FILED
2011 MAY 12 AM 10:42
CLERK
US BANKRUPTCY COURT
DISTRICT OF DELAWARE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Chapter 11:

Washington Mutual, Inc.	Case Number:	08-12229 (MFW)
Debtors	Hearing Date:	06/06/2011
	Objection Deadline:	05/13/2011

STEPHEN O'GRADY'S OBJECTION TO CONFIRMATION OF DEBTORS CHAPTER 11 MODIFIED 6TH PLAN OF REORGANIZATION DATED MARCH 25, 2011

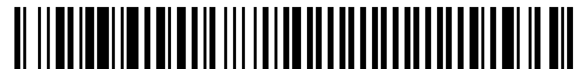
Your Honor,

As a preferred shareholder of Washington Mutual, Inc. I have standing to file this objection to the current plan of reorganization submitted by the debtors in possession in case No. D8-12229.

Background:

There have been 2 recent bankruptcy court decisions involving claims by the FDIC against 2 different banking holding companies. The judgments have direct significance in regards to the FDIC's and JP Morgan Chase's (JPM) claims against the estate assets of Washington Mutual, Inc. (WMI). As the court knows, in the 6th amended plan of reorganization, the debtors in possession have awarded the FDIC and JPM a significant portion of the net operating loss (NOL) refunds WMI has or is due to receive from the IRS that resulted from pre-petition operating losses and subsequent write offs due to the pre-petition loss of value of the shares of Washington Mutual Bank (WMB). (Exhibit F)

It is my contention that the FDIC or JPM have no direct or derivative pre-petition or post petition claims against the estate and their claims in the amended plan of reorganization should be denied. My objection is based on the 2 recently decided bankruptcy court opinions which legitimizes the premise that FDIC and JPM claims have no standing and should, in fact, are violations of the Federal Bankruptcy Code. The legal basis of my objection is supported by 2 sources: the precedent established by the 2 court cases and the direct evidence from the FDIC and JPM that they do not have any pre-petition or post petition debts against the estate of WMI.


0812229110513000000000024

Discussion of the Legal Support for this Objection

The first court case is the opinion rendered by the Honorable Judge Dwight H. Williams of the U.S. Bankruptcy Court of the Middle District of Alabama on September 1, 2010. (Case no. 09-3803) In this ruling the court denied the FDIC's request for summary judgment for a set off claim of the demand deposit accounts also claimed by the debtors in possession of the holding company of Colonial Bankcorp. The court concluded that the FDIC had no set off right to these accounts because the FDIC could not show that it had incurred a pre petition debt against the estate and thus its claim was barred by the automatic stay provision of the Federal Bankruptcy code. The court further stated that a pre-petition memorandum of understanding and cease and desist order contained no specific instructions to Colonial for capital maintenance and thus section 11U.S.C. 365 did not apply and the FDIC could not show it had a pre-petition claim (see exhibit A, B).

This ruling is pertinent to the WMI chapter 11 Case because the FDIC, just like in the Colonial case, has shown this court no evidence that they have a pre-petition debt claim against the estate currently controlled by the parent holding company of Washington Mutual. To support this assertion I have included information regarding the MOU and cease and desist order sent to WMI by the Office of Thrift Supervision (OTS) pre-petition and in neither is there a specific order for capital maintenance that I can discern. (Exhibits D, E and J)

One last but important opinion that came out of the Colonial Bankcorp ruling was that the court felt the FDIC did not have jurisdiction over the holding company either pre or post petition and that the Federal Reserve Board had the authority of regulatory oversight for the holding company. I assert the same opinion applies to the holding company of Washington Mutual.(Exhibit A)

The second court case I cite in support of my objection is the opinion rendered in the Kansas District Bankruptcy Court, case 09-10926 on September 10, 2010. The court essentially denied the FDIC's claim against the NOL carryback of the petioner of that Chapter 11 Case, Team Financial, Inc. The court opined that the carrybacks belonged to the estate even if there was a pre-petition tax sharing agreement and therefore the FDIC did not have a claim derived from the banking subsidiary that was placed into FDIC receivership. The court indicated, in my opinion, that if a subsidiary of the holding company had a claim on the NOL carrybacks then the subsidiary could make a claim directly with the court. I am under the impression that none of the subs of WMI have made such a claim with Your Honors court against WMI's NOL carrybacks. This would indicate that if the opinion of the Kansas District Bankruptcy case were applied to this case the FDIC has no standing to file a derivative claim for the NOL refunds on the behalf of the subsidiary in question, WMB. (see Exhibit D, E, J)

Lastly, it should be obvious to this Court that the FDIC (either receiver or corporate) or JPM have ever shown that they incurred a pre-petition or post petition debt claim on the WMI estate. In support of this opinion, I would direct the Court's attention to the FDIC Chairman's own words that the seizure and sale of Washington Mutual Bank cost her

agency's insurance fund nothing (Exhibits H, I and G - pg. 365, 366 of the Financial Crisis Inquiry Committee Report). Neither has a review of JPM's quarterly financial statements shown a loss attributable to their acquisition of Washington Mutual Bank deposits or assets. They have however shown trends of increasing JPM profits since their acquisition of WMB's assets.

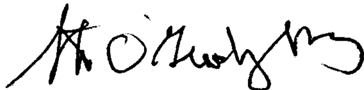
Conclusion:

I feel strongly that the bankruptcy court opinions I have cited support my contention that the FDIC or JPM via derivative actions have shown the Court any evidence that they have any legitimate claims against the estate of WMI. I further assert that this lack of standing results in the debtors' plan of gifting assets to JPM and the FDIC places in violation of the Automatic Stay Provision of the Federal Bankruptcy code thus necessitating the Court's denial of their Plan of Reorganization. Furthermore, without legal standing the awarding of assets to these two entities constitutes a fraudulent conveyance which further supports the conclusion that the debtors Plan of Reorganization should be denied. I further assert that the Boli-Coli assets would be bound by the same sourced court opinions and the Federal Bankruptcy Code requires they also should remain with the estate...if we can ever actually figure out who is in possession of these assets so they can be returned.

As an aside, I would like to draw your Honor's attention to the difference in the way the Debtors and their Counsel actively pursued their responsibilities to maximize the estates' value in the respective cases I cited and how the Debtors in possession and their legal Counsel in THIS case have not only NOT aggressively pursed potential estate value but have turned over assets uncontested to parties who, in my opinion, have no standing in this bankruptcy case as legitimate creditors. The contrast is striking and it is very troubling to a non-legal expert such as myself that the Chapter 11 Case of Washington Mutual has been turned into an expensive, bizarre shell game by certain deep-pocketed, entities armed with large armies of attorneys who seemingly wish to hide assets from this Court and shareholders and exhaust their opponents into submission.

I thank the Court for its time

Stephen L. O'Grady
Ada, Oklahoma



Exhibits may be viewed on file with the Delaware District Court, 824 N. Market Street #500, Wilmington, DE 19801-4908, Presiding Judge the Honorable Mary Walrath.

Copies of Objection sent to the following via mail:

Charles E. Smith, Esquire
WASHINGTON MUTUAL, INC.
925 Fourth Avenue
Seattle, WA 98104

Jane Leamy, Esquire
THE OFFICE OF THE UNITED STATES TRUSTEE
FOR THE DISTRICT OF DELAWARE
844 King Street, Suite 2207
Lockbox 35
Wilmington, DE 19899-0035

Brian S. Rosen, Esquire
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

Fred S. Hodara, Esquire
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
New York, NY 10036

Mark D. Collins, Esquire
RICHARDS LAYTON & FINGER P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19899

David B. Stratton, Esquire
PEPPER HAMILTON LLP
Hercules Plaza - Suite 5100
1313 N. Market Street
Wilmington, DE 19801

Peter Calamari, Esquire
QUINN EMANUEL URQUHART & SULLIVAN, LLP
55 Madison Avenue, 22nd Floor
New York, NY 10010

William P. Bodwen, Esquire
ASHBY & GEDDES, P.A.
500 Delaware, 8th Floor
P. O. Box 1150
Wilmington, DE 19899

Stephen D. Susman, Esquire
SUSMAN GODFREY, L.L.P.
654 Madison Avenue, 5th Floor
New York, NY 10065

Stacey R. Friedman, Esquire
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498

Adam G. Landis, Esquire
LANDIS RATH & COBB LLP
P. O. Box 2087
919 Market Street, Suite 1800
Wilmington, DE 19899

Justin A. Nelson, Esquire
SUSMAN GODFREY, L.L.P.
1201 Third Avenue, Suite 3800
Seattle, WA 98101

Exhibit A

FDIC TAKES A HIT: THE REGULATOR'S 365(O) CLAIM IN COLONIAL BANCGROUP'S BANKRUPTCY FAILS

By Peter C. Bergan[1]
Miller, Canfield, Paddock and Stone, PLC
bergan@millercanfield.com

In a September 1, 2010 opinion, Judge Dwight H. Williams, Jr., of the U.S. Bankruptcy Court of the Middle District of Alabama, rejected the FDIC's claim that it is owed more than $900 million from Colonial Bancgroup in the former bank holding company's chapter 11 bankruptcy. Colonial Bank's failure in 2009 was, along with that of IndyMac, one of the largest that year. In the months preceding its closure, Colonial Bank's former parent had entered into a variety of formal and informal agreements with several banking regulators stating that it would "assist" Colonial Bank in achieving or maintaining certain capital requirements. The Court held, however, that none of the agreements constituted binding commitments to Colonial Bank's primary federal regulator under §365(o) of the Bankruptcy Code. As a result, FDIC's claim for priority was denied, entitling the FDIC to receive only a pro rata distribution with the other general unsecured creditors. The FDIC filed an appeal on September 13, 2010.

BACKGROUND

Prior to its bankruptcy, The Colonial Bancgroup, Inc. (the "Debtor") was a bank holding company whose primary asset was Colonial Bank (the "Bank"). On June 30, 2009, the Debtor had $20 billion of deposits and assets in excess of $25 billion. After the Bank was closed and its branches and deposits were turned over to BB&T Corp., the Debtor listed assets of $45 million and liabilities of $380 million. The Debtor and its bank subsidiary had lost nearly $2 billion in 2008 and 2009 due in large part to defaults on loans to Florida builders and developers. Moreover, the Debtor provided substantial funding to Taylor, Bean & Whitaker Mortgage Corp., the nation's 12th largest home lender, which filed for bankruptcy on the same day as the Debtor.[2]

About a year before the Debtor's bankruptcy, in June 2008, the Bank converted itself from a national bank to an Alabama state-chartered, non-member bank (switching back to state regulation: some years before it had converted *from* a state bank to become a national bank). Because of the Bank's conversion, its state regulator became the Alabama State Banking Department ("ASBD"), and its primary federal regulator became the FDIC.

In a letter dated October 9, 2008, the FDIC and the ASBD notified Colonial Bank that they were downgrading the Bank's composite rating to a "3", due to declining asset quality and the results of targeted examinations since the conversion. Shortly thereafter, in November 2008,

---

[1] The views and opinions in this article are entirely the author's and not those of Miller, Canfield, Paddock and Stone or any of its clients.

[2] *See* Steven Church & Edvard Petterson, *Colonial Bancgroup Seeks Bankruptcy Amid U.S. Criminal Probe*, BLOOMBERG, August 26, 2009.

