby provides notice (the “Notice”) that the Filer is a Substantial CCB Guarantee Claimholder of Claims against Washington Mutual, Inc. as Debtor in Case No. 08-12229, pending in the United States Bankruptcy Court for the District of Delaware.

PLEASE TAKE FURTHER NOTICE that the following table sets forth the following information:

1. In the case of CCB Guarantee Claims that are owned directly by the Filer, the table sets forth (i) the dollar amount of such CCB Guarantee Claims; and (ii) the date(s) on which such CCB Guarantee Claims were acquired.
2. In the case of CCB Guarantee Claims that are not owned directly by the Filer but are nonetheless beneficially owned by the Filer, the table sets forth (i) the name(s) of each record or legal owner of CCB Guarantee Claims that are beneficially owned (as defined below) by the Filer; (ii) the dollar amount of such CCB Guarantee Claims; and (iii) the date(s) on which such CCB Guarantee Claims were acquired.

Trust	Name of Owner	Dollar Amount Owned	Date(s) Acquired
[Identify trust]			
[Identify trust]			

(Attach additional page if necessary)

PLEASE TAKE FURTHER NOTICE that the taxpayer identification number of the Filer is _____.

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

PLEASE TAKE FURTHER NOTICE that, under penalties of perjury, the Filer hereby declares that it has examined this Notice and accompanying attachments (if any), and, to the best of its knowledge and belief, this Notice and any attachments which purport to be part of this Notice are true, correct and complete.

PLEASE TAKE FURTHER NOTICE that, pursuant to that Order Under 11 U.S.C. §§ 105 and 362 and Fed. R. Bankr. P. 3001 And 3002 Establishing Notice And Hearing Procedures For Trading In CCB Guarantee Claims Against The Debtors (Docket No. []), this Notice is being (a) filed with the Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor, Wilmington, Delaware 19801, and (b) served upon (i) the Debtors, c/o Alvarez & Marsal, 100 Pine Street, Suite 100, San Francisco, California 94111 (Attn: Bill Kosturos); (ii) Weil, Gotshal & Manges LLP, attorneys for the Debtors, 767 Fifth Avenue, New York, New York 10153 (Attn: Marcia Goldstein, Esq., Brian S. Rosen, Esq., and Michael F. Walsh, Esq.); (iii) Richards, Layton & Finger, One Rodney Square, 920 North King Street, Wilmington, Delaware 19801 (Attn: Mark D. Collins, Esq.); (iv) Simpson Thacher, 425 Lexington Avenue, New York, New York, 10017-3954 (Attn: Lee A. Meyerson, Esq. and Maripat Alpuche, Esq.); (v) Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, New York 10036 (Attn: Fred S. Hodara, Esq.); (vi) the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Joseph J. McMahon, Jr., Esq.); (vii) Arent Fox LLP, 1675 Broadway, New York, New York 10019 (Attn: Andrew I. Silfen, Esq., Leah M. Eisenberg, Esq.), counsel to Wilmington Trust; (viii) Emmet Marvin & Marvin LLP, 120 Broadway, 32nd Floor, New York, New York, 10271 (Attn: Christopher Murray, Esq.), counsel to Deutsche Bank Trust Company Americas; and (ix) Deutsche Bank Trust Company Americas, 60 Wall Street Trust & Securities Services, 27th Floor, MS NYC60-2720, New York, New York, 10005 (Attn: Mr. Stanley Burg). This Notice is given in addition to, and not as a substitute for, any requisite notice under Rule 3001 (e) of the Federal Rules of Bankruptcy Procedure.

For purposes of this Notice:

- (i) “Beneficial Ownership” of CCB Guarantee Claims shall be determined in accordance with applicable rules under Section 382 of the I.R.C. and regulations promulgated thereunder, as if such rules applied to CCB Guarantee Claims in the same manner as they apply to equity except to the extent inconsistent with rules and regulations specifically applicable to the ownership of CCB Guarantee Claims.
- (ii) “CCB Guarantee Claim” shall mean a guarantee claim against Washington Mutual, Inc. as guarantor of the obligations of Washington Mutual Bank as successor issuer under a series of debt financings involving HFC Capital Trust I, CCB Capital Trust IV, CCB Capital Trust V, CCB Capital, Trust VI, CCB Capital Trust VII, CCB Capital Trust VIII, and CCB Capital Trust IX.
- (iii) “Substantial CCB Guarantee Claimholder” means a person or entity that beneficially owns, with respect to any CCB Guarantee Claims, a dollar amount of CCB Guarantee Claims of more than the Threshold Amount (as defined below).
- (iv) “Threshold Amount” means an amount of CCB Guarantee Claims equal to \$3,000,000

[IF APPLICABLE] the Filer is represented by [name of the law firm], [address], [phone], (Attn: [name]).