Exhibit A

the Federal Reserve Board informed the Debtor that, because of the Bank's recent ratings downgrade, the Debtor was no longer in compliance with the requirement that the Debtor maintain the Bank in a "well-capitalized" and "well-managed" condition in order to continue to qualify as a "financial holding company."[3]

In December 2008, the Bank entered into a "Memorandum of Understanding" with the FDIC (the "Bank MOU") in which the Bank agreed to "move in good faith to comply with the requirements of the [Bank MOU] and eliminate the problems of the Bank." The Bank MOU required that the Bank obtain a Tier 1 Leverage Capital ratio of not less than 8% and a Total Risk-Based Capital ratio of not less than 12%. Similarly, a month later, in January 2009, the Debtor and the Federal Reserve executed an "Agreement Under the Bank Holding Company Act" (the "4(m) Agreement") in which the Debtor agreed, among other things, to "tak[e] steps designed to ensure that the Bank complies with the [Bank MOU], and any other supervisory action regarding the Bank...during the term of this agreement."[4]

Only a couple of weeks later, the Debtor signed a separate memorandum of understanding (the "Debtor MOU") with the Federal Reserve. It is important to note here that the FDIC was not a party to the Debtor MOU. The Debtor MOU was an undertaking "in good faith" to "utilize its financial and managerial resources to assist its subsidiary bank." The Debtor MOU, though, specifically stated that it is "not a 'written agreement' for the purposes of section 8 of the Federal Deposit Insurance Act." Importantly, the Debtor MOU did not expressly require the Debtor to either infuse capital into the Bank or otherwise guarantee or pledge any assets to secure any Bank deficiency. The Debtor MOU did call for the Debtor to assist the Bank in complying with the Bank's memorandum of understanding with the FDIC; that is, the Debtor was asked to assist the Bank in achieving the target capital ratios described in the Bank MOU.

The regulators' actions escalated from informal to formal when the FDIC issued a cease and desist order with respect to the Bank (the "Bank C&D") on June 15, 2009. The Bank C&D formalized the terms of the Bank MOU, requiring the Bank to achieve the target capital ratios by September 30, 2009. And about a month later, the Debtor consented to the issuance of a cease and desist order (the "Debtor C&D") issued by the Federal Reserve and the Alabama State Banking Department. The Debtor C&D directed the Debtor to "take appropriate steps" to ensure the Bank complied with the Bank C&D. Notably, the Debtor C&D required the Debtor to submit a capital plan that would address the requirements of section 225.4(a) of Regulation Y that the Debtor serve "as a source of strength to the Bank " and also required the Debtor to notify the Federal Reserve and the ASBD after the end of any quarter in which its own capital ratios, or those of Colonial Bank, fell below the plan's minimum ratios, and to include with the notification "an acceptable written plan that details the steps Bancgroup will take to increase its and/or the Bank's capital ratios above the plan's minimums."

---

[3] *See* 12 C.F.R. § 225.81(b)(1).

[4] The 4(m) Agreement was called for by section 4(m) of the Bank Holding Company Act, which requires bank holding companies that fail to maintain compliance with the requirements for financial holding company status to execute an agreement with the Federal Reserve to comply with such requirements. 12 U.S.C. § 1843(m)(2).

Exhibit A

Despite their efforts[5], neither the Bank nor the Debtor was able to raise enough capital to satisfy the regulators, and on August 14, 2009 the ASBD closed the Bank and appointed the FDIC as receiver for the Bank. On August 25, 2009, The Colonial Bancgroup, Inc. filed for Chapter 11 bankruptcy in the United States Bankruptcy Court of the Middle District of Alabama.[6]

THE BANKRUPTCY CASE

About three months after the Debtor's bankruptcy filing, the FDIC filed a motion in the case to require the Debtor to immediately cure the large deficit[7] under an alleged commitment to maintain the capital of the Bank or, in the alternative, to convert the case to a chapter 7 liquidation. The Court's task, therefore, was to decide whether any of the various agreements between the Debtor, the Bank, and the regulators constituted a "commitment to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of" Colonial Bank within the meaning of section 365(o) of the Bankruptcy Code, 11 U.S.C. § 365(o).

Regulatory Framework

Because of the myriad of entities and regulators, as well as formal and informal actions, it may be useful to briefly describe some aspects of banking regulation as they apply to this case. The Debtor, as a bank holding company, was subject to regulation by the Board of Governors of the Federal Reserve System. The Bank, a state-chartered nonmember bank, was subject to the regulation at the federal level by the FDIC. The FDIC, the entity that filed the motion, is the primary federal regulator of state-chartered banks that do not elect to become members of the Federal Reserve System.

A key distinction in this case is that between informal and formal supervisory actions. Informal actions, such as the Debtor MOU, are "not enforceable" and their violation cannot serve as a basis for assessing a civil money penalty or initiating a removal and prohibition action. Generally, "[i]nformal supervisory tools are used when circumstances warrant a less severe form of action than the formal supervisory actions." Informal actions are neither published nor generally publicly available.[8] Federal regulators typically use these MOUs "when they do not

---

[5] According to testimony of Sarah Moore, the Debtor's CFO, the Debtor's application for TARP funds had been approved contingent upon additive capital of $300 million. Looking to receive $533 million in TARP funds, the Debtor contributed securities, loans, and cash to the Bank in the amount of $134 million. The Debtor worked with Taylor, Bean & Whitaker, as well as Promontory Financial Group in ultimately unsuccessful efforts to raise additional capital.

[6] *In re The Colonial Bancgroup, Inc.*, Case No. 09-32303 (Bankr. M.D. Alabama 2009).

[7] At the time of filing, the FDIC calculated the deficit at $904,954,360.

[8] *See* BD. OF GOVERNORS OF FED. RESERVE SYS., COMMERCIAL BANK EXAMINATION MANUAL §5040.1 at p.6; see also, FDIC Compliance Examination Manual §II-8.1 (June 2009).

Exhibit A

perceive the identified weakness as being an immediate threat to the safety and soundness of the bank."[9]

Formal actions, on the other hand, are enforceable and are required to be both published and made public.[10] Cease and desist orders, which constitute a formal action, are generally used when the regulator finds that the entity has or will engage in a serious violation of law or regulation; or where the entity has engaged or is about to engage in some unsafe or unsound practice in conducting the business of the institution.[11]

The FDIC's 365(o) Motion

The FDIC's motion to cure the deficit under the alleged capital commitment was made under section 365(o) of the Bankruptcy Code. Generally, 11 U.S.C. § 365 addresses a bankruptcy trustee's rights and responsibilities regarding the assumption or rejection of a debtor's executory contracts and unexpired leases. Section 365(o), however, creates an exception to the trustee's powers to reject burdensome executory agreements by *requiring* assumption of a capital maintenance commitment.[12] This section seeks to "prevent institution-affiliated parties from using bankruptcy to evade commitments to maintain capital reserve requirements of a Federally insured depository institution."[13] Specifically, section 365(o) states that:

> In a case under Chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under

---

[9] *See* James M. Rocket, *Confronting a Regulatory Crisis: A View From the Trenches During Troubled Times*, 126 BANKING L.J. 307, 311 (April 2009).

[10] COMMERCIAL BANK EXAMINATION MANUAL §5040.1, *supra* note 8 at pp. 1-2.

[11] *Id.* at pp. 1-5.

[12] *See Wolkowitz v. FDIC (In re Imperial Credit Industries, Inc.)*, 527 F.3d 959, 975 (9th Cir. 2008).

[13] *Resolution Trust Corp. v. Firstcorp, Inc. (In re Firstcorp)*, 973 F.2d 243, 246 (4th Cir. 1992) (quoting H.R.Rep. No. 681(I), 101st Cong., 2d Sess. 179 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6585) (Congress enacted 365(o) to prevent a bank holding company that has committed to maintain the capital of its depository institution subsidiary from using Chapter 11 "to jettison the subsidiary in an effort to enhance its own financial position and that of its creditors." *In re Firstcorp*, 973 F.2d at 248).

Exhibit A

section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such agency.[14]

In this case, if the Court had granted the FDIC's 365(o) motion, the Debtor would have been required to cure the large deficit immediately. However, because the Debtor would have been unable to do so, the case would likely have been converted to a chapter 7 liquidation,[15] the FDIC would have been entitled to a priority claim under §507(a)(9), and the FDIC would ultimately have benefited from a ninth priority under section 507, leaving lower priority unsecured claimants of about $400 million out of luck. The Court, however, held that the arguments raised in the FDIC's 365(o) motion were unpersuasive, entitling the FDIC to only a pro rata distribution of the Debtor's remaining assets with the other general unsecured creditors.

The Court's Decision

The Bankruptcy Court ultimately held that the Debtor did not make a commitment to a federal depository institutions regulatory agency to maintain the capital of the Bank under § 365(o); and, even had the Debtor made such a commitment, that § 365(o) did not apply to such a commitment because the Bank was no longer operating on the date of the bankruptcy petition.

The Court made its decision by analyzing the content and context of the three agreements involving the Debtor: the 4(m) Agreement, the Debtor MOU, and the Debtor C&D. The Court found that the documents did not require the Debtor to comply on behalf of the Bank or impose any sort of liability on the Debtor in the event the Bank failed to reach the required capital ratios. According to the Court, the language in the documents merely required the Debtor to "assist" the Bank in reaching its goals.

The Debtor C&D

The FDIC's strongest argument was based on the language of the Debtor C&D. The Debtor C&D, which, unlike the Debtor MOU, was a formal enforceable action, required the Debtor, under a paragraph titled "Source of Strength," to "take appropriate steps to ensure that the Bank complies with the [Bank C&D]."

---

[14] 11 U.S.C. 365(o). The original text of this section 365(o) covered "any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System." This section, though, was modified in 1994, in what was characterized as a technical amendment, by replacing the names of the specific entities with the current phrase "a Federal depository institutions regulatory agency (or predecessor to such agency)." Under the pre-1994 language of the provision, the fact that the obligation to maintain the Bank's capital embodied in the Debtor C&D was imposed by the Federal Reserve, rather than the FDIC, would presumably not have prevented that obligation from receiving the special protection provided by section 365(o). Section 507(a)(9) gives ninth priority to such claims ("Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor agency), to maintain the capital of an insured depository institution.").

[15] *See Firstcorp*, 973 F.2d at 248 (If the holding company is not financially able to satisfy its capital maintenance obligations, §365(o) denies it the opportunity to reorganize under Chapter 11, leaving liquidation under Chapter 7 as its only option. Through this mechanism, §365(o) places the financial interest of the federal deposit insurance system ahead of that of the holding company and its creditors.).

Exhibit A

The source of strength doctrine provides that a bank holding company shall "serve as a source of financial and managerial strength to its subsidiary bank and shall not conduct its operations in an unsafe or unsound manner."[16] In a footnote citing *MCorp. Fin. Corp. Inc. v. Board of Governors of the Federal Reserve*,[17] the Court stated that the "source-of-strength doctrine does not require a bank holding company to make capital contributions to its subsidiaries."[18]

After analyzing the three documents at issue, the Court held that the "Debtor did not make a commitment to maintain the capital of the [Bank] within the meaning of § 365(o)." The Court only briefly mentioned the source of strength doctrine, instead choosing to parse the language of the agreements between the Debtor and the Board. The documents were peppered with terms like "assist" and "good faith." In the Court's view, no part of any of the three documents described any specific requirements; nor did any document mention any potential liability for the Debtor.

The Debtor C&D did, however, contain a section titled "Capital Plan" which required the Debtor to "submit a capital plan that would 'address, consider and include,' among other things, the Bank's current and future capital requirements, the source and timing of additional funds to fulfill the Bank's future capital requirements, and the requirements of section 225.4(a) of Regulation Y that the Debtor serve 'as a source of strength to the Bank.'"[19] This section also required the Debtor to notify the Federal Reserve if either the Debtor or the Bank's capital ratios fell below the ratios described in the submitted capital plan. Together with such notification, the Debtor was required to submit a plan "that details the steps [Debtor] will take to increase its and/or the Bank's capital ratios above the plan's minimums."[20]

---

[16] Regulation Y, 12 C.F.R. §225.4(a)(1).

[17] 900 F.2d 852, 863 (5th Cir. 1990), *rev'd on other grounds*, 502 U.S. 32 (1991).

[18] Much has been written on the source of strength doctrine, and yet its force remains questionable. The Federal Reserve Board issued a policy statement in 1987 stating that "a bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity and should maintain the financial flexibility and capital-raising capacity to obtain additional resources for assisting its subsidiary banks in a manner consistent with the provisions of this policy statement." *Policy Statement on the Responsibility of Bank Holding Companies to Act as Sources of Strength to their Subsidiary Bank*, 52 Fed. Reg. 15707, April 30, 1987, effective April 24, 1987. According to this policy, the Federal Reserve Board is asserting its authority to compel a bank holding company to assist a subsidiary bank. *See* Milton R. Schroeder, Esq., LAW & REG. OF FIN. INST. at §5.08, *The Federal Reserve Board Source of Strength Policy*, (A.S. Pratt & Sons, July 2010). Yet this case, as well as the *MCorp Financial* case, beg the question of what the source of strength doctrine actually requires a bank holding company to do. The Source of Strength doctrine is addressed in the Dodd-Frank Wall Street Reform and Consumer Protection Act in Section 38A which states that "[t]he appropriate Federal banking agency for a bank holding company or savings and loan holding company shall require the bank holding company or savings and loan holding company to serve as a source of financial strength for any subsidiary of the bank holding company or savings and loan company that is a depository institution."

[19] *In re The Colonial Bancgroup, Inc.*, Case No. 09-32303, at p. 6 (citing the Debtor C&D, at ¶ 2).

[20] Debtor C&D at ¶ 2

Exhibit A

Nonetheless, finding that the documents lacked specificity and any binding language, the Court held that nothing in the three documents constituted a "commitment" as that term is used in § 365(o).

§365(o) Only Applies to Commitments Made to 'Federal Depository Institutions Regulatory Agency'

The Debtor argued that, because none of the agreements were executed between the Debtor and the FDIC, such agreements, and anything contained within, were not subject to §365(o). None of the three agreements involving the Debtor involved the FDIC, which is the entity that filed the § 365(o) motion. Section 365(o) embraces only commitments made to a *Federal depository institutions regulatory agency* to maintain the capital of an insured depository institution. With respect to an insured depository institution for which the FDIC has been appointed receiver, such agency is the FDIC.[21] Moreover, section 3(q) of the Federal Deposit Insurance Act identifies the FDIC as the "appropriate Federal banking agency" for state nonmember insured banks.[22] In other words, at all relevant times, the FDIC was the appropriate federal agency.

It is understandable that the Debtor did not make any commitments to the FDIC; as a bank holding company, the Debtor's regulator throughout its existence was the Board of Governors of the Federal Reserve System. The Court discussed a number of cases where a depository institution holding company made commitments to the subsidiary institution's regulator.[23] In each of those cases, though, the commitments were made as a condition of approval of the acquisition of a bank or in response to a prompt corrective action order. The situation in this case was quite different. The Debtor already owned the Bank at the time of its various agreements with federal banking regulators, and a prompt corrective action order was never issued.

In any event, the FDIC was clearly not a party to either the 4(m) Agreement, the Debtor MOU, or the Debtor C&D. As such, the Court held that any commitment contained in the documents to maintain the capital of the Bank did not come within the meaning of §365(o) because such commitment was not made to the FDIC, the Federal depository institutions regulatory agency with respect to a state non-member bank.

The Various Agreements Were Not Enforceable Because the Bank was Closed Prior to the Debtor's Bankruptcy Petition

[21] *See* 11 U.S.C. §101(21B)(D).

[22] *See* 12 U.S.C. §1813(q).

[23] *Franklin Savings Corporation v. Office of Thrift Supervision*, 303 B.R. 488 (D. Kan. 2004) (debtor did not dispute that it made a capital maintenance commitment); *Resolution Trust Corp. v. Firstcorp, Inc. (In re Firstcorp)*, 973 F.2d 243 (4th Cir. 1992) (commitment made as a condition to acquiring thrift); *Office of Thrift Supervision v. Overland Park Fin'l Corp. (In re Overland Park)*, 236 F.3d 1246 (10th Cir. 2001) (commitment made as a condition to acquiring thrift); *Wolkowitz v. FDIC (In re Imperial Credit Industries, Inc.)*, 527 F.3d 959 (9th Cir. 2008) (holding company's guarantee of capital restoration plan after prompt corrective action was required by federal law).

Exhibit A

The Debtor further argued that because none of the commitments were enforceable, section §365(o) did not apply. The Debtor MOU expressly stated that it "is not a 'written agreement' for the purposes of Section 8 of the Federal Deposit Insurance Act." A "written agreement," unlike a memorandum of understanding, would be a formal, enforceable enforcement action.[24] The Debtor MOU, as an informal action, was not enforceable. The Debtor MOU, though, was superseded by the Debtor C&D, which is enforceable. As stated above, the Debtor C&D asked the Debtor to assist the Bank in complying with its own Bank C&D. The Bank, though, was shut down on August 14, 2009. The Debtor argued that the Bank C&D was terminated on that same date.

The Court stated that §365(o) contemplated a commitment that, on the date of the bankruptcy petition, can be assumed and cured. The Bank was closed on August 14, 2009, and the Debtor's obligation under the Debtor C&D was to continue until September 30, 2009. The Debtor, though, filed for bankruptcy protection on August 25, 2009. The Court stated that "[w]ith the closing and sale of the Bank, the purpose for the commitment could no longer be fulfilled, and the performance under the commitment was impossible."

A similar argument was considered and rejected in the *Firstcorp* case. There, the debtor claimed that because its subsidiary was placed in receivership, any commitment it had with its regulator terminated. The court held, "that termination, however, operated only to absolve Firstcorp of any obligation to *continue* maintaining [its subsidiary's] capital and thereby cleared it of any liability arising from *further* deterioration of [the subsidiary]'s capital."[25] The court in *Firstcorp* recognized that "[u]nder Firstcorp's interpretation, a holding company obligated to maintain the capital of a depository institution could avoid that obligation entirely simply by ignoring it: once the institution's financial position deteriorated to such an extent that federal regulators were forced to step in and take control, the holding company could argue that its liability under the capital maintenance obligation was thereby extinguished. Congress could not have intended such a result."[26]

The Court gave some recognition to the holding in *Firstcorp* in a footnote. The Court stated that "the court is not holding that because the bank closed, there can be no claim for any prepetition breach of an enforceable commitment. The court is holding merely that section 365(o) does not apply to such commitments, and any claim for a prepetition breach must be addressed through 11 U.S.C. § 507(a)(9)", which gives ninth priority status to such commitments. And so, the Court held that §365(o) does not apply to a capital maintenance commitment where the commitment cannot be assumed and cured because the underlying depository institution is no longer operating.

CONCLUSION

This opinion, assuming it withstands review, is troubling for federal regulators going forward. Here, there was little doubt what the regulators were asking the Debtor and the Bank to

---

[24] *See* COMMERCIAL BANK EXAMINATION MANUAL, Doc. #701, Ex. 8, p. 56.

[25] *In re Firstcorp*, 973 F.2d at 251 (emphasis in original).

[26] *Id.*

Exhibit A

do; that is, raise capital lest the Bank be shut down. Clearly the Debtor understood this directive because it made efforts to raise capital and to institute a management plan. Nonetheless, because the various documents, in the Court's view, did not contain a sufficiently explicit and formal undertaking by the Debtor to provide capital to the Bank, the Court deemed that they were not in fact "commitments."

However, even a more clearly written cease and desist order would not have resulted in a different outcome in this case. To withstand the Court's analysis, any commitment by the Debtor would have to been made *to the FDIC*, as the "Federal depository institutions regulator" with respect to Colonial Bank. Moreover, in the Court's view, only if the Bank were closed *after* the Debtor filed bankruptcy would the commitment under §365(o) apply.

There is little doubt that the FDIC's ability to proceed against bank holding companies is critical if it wishes those companies to honor any promises to shore up a subsidiary bank's capital. Assuming the Court's decision is upheld in the coming appeal, the Federal Reserve, as holding company regulator, may wish to add the Federal depository institutions regulator of the subsidiary bank as a party to any supervisory orders directing the infusion of capital into such a subsidiary, or at least modify the language of such orders to explicitly provide that the subsidiary's primary federal regulator is an intended beneficiary of any capital commitment by a depository institution holding company.

Exhibit B

Home About Us Contact Us

Step Off! Colonial BancGroup Bankruptcy Court Rejects FDIC Setoff Attempt

By Andrea Saavedra and Kyle J. Ortiz
Published on February 23, 2011

A recent decision in ***In re The Colonial BancGroup, Inc.***, Case No. 09-32303-(DHW) (Bankr.M.D. Ala. Jan. 24, 2011), addresses the complex tripartite relationship between a bank holding company in bankruptcy, the Federal Deposit Insurance Corporation as receiver for the failed bank subsidiary, and the successor bank which assumed liability for the failed bank's deposit accounts. The decision limits the FDIC's ability to exercise setoff rights with respect to deposit accounts of the holding company/debtor.

The financial crisis of 2008 and the collapse of the housing market precipitated a slew of consumer depository bank failures, the likes of which has not been seen since the savings and loan crisis of the 1980s. In most bank failures, the FDIC is appointed as receiver for the failed bank, and in many instances the FDIC immediately enters into a Purchase and Assumption (P&A) agreement with a healthy bank to acquire assets of the failed bank and assume its liabilities to depositors. These transactions, often negotiated quickly in the days before a bank failure, allow retail depositors immediate and seamless access to their money and protect the federal deposit insurance fund from depletion. One issue often not clearly addressed by the P&A agreement, however, is the treatment of intracompany deposit accounts. Many bank and thrift holding companies keep their cash in deposit accounts with their subsidiaries. When the holding company files for bankruptcy, as many have done, its deposit accounts often are a critical source of recovery for its creditors.

The FDIC often appears as a putative creditor in a HoldCo bankruptcy case, trying to recover any assets that it may claim title to on behalf of the failed bank and maximize the assets of the receivership. As a result, a HoldCo is often found in a face off with the FDIC as to whether certain assets, such as deposits of the HoldCo, are really assets of the HoldCo, assumed assets/liabilities of the bank purchaser, or somehow subject to claims of title by the FDIC. To that end, the FDIC has become a major player in our nation's bankruptcy courts over the past few years.

Exhibit B

The facts of *Colonial* are common in the current landscape of failed banks. On August 14, 2009, the Alabama State Banking Department closed Colonial Bank and appointed the FDIC as receiver. On the same day, the FDIC entered into a P&A agreement with BB&T Corp. As part of the P&A agreement, BB&T Corp. assumed liability for the vast majority of Colonial's deposits. However, the P&A agreement had a clawback provision, Section 9.5, that entitled the FDIC to designate certain deposits for retention by the receivership. The clawback provision found in Section 9.5 of the P&A agreement (which contains language similar to that found in other failed bank sale agreements), permits the FDIC, in its capacity as receiver, to:

> in its discretion, determine that all or any portion of any deposit balance assumed by the Assuming Bank pursuant to [the P&A agreement] does not constitute a "Deposit" (or otherwise, in its discretion, determine that it is the best interest of the Receiver or Corporation to withhold all or any portion of any deposit), and may direct the Assuming Bank to withhold payment of all or any portion of any such deposit balance.

In the hurried negotiations, the FDIC specifically carved out certain deposit accounts from the assumed liabilities of BB&T, but there was no carve-out for the deposit accounts of Colonial's HoldCo. Shortly after the closure of the bank, the HoldCo filed for chapter 11 protection and a dispute arose between the FDIC, the HoldCo, and BB&T as to whether the HoldCo's deposits were assumed by BB&T or remained subject to the FDIC's clawback rights under Section 9.5. The FDIC filed a motion seeking relief from the automatic stay so that it could exercise alleged setoff rights against the deposits.

In simple terms, setoff is a creditor's right to cancel mutual debts against the debtor, in full or in part. Bankruptcy preserves the right of setoff under applicable nonbankruptcy law if a creditor is able to show that the debt it seeks to setoff is both prepetition and mutual (same parties, same capacity). 11 U.S.C. § 553. The FDIC argued that it had a right of setoff because either (1) BB&T did not assume HoldCo's accounts under the P&A agreement (because the FDIC did not intend for those accounts to be part and parcel of the sale), or (2) even if BB&T had assumed the accounts, the FDIC has the right to claw back the deposits under section 9.5 of the P&A agreement, thereby creating mutuality and a right of setoff.