Respectfully submitted,

[Name of Filer]

By:

Name:

Address:

Telephone:

Facsimile:

EXHIBIT B-2

Notice of Proposed Transfer

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

----- X
:
In re : **Chapter 11**
:
WASHINGTON MUTUAL, INC., et al.¹ : **Case No. 08-12229 (MFW)**
:
Debtors. : **(Jointly Administered)**
:
----- X

**NOTICE OF INTENT TO PURCHASE, ACQUIRE OR OTHERWISE
ACCUMULATE A CCB GUARANTEE CLAIM**

PLEASE TAKE NOTICE THAT [Name of Filer] (the “Filer”) hereby provides notice (the “Notice”) of (i) its intent to purchase, acquire or otherwise accumulate directly a CCB Guarantee Claim or CCB Guarantee Claims against Washington Mutual, Inc. (“WMI”), a debtor and debtors-in-possession (the “Debtor”) and/or (ii) a proposed purchase or acquisition of Claims that, following the proposed acquisition, would be beneficially owned by the Filer (any proposed transaction described in (i) or (ii), a “Proposed Transfer”).

PLEASE TAKE FURTHER NOTICE THAT, if applicable, on [Prior Date(s)], the Filer filed a Notice of Substantial CCB Guarantee Claimholder Status with the Court and served copies thereof on the Debtors and Debtors’ counsel.

PLEASE TAKE FURTHER NOTICE THAT the Filer is filing this notice as (select one):

- A Substantial CCB Guarantee Claimholder
- A person or entity that would, upon consummation of the Proposed Transfer, become a Substantial CCB Guarantee Claimholder

PLEASE TAKE FURTHER NOTICE THAT the following table sets forth the following information:

1. In the case of CCB Guarantee Claims that are owned directly by the Filer, the table sets forth (i) the dollar amount of such CCB Guarantee Claims; and (ii) the date(s) on which such CCB Guarantee Claims were acquired.
2. In the case of CCB Guarantee Claims that are not owned directly by the Filer but are nonetheless beneficially owned by the Filer, the table sets forth (i) the name(s) of each

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

record or legal owner of CCB Guarantee Claims that are beneficially owned (as defined below) by the Filer; (ii) the dollar amount of such CCB Guarantee Claims (by trust); and (iii) the date(s) on which such CCB Guarantee Claims were acquired.

Trust	Name of Owner	Dollar Amount Owned	Date(s) Acquired
[Identify trust]			
[Identify trust]			

(Attach additional page if necessary)

PLEASE TAKE FURTHER NOTICE THAT if the Proposed Transfer involves a purchase or acquisition of CCB Guarantee Claims directly by the Filer and such Proposed Transfer would result in

- (i) an increase in the dollar amount of CCB Guarantee Claims beneficially owned by a Substantial CCB Guarantee Claimholder (other than the Filer);
- (ii) or a person or entity (other than the Filer) becoming a Substantial CCB Guarantee Claimholder, the following table sets forth
 - a. the name of each such person or entity;
 - b. the dollar amount of CCB Guarantee Claims (by trust) that are beneficially owned by such person or entity prior to the Proposed Transfer;
 - c. the dollar amount of CCB Guarantee Claims (by trust) that would be beneficially owned by such person or entity immediately following the Proposed Transfer; and
 - d. the date(s) of the Proposed Transfer:

Trust	Name of Owner	Dollar Amount Currently Owned	Dollar Amount to be Acquired	Date(s) of Proposed Transfer
[Identify trust]				
[Identify trust]				

(Attach additional page if necessary)

PLEASE TAKE FURTHER NOTICE THAT the taxpayer identification number of the Filer is _____.

PLEASE TAKE FURTHER NOTICE that, under penalties of perjury, the Filer hereby declares that it has examined this Notice and accompanying attachments (if any), and, to the best of its knowledge and belief, this Notice and any attachments which purport to be part of this Notice are true, correct and complete.