The Bankruptcy Court rejected both of the FDIC's arguments. First, the Bankruptcy Court found that, although the FDIC had the discretion to exclude the HoldCo's deposits under the P&A agreements, there was no evidence that it did so – or intended to do so – before HoldCo filed its chapter 11 petition. In contrast, there was "overwhelming evidentiary support" that BB&T assumed liability for HoldCo's accounts, including that: after the petition date, the accounts were designated as "debtor-in-possession" accounts by BB&T; since the closing of the sale, BB&T included the balances for the accounts in statistics included within its quarterly reports to the Securities & Exchange Commission; and, since the closing of the subsidiary bank, BB&T included the balances of the HoldCo's accounts in calculating its deposit insurance premiums paid to the FDIC. While the court recognized that the FDIC did have the statutory right under 12 U.S.C. § 1822(d) to offset mutual debt, the debt in question was assumed by BB&T when the P&A agreement was signed, and at that time mutuality ceased to exist. Thus, the Bankruptcy Court held that the FDIC did not have a right to setoff because there was a lack of mutuality as between the FDIC and the HoldCo as BB&T, and not the FDIC, was liable on the accounts to the HoldCo.

Second, the Bankruptcy Court also rejected the FDIC's attempt to utilize section 9.5 of the P&A agreement to allow for postpetition assumption of the deposits so as to create a prepetition setoff right. While not unsympathetic to the speed under which the FDIC must operate to ensure "seamless operation of the banking system and the confidence of the general public," the court held that the optionality provided by the clawback provision ended when the bankruptcy of the HoldCo intervened. Once the HoldCo filed for chapter 11, "the FDIC could not, within this universe of time and space, transform its postpetition assumption of the accounts into a

Exhibit B

prepetition debt." In other words, once HoldCo filed for chapter 11, the FDIC's clawback rights under the P&A could not be used to create a right of setoff.

The FDIC wasted no time in filing an appeal the day after the Bankruptcy Court released its decision. The FDIC clearly recognizes that the effect of a HoldCo bankruptcy on clawback rights under a P&A agreement is an important precedent with implications for many other cases. The FDIC already is appealing an earlier decision in the case in which the bankruptcy court rejected its contention that section 365(o) of the Bankruptcy Code required the HoldCo to satisfy a capital maintenance requirement. Keep an eye on the Weil Bankruptcy Blog for updates as these appeals move forward.

Bookmark It

Posted in **Setoffs**

Home **About Us** **Contact Us** **Disclaimer**

This website is maintained by **Weil, Gotshal & Manges LLP** in New York, NY Copyright 2011 Weil, Gotshal & Mai
The contents of this web site may contain attorney advertising under the laws of various states. Prior results do no

REDACTED

Exhibit C can be viewed at:

United States Bankruptcy Court

District of Delaware

824 market Street, 3rd Floor Clerks Office

Wilmington, DE 19801

Exhibit D

Exhibit D

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION

In the Matter of **WASHINGTON MUTUAL BANK,** Henderson, Nevada. OTS Docket No.: 08551	)	Order No.: WE-07-007 Effective Date: October 17, 2007

STIPULATION AND CONSENT TO ISSUANCE OF AN
ORDER TO CEASE AND DESIST FOR AFFIRMATIVE RELIEF

WHEREAS, the Office of Thrift Supervision (OTS), based upon information derived from the exercise of its regulatory responsibilities, is of the opinion that grounds exist to initiate an administrative cease and desist proceeding for affirmative relief against Washington Mutual Bank, Henderson, Nevada, OTS Docket No. 08551 (Institution), pursuant to 12 U.S.C. § 1818(b);

WHEREAS, the Institution desires to cooperate with the OTS and to avoid the time and expense of such administrative proceeding; and

WHEREAS, the Institution enters into this Stipulation and Consent to the Issuance of an Order to Cease and Desist for Affirmative Relief (Stipulation): (1) without any adjudication on the merits; (ii) without admitting or denying that grounds exist to initiate an administrative cease and desist proceeding; (iii) without admitting or denying the Findings of Fact, except as to jurisdiction (¶1 below), which jurisdiction is admitted;

Exhibit D

NOW, THEREFORE, the Institution hereby stipulates and agrees as follows:

1. **Jurisdiction.**

(a) The Institution is a "savings association" within the meaning of 12 U.S.C. § 1813(b) and 12 U.S.C. § 1462(4). Accordingly, the Institution is an "insured depository institution" as that term is defined in 12 U.S.C. § 1813(c).

(b) Pursuant to 12 U.S.C. § 1813(q), the Director of the OTS is the "appropriate Federal banking agency" with jurisdiction to maintain an administrative cease and desist proceeding against such a savings association. Therefore, the Institution is subject to the jurisdiction of the OTS to initiate and maintain a cease and desist proceeding against it pursuant to 12 U.S.C. § 1818(b).

(c) The Director of the OTS has delegated to the Regional Director of the West Region of the OTS (Regional Director) the authority to issue cease and desist orders where the savings association has consented to the issuance of the orders.

2. **OTS Findings of Fact.** The OTS has determined that the Institution has failed to comply fully with the requirements of the Currency and Foreign Transactions Reporting Act (the Bank Secrecy Act or BSA), 31 U.S.C. § 5311 et seq.; the related BSA regulations issued by the United States Department of the Treasury, 31 C.F.R. Part 103 and the OTS, 12 C.F.R. § 563.177; and the OTS regulations governing suspicious activity reports (SAR) set forth in 12 C.F.R. § 563.180.

3. **Consent.** The Institution consents to the issuance by the OTS of the accompanying Consent Order to Cease and Desist for Affirmative Relief (Order). The Institution further agrees to comply with the terms of the Order upon issuance and stipulates that the Order complies with all requirements of law.

Exhibit D

4. **Finality.** The Order is issued under 12 U.S.C. § 1818(b) and upon its effective date shall be a final order, effective and fully enforceable by the OTS under 12 U.S.C. § 1818(i).

5. **Waivers.** The Institution waives the following:

(a) The right to be served with a written notice of the OTS's charges provided by 12 U.S.C. § 1818(b);

(b) The right to an administrative hearing of the OTS's charges against it as provided by 12 U.S.C. § 1818(b), 12 C.F.R. Part 509;

(c) The right to seek judicial review of the Order including, without limitation, any such right provided by 12 U.S.C. § 1818(h), or otherwise to challenge the validity of the Order;

(d) Any and all claims against the OTS, including its employees and agents, and any other governmental entity for the award of fees, costs, or expenses related to this OTS enforcement matter and/or the Order, whether arising under common law, or under the term of any statutes including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504, or 28 U.S.C. § 2412; and

(e) The right to assert this proceeding, its consent to issuance of the Order, the issuance of the Order, or any one or more of them, as the basis for a claim of double jeopardy in any pending or future proceeding brought by the United States Department of Justice or any other governmental entity.

6. **OTS Authority Not Affected.** Nothing in this Stipulation or accompanying Order shall inhibit, estop, bar, or otherwise prevent the OTS from taking any other action

Exhibit D

affecting the Institution if at any time OTS deems it appropriate to do so to fulfill the responsibilities placed upon OTS by law.

7. **Other Government Actions Not Affected**. Institution acknowledges and agrees that its consent to the issuance of the Order does not release, discharge, compromise, settle, dismiss, resolve, or in any way affect any actions, charges against, or liability of the Institution that arise pursuant to this action or otherwise, and that may be or have been brought by any other government entity other than the OTS.

8. **Miscellaneous**.

(a) The laws of the United States of America shall govern the construction and validity of this Stipulation and of the Order.

(b) If any provision of this Stipulation and the Order is ruled to be invalid, illegal, or unenforceable by the decision of any Court of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions hereof shall not in any way be affected or impaired thereby, unless the Regional Director in his or her sole discretion determines otherwise.

(c) The terms and provisions of this Order shall be binding upon, and inure to the benefit of, the parties hereto and their successors in interest. Nothing in this Stipulation or the Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under this Stipulation or the Order.

(d) The section and paragraph headings in this Stipulation and the Order are for convenience only, and such headings shall not affect the interpretation of this Stipulation or the Order.

Exhibit D

(e) The terms of this Stipulation and the Order represent the final agreement of the parties with respect to the subject matters hereof and constitute the sole agreement of the parties with respect to such subject matters.

(f) This Stipulation and the Order shall remain in effect until terminated, modified, or suspended in writing by the OTS, acting through its Director, Senior Deputy Director, Regional Director, or other authorized representative.

8. Signature of Directors.

Each Director signing this Stipulation attests that he or she voted in favor of a resolution authorizing the consent of the Institution to the issuance of the Order and the execution of the Stipulation.

WHEREFORE, the Institution, by a majority of its directors, executes this Stipulation and Consent to the Issuance of an Order to Cease and Desist for Affirmative Relief intending to be legally bound hereby.

Washington Mutual Bank
Henderson, Nevada

Accepted by a majority of its directors:

By:

/s/
Director

/s/
Director

/s/
Director

Office of Thrift Supervision
West Region

By: /s/
Darrel W. Dochow
Regional Director, West

Dated: ____________________

Exhibit D

/s/
Director

/s/

/s/
Director

/s/
Director

/s/
Director

Exhibit D

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION

In the Matter of

WASHINGTON MUTUAL BANK,
Henderson, Nevada.

OTS Docket No.: 08551

Order No.: WE-07-008

Effective Date: October 17, 2007

CONSENT ORDER OF ASSESSMENT OF A CIVIL MONEY PENALTY

WHEREAS, Washington Mutual Bank, Henderson, Nevada, OTS Docket No. 08551 (Institution), by and through its Board of Directors (Board), has executed a Stipulation and Consent to the Issuance of an Order of Assessment of a Civil Money Penalty (Stipulation); and

WHEREAS, the Institution, by executing the Stipulation, has consented and agreed to the issuance of this Order of Assessment of Civil Money Penalty (Order) by the Office of Thrift Supervision (OTS), pursuant to 42 U.S.C. § 4012a(f); and

WHEREAS, the Director of the OTS has delegated to the Regional Directors of the OTS the authority to issue consent orders on behalf of the OTS.

NOW THEREFORE, IT IS ORDERED THAT:

1. Payment of Civil Money Penalty.

Within ten (10) calendar days after the date of this Order, the Institution shall pay the sum of Sixty Thousand Four Hundred and Forty-Five Dollars ($60, 445) by tendering a certified check or bank draft made payable to the order of the National Flood Insurance

Exhibit D

Program – Mitigation Fund, together with a copy of the executed CMP Order and a cover letter referencing Washington Mutual Bank, Henderson, Nevada, OTS Docket No. 08551, to: Kevin Montgomery, Financial Management Specialist, Federal Emergency Management Agency, National Flood Insurance Program, 7700 Hubble Drive, Lanham, Maryland 20706. A copy of the certified check or bank draft and the cover letter shall be provided by U.S. Mail or overnight courier to James A. Hendriksen, Regional Enforcement Counsel, Office of Thrift Supervision, 2001 Junipero Serra Boulevard, Suite 650, Daly City, CA, 94014-3897.

2. Duration, Termination or Suspension of Order.

This Order is and shall become effective on the date it is issued, as shown in the caption hereof.

THE OFFICE OF THRIFT SUPERVISION

By: /s/
Darrel W. Dochow
Regional Director

(Wamu CMP Order)

Exhibit E

Exhibit E

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION

In the Matter of	)	Order No.: WE-07-007
WASHINGTON MUTUAL BANK, Henderson, Nevada.	)	Effective Date: October 17, 2007
OTS Docket No.: 08551	)	

CONSENT ORDER TO
CEASE AND DESIST FOR AFFIRMATIVE RELIEF

WHEREAS, Washington Mutual Bank, Henderson, Nevada, OTS Docket No. 08551 (Institution), has executed a Stipulation and Consent to the Issuance of an Order to Cease and Desist for Affirmative Relief (Stipulation); and

WHEREAS, the Institution, by executing the Stipulation, has consented to the issuance of this Consent Order to Cease and Desist for Affirmative Relief (Order) by the Office of Thrift Supervision (OTS), pursuant to 12 U.S.C. § 1818(b); and

WHEREAS, the Director of the OTS has delegated to the Regional Directors of the OTS the authority to issue consent orders on behalf of the OTS pursuant to provisions of 12 U.S.C. § 1818.

NOW, THEREFORE, IT IS ORDERED THAT:

I. ORDER TO CEASE AND DESIST

A. The Institution and its directors, officers, employees, and agents shall cease and desist from any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding and abetting any violation of:

Exhibit E

(1) The Currency and Foreign Transactions Reporting Act (the Bank Secrecy Act or BSA), 31 U.S.C. §§ 5311 et seq., and the related BSA regulations issued by the United States Department of the Treasury, 31 C.F.R. Part 103, and the OTS, 12 C.F.R. § 563.177; and

(2) The OTS regulations governing suspicious activity reports (SARs) set forth in 12 C.F.R. § 563.180 (the SAR Regulation).

II. BANK SECRECY ACT/ANTI-MONEY LAUNDERING (BSA/AML) PLAN

A. Within thirty (30) days from the effective date of this Order, the Institution shall submit an acceptable written BSA/AML Plan to the Regional Director that includes a specific description of the actions the Institution proposes to take, or has taken, to ensure future compliance with all applicable BSA/AML requirements (Plan). The Plan shall be fully implemented by March 31, 2008, unless otherwise noted in the approved Plan. At a minimum, the Plan shall include:

(1) Strengthening the system of internal controls to ensure compliance with the BSA, the related BSA regulations, and the SAR Regulation. The strengthened system must include enhanced oversight of the BSA/AML compliance program and should ensure adequate staffing of the program by qualified and appropriately trained personnel needed for an effective control environment. The internal controls should include feedback mechanisms to monitor and assess overall effectiveness of the program;

(2) Enhancing independent testing of compliance with the BSA, the related BSA regulations, and the SAR Regulation, including a review of the coverage and scope of independent testing of the Institution's BSA/AML compliance program. Such testing, which may be accomplished by the Company's General Auditor, shall include, but not be limited to, transactions and account monitoring policies, procedures and practices and the transaction monitoring system;

Exhibit E

(3) Providing adequate resources and authority for the BSA compliance officer, including structuring the program to provide the BSA officer with sufficient control over all components of the Institution's BSA/AML program to ensure compliance with BSA/AML requirements. The duties and responsibilities of each officer and staff member involved in the BSA/AML program should be detailed, including reporting lines within each unit and business line accountability;

(4) Reviewing the process for internal investigation of alerts to measure the volume and timeliness of workflow and determining the appropriate staff levels and skills. The Plan should provide a specific timeline for additions to staff to meet identified volume and workload demands;

(5) Establishing a program to provide appropriate training for staff, management, and the Board of Directors concerning the BSA and the related BSA regulations;

(6) Enhancing the ongoing Customer Identification Program to ensure appropriate customer risk scoring. The customer risk scoring process and the process and system for collecting and storing customer data should also be evaluated and a timeline for additional enhancements shall be provided as part of the Plan;

(7) Establishing appropriate controls, processes, procedures, and evaluation criteria to ensure the timely, accurate, and complete identification and reporting of suspicious activities as required by applicable suspicious activity reporting laws and regulations. Such controls, processes, procedures, and evaluation criteria should provide for monitoring, assessment, and review of the effectiveness of the Institution's investigation procedures and the propriety of the decision whether or not to file a suspicious activity report;

(8) Enhancing existing transaction monitoring, including aggregation of customer transactions by or on behalf of related individuals and entities. The Plan shall also provide a

Exhibit E

timetable for the testing and full installation across all business lines of the transaction monitoring systems used by the Institution. Such a timetable should include the establishment of processes, procedures, and evaluation criteria to ensure that the systems are validated and that the program logic- and rules-based triggers are appropriate and that data feeds are accurate and complete across all business lines. The systems must be able to link and aggregate transactions by or on behalf of related individuals and entities across all business lines. The timetable should also include a methodology and target date for certification to the Regional Director that the transaction monitoring systems are fully effective.

(9) The Board shall submit the Plan to the Regional Director for his review and comment. The Board shall revise the Plan as required by the Regional Director within thirty (30) days of receiving his comments or at its next regular meeting, if later. The Plan, as modified by the comments of the Regional Director, shall be incorporated into this Order and any deviation from such Plan shall be a violation of this Order.

B. Compliance Committee.

(1) Within thirty (30) days of the effective date of this Order, the Board shall establish and appoint an oversight committee of the Board (the Compliance Committee) comprised of at least three directors, the majority of whom shall be Outside Directors,[1] to coordinate and monitor the Institution's progress and compliance with this Order.

(2) Beginning at the end of the first quarter after the effective date of this Order and quarterly thereafter, the Oversight Committee shall provide a written progress report to the Board that:

[1] As used in this Order, "Outside Director" means a director who is not: (1) a controlling shareholder (as defined in 12 C.F.R. § 215.2(m); (2) a salaried officer or employee of the Savings Association or its subsidiary(ies) or service corporation(s); or (3) a salaried officer or employee of its holding company or subsidiary of the holding company.

Exhibit E

(a) Describes the actions taken by the Institution to comply with this Order and the Plan and the results of such actions;

(b) Identifies remaining actions to be completed within the quarter;

(c) Identifies with specificity any noncompliance with the Order or Plan and remedial actions taken or proposed with respect to any noncompliance;

(d) Within thirty (30) days thereafter, the Board shall submit to the OTS:

(i) A copy of the Compliance Committee's progress reports for that quarter, with any additional comments made and actions taken by the Board; and

(ii) A copy of the Board minutes reflecting discussion of the progress report.

(e) Nothing contained herein shall diminish the responsibility of the entire Board to ensure the Institution's compliance with the provisions of this Order.

C. Submission to OTS.

All submissions to the OTS that are required by or contemplated by this Order shall be submitted within the specified timeframes. Submissions, including progress reports and any requests for extension of time, shall be sent to:

Darrel Dochow, Regional Director
Office of Thrift Supervision
2001 Junipero Serra Blvd.
Daly City, CA 94014-3897

Mark Johnson, Assistant Director
Office of Thrift Supervision
101 Stewart Street, Suite 1010
Seattle, WA 98101-2419

D. Definitions.

All technical words or terms used in this Order for which meanings are not specified or otherwise provided by the provisions of this Order shall, insofar as applicable, have meanings as defined in Chapter V of Title 12 of the Code of Federal Regulations, the Home

Exhibit E

Owners Loan Act (HOLA), the BSA, the Federal Deposit Insurance Act (FDIA), OTS Memoranda, or other published OTS guidance. Any such technical words or terms used in this Order and undefined in said Code of Federal Regulations, the HOLA, the FDIA, OTS Memoranda, or other published regulatory guidance shall have meanings that are in accordance with the best custom and usage in the savings and loan industry.

E. Successor Statutes, Regulations, Guidance, Amendments.

Reference in this Order to provisions of statutes, regulations, OTS Memoranda, and other published regulatory guidance shall be deemed to include references to all amendments to such provisions as have been made as of the Effective Date and references to successor provisions as they become applicable.

F. No Violations Authorized; OTS Not Restricted.

Nothing in this Order or the Stipulation shall be construed as:

(1) Allowing the Institution to violate any law, rule, regulation, or policy statement to which it is subject, or

(2) Restricting or estopping the OTS from taking any action(s) that it believes are appropriate in fulfilling the responsibilities placed upon it by law including, without limitation, any type of supervisory, enforcement or other action that the OTS determines to be appropriate, arising out of matters described in Reports of Examination or based on other information in the possession of the OTS.

G. Time Calculations; Separability Clause; Stipulation Incorporated.

(1) Calculation of time limitations for compliance with the terms of this Order run from the Effective Date and shall be calendar based, unless otherwise noted;

(2) The Regional Director, in the exercise of his discretion, may extend any of the deadlines set forth in the provisions of this Order upon written request by the Institution that

Exhibit E

includes reasons in support for any such extension. Any extension or notice of no objection to a request for an extension shall be made in writing by the Regional Director;

(3) In the event any provision in this Order is ruled to be invalid, illegal or unenforceable by the decision of any court of competent jurisdiction, the validity, legality and enforceability of the remaining provisions hereof shall not in any way be affected or impaired thereby, unless the Regional Director in his/her sole discretion determines otherwise; and

(4) The Stipulation is made a part hereof and is incorporated herein by this reference.

H. Effective Date: Duration.

This Order is effective on the Effective Date as shown on the first page. This Order (including the related Stipulation) shall remain in effect until terminated, modified, or suspended, in writing by the OTS, acting through its Director, Regional Director, or other authorized representative.

OFFICE OF THRIFT SUPERVISION

By: /s/
Darrel W. Dochow
Regional Director
West Region

Exhibit F

Exhibit F

to ensure that the 2008 tax year shall be the tax year of the Group to which the 5-year carryback available under Section 172(b)(1)(H) of the Internal Revenue Code of 1986, as amended, shall apply (the "***Election***"). Each of WMI and the FDIC Receiver represent that it has not made any election or filing which would make the Election invalid or inoperative in any way.

(ii) From and after the date hereof, subject to the terms and provisions of Section 2.4(a)(iii) hereof, but without otherwise limiting the foregoing, WMI, JPMC and the FDIC Receiver shall jointly control and administer all Pre-2009 Group Tax matters, in respect of all relevant Tax years, that (x) relate to U.S. federal income tax and (y) are reasonably expected to have a material effect on the amount of Net Tax Refunds to which the FDIC Receiver is entitled under this Agreement, provided, however, that the FDIC Receiver's concurrence shall not be required with respect to any settlement offers made or accepted by WMI on or before May 21, 2010, the principal terms of which have been evidenced in writing (whether or not such offer or acceptance is conditioned upon approval of any supervising authority). For the avoidance of doubt, the preceding sentence shall not apply to give the FDIC Receiver joint control of any proceedings related to any of the predecessor entities listed on Schedule 2.4(a). WMI and JPMC shall jointly control and administer all other Pre-2009 Group Tax matters, in respect of all relevant Tax years. From and after the date hereof, WMI, JPMC and the FDIC Receiver shall consult with and keep one another fully informed on all other Pre-2009 Group Tax matters that are jointly controlled by WMI, JPMC and the FDIC Receiver pursuant to the first sentence of this Section 2.4(a)(ii), and their ongoing discussions with the applicable Tax Authorities in respect of such Group Tax matters. From and after the date hereof, each of WMI and JPMC shall consult with and keep each other fully informed on all other Pre-2009 Group Tax matters and its ongoing discussions with the applicable Tax Authorities, and shall, from time-to-time, inform the FDIC Receiver of the status of all other Tax proceedings relating to Net Tax Refunds. For purposes of the foregoing, the administration of Pre-2009 Group Tax matters shall include, without limitation, the resolution of all current and pending Tax controversies (both administrative and judicial), the filing of any related carryback claims, elections, and other Tax Returns, and the entering into any other related agreements with a Tax Authority, except to the extent that such actions must be, pursuant to a legal or regulatory requirement, undertaken by the FDIC Receiver on behalf of WMB (or any subsidiary of WMB on or before September 24, 2008). For this purpose, JPMC and WMI will each have the right to participate in any meetings or proceedings related to the resolution of any Tax controversy that relates to the resolution of Pre-2009 Group Tax matters and each Party to this Agreement agrees to execute any forms, including (but not limited to) IRS Forms 2848, to authorize such participation upon the request of either JPMC or WMI; provided, however, in deciding whether to participate in any such meeting or proceeding, JPMC will give due consideration (in consultation with WMI and the FDIC Receiver) to whether participation by JPMC in any such meeting or proceeding would, in JPMC's sole discretion, materially adversely affect the resolution of the Pre-2009 Group Tax matters at issue and related proceedings. Similarly, the FDIC Receiver will have the right to participate in any meetings or proceedings related to the resolution of any Tax