PLEASE TAKE FURTHER NOTICE that, pursuant to that Order Under 11 U.S.C. §§ 105 and 362 and Fed. R. Bankr. P. 3001 And 3002 Establishing Notice And Hearing Procedures For Trading In CCB Guarantee Claims Against The Debtors (Docket No. []), this Notice is being (a) filed with the Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor,

Wilmington, Delaware 19801, and (b) served upon (i) the Debtors, c/o Alvarez & Marsal, 100 Pine Street, Suite 100, San Francisco, California 94111 (Attn: Bill Kosturos); (ii) Weil, Gotshal & Manges LLP, attorneys for the Debtors, 767 Fifth Avenue, New York, New York 10153 (Attn: Marcia Goldstein, Esq., Brian S. Rosen, Esq., and Michael F. Walsh, Esq.); (iii) Richards, Layton & Finger, One Rodney Square, 920 North King Street, Wilmington, Delaware 19801 (Attn: Mark D. Collins, Esq.); (iv) Simpson Thacher, 425 Lexington Avenue, New York, New York, 10017-3954 (Attn: Lee A. Meyerson, Esq. and Maripat Alpuche, Esq.); (v) Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, New York 10036 (Attn: Fred S. Hodara, Esq.); (vi) the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Joseph J. McMahon, Jr., Esq.); (vii) Arent Fox LLP, 1675 Broadway, New York, New York 10019 (Attn: Andrew I. Silfen, Esq., Leah M. Eisenberg, Esq.), counsel to Wilmington Trust; (viii) Emmet Marvin & Marvin LLP, 120 Broadway, 32nd Floor, New York, New York, 10271 (Attn: Christopher Murray, Esq.), counsel to Deutsche Bank Trust Company Americas, and (ix) Deutsche Bank Trust Company Americas, 60 Wall Street Trust & Securities Services, 27th Floor, MS NYC60-2720, New York, New York, 10005 (Attn: Mr. Stanley Burg). This Notice is given in addition to, and not as a substitute for, any requisite notice under Rule 3001 (e) of the Federal Rules of Bankruptcy Procedure.

PLEASE TAKE FURTHER NOTICE that the Filer hereby acknowledges that if the Proposed Transfer is not approved in writing by the Debtors within five (5) business days after the filing of this Notice, such Proposed Transfer shall be deemed rejected and will not be effective ab initio. If the Debtors provide written authorization approving the Proposed Transfer prior to the end of such five (5) business day period, then such Proposed Transfer may proceed solely as specifically described in this Notice.

PLEASE TAKE FURTHER NOTICE that any further transactions that may result in the Filer increasing its beneficial ownership of CCB Guarantee Claims will each require an additional notice filed with the Court to be served in the same manner as this Notice. This Notice is given in addition to, and not as a substitute for, any requisite notice under Rule 3001 (e) of the Federal Rules of Bankruptcy Procedure.

For purposes of this Notice:

- (i) “Beneficial Ownership” of CCB Guarantee Claims shall be determined in accordance with applicable rules under Section 382 of the I.R.C. and regulations promulgated thereunder, as if such rules applied to CCB Guarantee Claims in the same manner as they apply to equity except to the extent inconsistent with rules and regulations specifically applicable to the ownership of CCB Guarantee Claims.
- (i) “CCB Guarantee Claim” shall mean a guarantee claim against Washington Mutual, Inc. as guarantor of the obligations of Washington Mutual Bank as successor issuer under a series of debt financings involving HFC Capital Trust I, CCB Capital Trust IV, CCB Capital Trust V, CCB Capital, Trust VI, CCB Capital Trust VII, CCB Capital Trust VIII, and CCB Capital Trust IX.
- (ii) “Substantial CCB Guarantee Claimholder” means a person or entity that beneficially owns, with respect to any CCB Guarantee Claims, a dollar amount of CCB Guarantee Claims of more than the Threshold Amount (as defined below).

(iii)“Threshold Amount” means the amount of Claims equal to \$3,000,000

[IF APPLICABLE] the Filer is represented by [name of the law firm], [address].
[phone]. (Attn: [name]).

Respectfully submitted,

[Name of Filer]

By:

Name:

Address:

Telephone:

Facsimile:

Date: _____

EXHIBIT B-3

Proposed Notice Procedures

(attached to Proposed Order)

CERTIFICATE OF SERVICE

I, Donna L. Harris, hereby certify that on November 16, 2010, copies of the *Entry of Appearance and Request for Notice of Papers* was served via first class mail upon the parties listed on the attached matrix.

/s/ Donna L. Harris

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