Exhibit F

controversy that relates to the resolution of Pre-2009 Group Tax matters that are jointly controlled by WMI, JPMC and the FDIC Receiver pursuant to the first sentence of this Section 2.4(a)(ii), and each Party to this Agreement agrees to execute any forms, including (but not limited to) IRS Forms 2848, to authorize such participation upon the request of the FDIC Receiver; provided, however, in deciding whether to participate in any such meeting or proceeding, the FDIC Receiver will give due consideration (in consultation with WMI and JPMC) to whether participation by the FDIC Receiver in any such meeting or proceeding would, in the FDIC Receiver's sole discretion, materially adversely affect the resolution of the Pre-2009 Group Tax matters at issue and related proceedings. Notwithstanding WMI's and JPMC's control over the administration of certain Pre-2009 Group Tax matters, to the extent that any of the foregoing actions must be undertaken by the FDIC Receiver as a result of a legal or regulatory requirement, then the FDIC Receiver shall take any actions that are reasonably requested by WMI and JPMC jointly with respect to Pre-2009 Group Taxes. None of WMI, JPMC and the FDIC Receiver shall, with respect to Taxes, make or change any Tax election, change any annual Tax accounting period, adopt or change any method of Tax accounting, enter into any closing agreement, settle any Tax claim or assessment, surrender any right to claim a Tax refund, offset or other reduction in Tax liability, or consent to any extension or waiver of the limitations period applicable to any Tax claim or assessment relating to any Pre-2009 Group Tax matters unless it obtains the written consent of: (x) in the case of any such action that is to be taken by WMI, JPMC and, to the extent it has joint control over with respect to the matter pursuant to the first sentence of this Section 2.4(a)(ii), the FDIC Receiver; (y) in the case of any such action that is to be taken by JPMC, WMI and, to the extent it has joint control over with respect to the matter pursuant to the first sentence of this Section 2.4(a)(ii), the FDIC Receiver; and (z) in the case of any such action that is to be taken by the FDIC Receiver, each of WMI and JPMC (which, in the case of each of (x), (y) and (z), shall not be unreasonably withheld or delayed).

(iii) From and after the date hereof, to the extent reasonably necessary to administer and resolve any Pre-2009 Group Tax matter, (A) JPMC shall provide each of WMI and the FDIC Receiver access in a reasonable and timely manner to historic WMI or WMB employees with material knowledge of such matters who are currently employees of JPMC, and WMI shall provide each of JPMC and the FDIC Receiver access in a reasonable and timely manner to historic WMI, JPMC or WMB employees with material knowledge of such matters that are currently employees of WMI and (B) JPMC shall provide each of WMI and the FDIC Receiver, and, with respect to each of WMI and the FDIC Receiver, its officers, employees, and representatives (including, without limitation, its legal and tax advisors) with reasonable and timely access to all information, data, and documentation (including, without limitation, tax and accounting records, financial information records and financial information systems, databases, email servers, and other electronic information systems) within its possession or control and reasonably necessary to administer and resolve any Pre-2009 Group Tax matter, and WMI shall provide each of JPMC and the FDIC Receiver, and, with respect to each of JPMC and the FDIC Receiver its officers, employees, and representatives (including, without limitation, its legal and tax advisors)

Exhibit F

with reasonable and timely access to all information, data, and documentation (including, without limitation, tax and accounting records, financial information records and financial information systems, databases, email servers, and other electronic information systems) within its possession or control and reasonably necessary to administer and resolve any Pre-2009 Group Tax matter. WMI and JPMC, respectively, shall provide such information, data, and documentation in a manner and forum reasonably convenient to each of WMI, JPMC and the FDIC Receiver, and shall permit the other Parties, through their officers, employees, and representatives, to make extracts and copies of such information, data, and documents to the extent reasonably necessary in the administration and resolution of any Pre-2009 Group Tax matter.

(iv) Without in any way limiting the foregoing, the FDIC Receiver (on behalf of WMB) shall fully cooperate with WMI and JPMC with respect to the administration and resolution of all Pre-2009 Group Tax matters, will reasonably provide WMI, the Creditors' Committee and JPMC, through their respective officers, employees, and representatives, the necessary information, data, and documentation (electronic and otherwise and notwithstanding the termination of the IAA/JPMC pursuant to Section 2.20 hereof) within its possession or control in support of such administration and resolution (including providing such documentation in a reasonable location and within a reasonable timeframe), and shall permit WMI and JPMC, through their respective officers, employees, and representatives, to make extracts and copies of such information, data, and documents to the extent reasonably necessary in the administration and resolution of any Pre-2009 Group Tax matter. The Parties agree that any request for information that may reasonably be available both from JPMC and the FDIC Receiver shall first be requested from JPMC.

(v) Without limiting WMI's rights under Section 8.7 hereof, in the event WMI transfers all or part of its rights under this Section 2.4 to a liquidating trust pursuant to the Plan, WMI may assign (but is not obligated to assign) any or all of its control rights under this Section 2.4 to such liquidating trust; provided, however, that WMI shall continue to be responsible for all the liabilities and obligations of WMI under Section 2.4 of this Agreement; and, provided, further, however, that, if WMI assigns all of its rights and obligations under this Section 2.4 to a liquidating trust, WMI shall have no further liability or obligations under this Section 2.4 as long as the transfer to the liquidating trust shall not impose any additional liabilities or obligations on JPMC.

(vi) Notwithstanding anything to the contrary in this Agreement, the FDIC Receiver may not assign its rights under this Section 2.4(a) without the prior written consent of WMI and JPMC. Any purported assignment in violation of the preceding sentence shall be null and void.

(b) Receipt and Distribution of Tax Refunds. WMI, the FDIC Receiver and JPMC (as applicable, including on behalf of WMB and any subsidiary acquired by JPMC from the FDIC Receiver on behalf of WMB) shall jointly direct all Tax Authorities to pay any refunds of Pre-2009 Group Taxes to the Refund Escrow

Exhibit F

Account. In the event that any Party, any current or future subsidiary of any Party, any entity that is or was a subsidiary of any Party at any time on or after the Petition Date, any entity that is or was an Affiliate at any time on or after the Petition Date of any Party, any successor of any Party (including, for the avoidance of doubt, any liquidating trust established pursuant to the Plan), or any member of any Group has received on or after the Petition Date or hereafter receives any refund of Pre-2009 Group Taxes (other than any refunds deposited in the Disputed Accounts and the WMI Accounts governed by Section 2.1 hereof), the relevant Party shall promptly remit or cause to be remitted the amount of such refunds to the Refund Escrow Account. To the extent reasonably determined (as provided in Section 2.4(a)(ii) hereof) by WMI, JPMC and the FDIC Receiver jointly to be necessary for the discharge of Pre-2009 Group Tax Liabilities, WMI, JPMC and the FDIC Receiver shall jointly direct the custodian of the Refund Escrow Account to make remittances to discharge Pre-2009 Group Tax Liabilities.

(i) As soon as practical following JPMC's awareness that any Party, any current or future subsidiary of any Party, any entity that is or was a subsidiary of any Party at any time on or after the Petition Date, any entity that is or was an Affiliate at any time on or after the Petition Date of any Party, any successor of any Party (including, for the avoidance of doubt, any liquidating trust established pursuant to the Plan), or any member of any Group has received a refund of Pre-2009 Group Taxes, other than any refunds deposited in the Disputed Accounts and the WMI Accounts governed by Section 2.1 hereof (or if already received, following the Effective Date), JPMC will reasonably estimate the following amounts:

(A) The total expected amount of Pre-2009 Group Tax Liabilities (the "***Expected Pre-2009 Group Tax Liabilities***");

(B) The Homeownership Carryback Threshold; and

(C) The Homeownership Carryback Refund Amount.

For the avoidance of doubt, any estimated amount of the Homeownership Carryback Threshold shall be calculated net of the Expected Pre-2009 Group Tax Liabilities that have not, at the time of the calculation, been paid.

(ii) (A) Upon receipt of any refund of Pre-2009 Group Taxes, an amount equal to fifty percent (50%) of the interest component of such refund shall be distributed, in aggregate, as applicable to WMI, JPMC and the FDIC Receiver. Such direct distributions shall be made in the proportion to which the refunds to which such interest relates are divided between WMI, JPMC and the FDIC Receiver under this Agreement (it being understood that such interest which relates to the Homeownership Carryback Refund Amount shall be paid thirty and three hundred fifty-seven thousandths percent (30.357%) to the FDIC Receiver and sixty-nine and six hundred forty-three thousandths percent (69.643%) to WMI); all other such interest shall

Exhibit F

be paid eighty percent (80%) to JPMC and twenty percent (20%) to WMI. Such direct distributions to WMI, JPMC and the FDIC Receiver shall be treated, for all computational purposes of this Agreement, as if such distributions were distributions to the Washington Mutual Escrow Account, the JPMC Escrow Account and the FDIC Escrow Account, respectively, and released therefrom.

(B) At least quarterly (on or prior to each March 1, June 1, September 1 and December 1), fifty percent (50%) of all amounts earned by the Refund Escrow Account with respect to assets held in such account shall be distributed to WMI, JPMC and the FDIC Receiver in the same proportion that the Net Tax Refunds which were held in the Refund Escrow Account and generated such earnings are expected to be distributed to each of WMI, JPMC and the FDIC Receiver, as determined pursuant to the then-current adjusted estimates of the amount of Net Tax Refunds that will be received and the then-current Homeownership Carryback Threshold that are calculated under Section 2.4(b) of this Agreement and adjusted under Section 2.4(c) of this Agreement. In each case, such direct distributions to WMI, JPMC and the FDIC Receiver shall be treated, for all computational purposes of this Agreement, as if such distributions were distributions to the Washington Mutual Escrow Account, JPMC Escrow Account and the FDIC Escrow Account, respectively, and released therefrom.

(iii) Upon estimation of the amounts pursuant to Section 2.4(b)(i) hereof (subject to the Tax Dispute Resolution Procedure), and if any amounts were paid to a Tax Authority pursuant to Section 2.4(g)(iv), JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Refund Escrow Account to pay (A) eighty percent (80%) of any amount of refund received attributable to Pre-2009 Group Taxes to JPMC, and (B) twenty percent (20%) of any amount of refund received attributable to Pre-2009 Group Taxes to WMI, in each case until the gross amounts paid by JPMC and WMI, as the case may be, pursuant to Section 2.4(g)(iv) hereof has been offset by gross amounts paid to JPMC and WMI, as the case may be, pursuant to this Section 2.4(b)(iii) provided, however, that, if any person pursuant to this Section 2.4 shall have not made all or part of a payment required by Section 2.4(g)(iv) hereof, such person will be reimbursed pursuant to this Section 2.4(b)(iii) only up to the amount such person paid pursuant to Section 2.4(g)(iv) hereof. Notwithstanding anything contained herein to the contrary, to the extent that any Pre-2009 Group Tax Liabilities were paid by any Party hereto (or any Affiliate of such Party) other than pursuant to Section 2.4(g) hereof, then JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Refund Escrow Account to reimburse such amount to JPMC, WMI or the FDIC Receiver, as appropriate.

(iv) All amounts in the Refund Escrow Account in excess of the amounts required to be paid pursuant to Sections 2.4(b)(ii) and 2.4(b)(iii) hereof shall be retained in the Refund Escrow Account until the balance of the Refund Escrow Account equals the amount of the Expected Pre-2009 Group Tax Liabilities that have not yet been paid.

Exhibit F

(v) Subject to Section 2.4(b)(vii) below, upon estimation of the amounts pursuant to Section 2.4(b)(i) hereof (subject to the Tax Dispute Resolution Procedure), but only after the payments of any amounts pursuant to Sections 2.4(b)(ii) and 2.4(b)(iii) hereof and after taking into account Section 2.4(b)(iv) hereof, to the extent that the net amount of refunds of Pre-2009 Group Taxes paid to the JPMC Escrow Account under this Agreement (such net amount, the "***JPMC Balance***") is less than eighty percent (80%) of the Homeownership Carryback Threshold (the "***JPMC Amount***"), JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Refund Escrow Account to pay eighty percent (80%) of any incremental refunds of Pre-2009 Group Taxes received to the JPMC Escrow Account, and twenty percent (20%) of any incremental refunds of Pre-2009 Group Taxes received to the Washington Mutual Escrow Account.

(vi) Subject to Section 2.4(b)(vii) below, upon payment of the amounts required pursuant to Section 2.4(b)(v) hereof, JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Refund Escrow Account to pay sixty-nine and six hundred forty-three thousandths percent (69.643%) of any incremental refunds of Pre-2009 Group Taxes to the Washington Mutual Escrow Account and thirty and three hundred fifty-seven thousandths percent (30.357%) of any incremental refunds of Pre-2009 Group Taxes to the FDIC Escrow Account.

(vii) Notwithstanding anything to the contrary in this Section 2.4 (other than Section 2.4(b)(ii)(A) hereof), any Homeownership Carryback Refund Amount shall be transferred from the Refund Escrow Account sixty-nine and six hundred forty-three thousandths percent (69.643%) to the Washington Mutual Escrow Account and thirty and three hundred fifty-seven thousandths percent (30.357%) to the FDIC Escrow Account, so that the net amount of refunds of Pre-2009 Group Taxes paid to the FDIC Escrow Account shall be equal to thirty and three hundred fifty-seven thousandths percent (30.357%) of the Homeownership Carryback Refund Amount, and the net amount of refunds of Pre-2009 Group Taxes paid to the Washington Mutual Escrow Account under this Section 2.4(b)(vii) shall be equal to sixty-nine and six hundred forty-three thousandths percent (69.643%) of the Homeownership Carryback Refund Amount.

(c) Adjustments to Estimates. As additional information becomes available about the amount of Net Tax Refunds (including whenever additional Pre-2009 Group Tax Liabilities are determined to come into existence), JPMC may, from time-to-time (and at the reasonable request of WMI or the FDIC Receiver, shall), reasonably revise its estimates of figures calculated pursuant to this Section 2.4.

(i) Subject to Section 2.4(c)(iv) below, to the extent that, pursuant to a revised estimate calculated under this Section 2.4(c), the JPMC Balance exceeds the revised estimate of the JPMC Amount (such estimate, the "***Revised JPMC Amount***"), JPMC, WMI and the FDIC Receiver shall jointly direct: (y) the custodian of the JPMC Escrow Account to debit an amount equal to such excess from the JPMC Escrow Account and (z) the custodian of the Washington Mutual Escrow Account

Exhibit F

to debit an amount equal to twenty-five percent (25%) of such excess from the Washington Mutual Escrow Account, and, in each case, to pay the amounts so debited to the Washington Mutual Escrow Account and the FDIC Escrow Account in the percentages set forth in Section 2.4(b)(vi) hereof.

(ii) Subject to Section 2.4(c)(iv) below, to the extent that the Revised JPMC Amount exceeds the JPMC Balance, JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Washington Mutual Escrow Account and the custodian of the FDIC Escrow Account (A) to debit an aggregate amount equal to one hundred twenty-five percent (125%) of such excess from the Washington Mutual Escrow Account and the FDIC Escrow Account in the percentages set forth in Section 2.4(b)(vi) hereof, but as to each only to the extent of the net amount previously allocated to the Washington Mutual Escrow Account and the FDIC Escrow Account, respectively, under Section 2.4(b)(vi) and Section 2.4(b)(vii) hereof (for the avoidance of doubt, taking into account all prior adjustments), and (B) to pay eighty percent (80%) of the amount so debited to the JPMC Escrow Account and twenty percent (20%) of the amount so debited to the Washington Mutual Escrow Account.

(iii) Payments pursuant to this Section 2.4(c) shall be made within five (5) Business Days of the date on which the revised estimate was agreed upon, in writing by JPMC, WMI and the FDIC Receiver, or under the Tax Dispute Resolution Procedure.

(iv) Notwithstanding anything to the contrary in this Section 2.4, (y) no adjustments shall be made to the Washington Mutual Escrow Account or the FDIC Escrow Account under this Section 2.4(c) that would reduce such accounts below the amounts that were transferred to such accounts under Sections 2.4(b)(vi) and (vii) hereof, based on a revised determination of Homeownership Carryback Refund Amount and (z) to the extent that, pursuant to such revised determination of Homeownership Carryback Refund Amount calculated pursuant to this Section 2.4(c), the Washington Mutual Escrow Account and the FDIC Escrow Account shall be entitled to additional amounts, such amounts shall be immediately transferred to the Washington Mutual Escrow Account and the FDIC Escrow Account, as applicable.

(d) Final JPMC Amount. Within a reasonable period of time after the date on which both JPMC and WMI reasonably believe that (i) all Net Tax Refunds, including the Homeownership Carryback Refund Amount, have been received and (ii) all Pre-2009 Group Tax liabilities have been satisfied, settled or otherwise discharged, and (iii) the final amount of Net Tax Refunds received has been determined and is not subject to change, JPMC shall reasonably calculate a final value for the JPMC Amount (such calculated final value, the "***Final JPMC Amount***"), a final value for the Homeownership Carryback Threshold and a final value for the Homeownership Carryback Refund Amount. If a Final JPMC Amount is agreed upon or determined under the Tax Dispute Resolution Procedure, then --

Exhibit F

(i) Subject to Section 2.4(d)(iv), to the extent that the JPMC Balance exceeds the Final JPMC Amount, JPMC, WMI and the FDIC Receiver shall jointly direct (y) the custodian of the JPMC Escrow Account to debit the JPMC Escrow Account for the amount by which the JPMC Balance exceeds the Final JPMC Amount and (z) the custodian of the Washington Mutual Escrow Account to debit the Washington Mutual Escrow Account for an amount equal to twenty-five (25%) of such excess, and, in each case, to pay the amounts so debited to the Washington Mutual Escrow Account and the FDIC Escrow Account in the percentages set forth in Section 2.4(b)(vi) hereof.

(ii) Subject to Section 2.4(d)(iv), to the extent that the Final JPMC Amount exceeds the JPMC Balance, JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Washington Mutual Escrow Account and the custodian of the FDIC Escrow Account (A) to debit an aggregate amount equal to one hundred twenty-five percent (125%) of the amount by which the Final JPMC Amount exceeds the JPMC Balance, from the Washington Mutual Escrow Account and the FDIC Escrow Account in the percentages set forth in Section 2.4(b)(vi) hereof, but as to each only to the extent of the net amount previously allocated to the Washington Mutual Escrow Account and the FDIC Escrow Account, respectively, under Section 2.4(b)(vi), Section 2.4(b)(vii) and Section 2.4(c)(i) hereof (for the avoidance of doubt, taking into account all prior adjustments), and (B) to pay eighty percent (80%) of the amount so debited to the JPMC Escrow Account and twenty percent (20%) of the amount so debited to the Washington Mutual Escrow Account; and

(iii) The payments to be made pursuant to this Section 2.4(d) shall be made within five (5) Business Days of the date on which the calculations made pursuant to this Section 2.4(d) are finalized.

(iv) Notwithstanding anything to the contrary in this Section 2.4, (y) no adjustments shall be made to the Washington Mutual Escrow Account or the FDIC Escrow Account under this Section 2.4(d) that would reduce such accounts below the amount that would be transferred to such accounts under Section 2.4(b)(vii) hereof, based on the final determination of Homeownership Carryback Refund Amount and (z) to the extent that, pursuant to such revised determination of Homeownership Carryback Refund Amount calculated pursuant to this Section 2.4(d), the Washington Mutual Escrow Account and the FDIC Escrow Account shall be entitled to additional amounts, such amounts shall be immediately transferred to the Washington Mutual Escrow Account and the FDIC Escrow Account, as applicable.

(e) Calculations and Estimates. JPMC shall in a reasonable time (and in case of a revised calculation or estimate, within ten (10) Business Days) provide such calculations or estimates undertaken pursuant to this Section 2.4 and the underlying data, substantiation and computations to each of WMI and the FDIC Receiver for review. Each of WMI and the FDIC Receiver shall have a reasonable period to review any such calculations or estimates and such underlying items. WMI, JPMC and the FDIC Receiver shall endeavor in good faith to resolve any differences regarding any

Exhibit F

calculation or estimate undertaken pursuant to this Section 2.4 without delay. To the extent WMI, JPMC and the FDIC Receiver are unable to resolve any differences regarding a calculation or estimate undertaken pursuant to this Section 2.4, the Parties shall utilize the Tax Dispute Resolution Procedure.

(f) Tax Expenses. Except as otherwise provided herein, each of WMI, JPMC and the FDIC Receiver shall be responsible for its own expenses (including, without limitation, all of its outside advisors) incurred in connection with the pursuit or receipt of any refund, credit, offset or abatement of Pre-2009 Group Taxes.

(g) Payment of Pre-2009 Group Tax Liabilities. If, pursuant to the procedure detailed in Section 2.4(a) hereof, it is reasonably determined that an amount of Pre-2009 Group Taxes should be paid or a claim for any amount of Pre-2009 Group Taxes should be settled, and funds are available in the Refund Escrow Account to pay part or all of such Pre-2009 Group Taxes, JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Refund Escrow Account to remit the amount of such payment or settlement to the relevant Tax Authority. To the extent that it is reasonably determined pursuant to the procedures detailed in Section 2.4(a) hereof that an amount of Pre-2009 Group Taxes should be paid or a claim for any amount of Pre-2009 Group Taxes should be settled, and funds are not available in the Refund Escrow Account to discharge such payment or provide for such settlement after first making the adjustments provided for by Section 2.4(c) hereof:

(i) First, JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Washington Mutual Escrow Account and the custodian of the JPMC Escrow Account to pay from the Washington Mutual Escrow Account and the JPMC Escrow Account, in the percentages set forth in Section 2.4(b)(v) hereof, one-hundred percent (100%) of the amount of the payment or settlement of such Pre-2009 Group Taxes for which funds are not available in the Refund Escrow Account up to an aggregate amount equal to the result of dividing (y) the excess of the JPMC Balance over the then-current JPMC Amount, if any, by (z) eighty percent (80%).

(ii) Subject to the provisions of subparagraph (v) of this Section 2.4(g), thereafter, JPMC, WMI and the FDIC Receiver shall (A) jointly direct the custodian of the FDIC Escrow Account to pay thirty and three hundred fifty-seven thousandths percent (30.357%) of the remaining amount of the payment or settlement of such Pre-2009 Group Taxes for which funds are not available in the Refund Escrow Account, and (B) jointly direct the custodian of the Washington Mutual Escrow Account to pay sixty-nine and six hundred forty-three thousandths percent (69.643%) of the remaining amount of the payment or settlement of such Pre-2009 Group Taxes for which funds are not available in the Refund Escrow Account; provided, however, that, in both cases (A) and (B) only until (and so that) the net amount of refunds of Pre-2009 Group Taxes paid to the FDIC Escrow Account shall be equal to thirty and three hundred fifty-seven thousandths percent (30.357%) of the Homeownership Carryback Refund Amount, and the net amount of refunds of Pre-2009 Group Taxes paid to the Washington Mutual Escrow Account shall be equal to the sum of (x) sixty-nine and six hundred forty-three

Exhibit F

thousandths percent (69.643%) of the Homeownership Carryback Refund Amount, plus (y) twenty-five percent (25%) of the then-current JPMC Amount.

(iii) Thereafter, JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the Washington Mutual Escrow Account and the custodian of the JPMC Escrow Account to pay from the Washington Mutual Escrow Account and the JPMC Escrow Account, in the percentages set forth in Section 2.4(b)(v) hereof, one-hundred percent (100%) of the amount of the payment or settlement of such Pre-2009 Group Taxes for which funds are not available in the Refund Escrow Account until the balance of the JPMC Escrow Account is reduced to zero.

(iv) Thereafter, JPMC shall be responsible for paying eighty percent (80%) of the amount of the payment or settlement of Pre-2009 Group Taxes for which funds are not available in the Refund Escrow Account and WMI shall be responsible for paying twenty percent (20%) of such deficiency.

(v) Notwithstanding anything to the contrary herein, no amounts shall be debited out of the FDIC Escrow Account except (without duplication) with respect to (x), distributions made from the FDIC Escrow Account to the FDIC Receiver, (y) thirty and three hundred fifty-seven thousandths percent (30.357%) of any Homeownership Refund Taxes, and (z) amounts debited from the FDIC Escrow Account that need to be debited in order to properly reflect adjustments or modifications to the Homeownership Carryback Threshold or the Homeownership Carryback Refund Amount, or any estimates thereof, if any.

(h) Release of JPMC Escrow Account, Washington Mutual Escrow Account and FDIC Escrow Account.

(i) JPMC, WMI and the FDIC Receiver shall jointly direct the custodian of the JPMC Escrow Account, the Washington Mutual Escrow Account and the FDIC Escrow Account to release all or a portion of the JPMC Escrow Account, the Washington Mutual Escrow Account and the FDIC Escrow Account as the case may be, to JPMC, WMI and the FDIC Receiver, respectively, as soon as is practicable after the earlier to occur of: (A) the date on which all Pre-2009 Group Tax Liabilities are finally determined and paid and the final amount of Net Tax Refunds Received has been determined and is not subject to change; and (B) the date on which JPMC (with respect to the Washington Mutual Escrow Account), WMI (with respect to the JPMC Escrow Account), or JPMC and WMI jointly (with respect to the FDIC Escrow Account), consents, in writing, to permit the release of all or such agreed portion of the JPMC Escrow Account, the Washington Mutual Escrow Account or the FDIC Escrow Account, as applicable (such consent, in each case, not to be unreasonably withheld or delayed); provided, however, that there shall be released from each escrow account at least quarterly (on or prior to each March 1, June 1, September 1 and December 1) fifty percent (50%) of all amounts earned by such escrow account with respect to assets held therein.

Exhibit F

(ii) In the event that distributions have been made from the JPMC Escrow Account, the Washington Mutual Escrow Account or the FDIC Escrow Account, as the case may be, and a provision of this Section 2.4 (including without limitation, Sections 2.4(c) and 2.4(g) hereof) requires that an amount be paid from the JPMC Escrow Account, the Washington Mutual Escrow Account or the FDIC Escrow Account, as applicable, for which there are insufficient funds in such account, then WMI, JPMC or the FDIC Receiver, as applicable, shall return such amount to the respective account to allow the account to satisfy its obligations hereunder (and such amount shall thereafter be treated as if it had not been distributed); moreover for the avoidance of doubt, the JPMC Balance shall be determined without regard to distributions from the JPMC Escrow Account to JPMC.

(i) Tax Dispute Resolution Procedure. In the event that WMI or the FDIC Receiver do not consent to the estimates or calculations provided by JPMC, and WMI, JPMC and the FDIC Receiver are unable to resolve their differences as provided in Section 2.4(e) hereof, then WMI, JPMC and the FDIC Receiver will attempt to agree on the appointment of a mutually acceptable tax professional to arbitrate the dispute. If they are unable to agree on a single tax professional, then a panel of three (3) tax professionals shall be selected as follows: each of WMI, JPMC and the FDIC Receiver shall designate a tax professional. Each of WMI, JPMC and the FDIC Receiver shall then present their calculations or estimates (including underlying data, substantiation and computations) to the tax professional or the panel of tax professionals, which will determine (by majority vote in the case of the panel) whether WMI, JPMC or and the FDIC Receiver's calculations or estimates are more reasonable, and calculations or estimates so determined to be more reasonable shall apply for purposes of this Section 2.4 as if agreed upon by WMI, JPMC and the FDIC Receiver. In assessing whether WMI's, JPMC's or the FDIC Receiver's calculations or estimates are more reasonable, the tax professional or the panel of tax professionals shall treat the calculations or estimates submitted by each party with the same level of deference. The fees and expenses of the tax professional or the panel of tax professionals will be paid from the Refund Escrow Account (or, once the Refund Escrow Account is terminated, from the JPMC Escrow Account, the Washington Mutual Escrow Account or the FDIC Escrow Account, as the case may be). WMI, JPMC and the FDIC Receiver agree to act as expeditiously as practicably possible in connection with this tax dispute resolution process.

(j) Capital Contributions. WMI, WMB, the FDIC Parties and JPMC shall treat, solely for Tax purposes, all amounts paid, waived, allocated or transferred by WMI to WMB or to JPMC (on behalf of WMB or any subsidiary acquired by it from WMB, and hereby at the direction of the FDIC Parties) pursuant to the terms of this Agreement (other than any amounts paid or properties transferred to JPMC pursuant to this Section 2.4 and Sections 2.15, 2.17 and 2.18 hereof) as capital contributions from WMI to WMB, and then, as applicable, as a transfer from WMB to JPMC pursuant to the terms and conditions of the Purchase and Assumption Agreement.

Exhibit F

(k) FDIC Receiver. For the avoidance of doubt, the FDIC Receiver shall not be responsible for Group Taxes other than (x) thirty and three hundred fifty-seven thousandths percent (30.357%) of any Homeownership Refund Taxes and (y) Taxes, if any, imposed on interest allocated to WMB or the FDIC Receiver.

(l) No Double Counting. The Parties intend that the provisions of this Agreement be applied in a manner that prevents any item of refund, credit, offset, abatement, taxes or expenses from being taken into account more than once.

(m) Escrow Tax Treatment. For Tax purposes, the FDIC Receiver shall be deemed to own the assets in the FDIC Escrow Account and shall include as income for Tax purposes any income generated by assets in the FDIC Escrow Account. For Tax purposes, JPMC shall be deemed to own the assets in the JPMC Escrow Account and shall include as income for Tax purposes any income generated by assets in the JPMC Escrow Account. For Tax purposes, WMI shall be deemed to own the assets in the Washington Mutual Escrow Account and shall include as income for Tax purposes any income generated by assets in the Washington Mutual Escrow Account. For Tax purposes, the assets in the Refund Escrow Account shall be deemed to be owned by WMI, JPMC and the FDIC Receiver consistent with the allocation of interest in Section 2.4(b)(ii) hereof. Accordingly, as the owner for Tax purposes, WMI (or any assignee of its ownership rights), JPMC and the FDIC Receiver shall include as income for Tax purposes the income generated by the assets in the Refund Escrow Account in the same proportion that interest is allocated in Section 2.4(b)(ii) hereof, during the relevant period.

Section 2.5. Withdrawal of Claims.

(a) Chapter 11 Claims. Except as expressly provided herein or pursuant to the terms and provisions of the Plan, from and after the Effective Date, JPMC, the FDIC Receiver and FDIC Corporate shall take such action as may be reasonably requested by WMI to (a) cause the withdrawal, with prejudice, or the expungement of the JPMC Claims and the FDIC Claim and (b) assist the Debtors in the prosecution of any objections to the proofs of claim filed against the WMI Entities by creditors of WMB, including, without limitation, by filing with the Bankruptcy Court or such other court of competent jurisdiction with respect to the Bank Bondholder Claims a notice or other pleading stating that the claims and causes of action asserted by the FDIC Parties and the Receivership against the Debtors in the FDIC Claim and/or the WMI Action represent all claims and causes of action of the FDIC Parties and the Receivership against the Debtors and that the claims similar in nature which are asserted in the Bank Bondholder Claims, including, without limitations, fraudulent transfer claims, breach of fiduciary claims, corporate veil piercing or alter ego claims, substantive consolidation, securities fraud, and the undercapitalization of, failure to support and looting of WMB, are derivative in nature of the claims of the Receivership and of the claims set forth in the FDIC Claim and the WMI Action. Without in any way limiting the foregoing, on the Effective Date, the Debtors shall direct Kurtzman Carson Consultants, LLC ("***KCC***"), the

Exhibit G

Exhibit G

liquid during the crisis, dealers worried that they might be saddled with unwanted exposure. As a result, they began charging more to sell contracts (raising their ask price), and the spread rose. In addition, they offered less to buy contracts (lowered their bid price), because they feared involvement with uncreditworthy counterparties. The increase in the spread in these contracts meant that the cost to a firm of hedging its exposure to the potential default of a loan or of another firm also increased. The cost of risk management rose just when the risks themselves had risen.

Meanwhile, outstanding credit derivatives contracted by 48% between December 2007, when they reached their height of $58.2 trillion in notional amount, and the latest figures as of June 2010, when they had fallen to $30.3 trillion.[60]

In sum, the sharp contraction in the OTC derivatives market in the fall of 2008 greatly diminished the ability of institutions to enter or unwind their contracts or to effectively hedge their business risks at a time when uncertainty in the financial system made risk management a top priority.

WASHINGTON MUTUAL: "IT'S YOURS"

In the eight days after Lehman's bankruptcy, depositors pulled $16.7 billion out of Washington Mutual, which now faced imminent collapse. WaMu had been the subject of concern for some time because of its poor mortgage-underwriting standards and its exposures to payment-option adjustable-rate mortgages (ARMs). Moody's had downgraded WaMu's senior unsecured debt to Baa3, the lowest-tier investment-grade rating, in July, and then to junk status on September 11, citing "WAMU's reduced financial flexibility, deteriorating asset quality, and expected franchise erosion."[61]

The Office of Thrift Supervision (OTS) determined that the thrift likely could not "pay its obligations and meet its operating liquidity needs."[62] The government seized the bank on Thursday, September 25, 2008, appointing the Federal Deposit Insurance Corporation as receiver; many unsecured creditors suffered losses. With assets of $307 billion as of June 30, 2008, WaMu thus became the largest insured depository institution in U.S. history to fail—bigger than IndyMac, bigger than any bank or thrift failure in the 1980s and 1990s. JP Morgan paid $1.9 billion to acquire WaMu's banking operations from the FDIC on the same day; on the next day, WaMu's parent company (now minus the thrift) filed for Chapter 11 bankruptcy protection.

FDIC officials told the FCIC that they had known in advance of WaMu's troubles and thus had time to arrange the transaction with JP Morgan. JP Morgan CEO Jamie Dimon said that his bank was already examining WaMu's assets for purchase when FDIC Chairman Sheila Bair called him and asked, "Would you be prepared to bid on WaMu?" "I said yes we would," Dimon told the FCIC. "She called me up literally the next day and said—'It's yours.' . . . I thought there was another bidder, by the way, the whole time, otherwise I would have bid a dollar—not [$1.9 billion], but we wanted to win."[63]

The FDIC insurance fund came out of the WaMu bankruptcy whole. So did the uninsured depositors, and (of course) the insured depositors. But the FDIC never contemplated using FDIC funds to protect unsecured creditors, which it could have done by invoking the "systemic risk exception" under the FDIC Improvement Act of

Exhibit G

1991. (Recall that FDICIA required that failing banks be dismantled at the least cost to the FDIC unless the FDIC, the Fed, and Treasury agree that a particular company's collapse poses a risk to the entire financial system; it had not been tested in 17 years.) Losses among those creditors created panic among the unsecured creditors of other struggling banks, particularly Wachovia—with serious consequences. Nevertheless, FDIC Chairman Bair stood behind the decision. "I absolutely do think that was the right decision," she told the FCIC. "WaMu was not a well-run institution." She characterized the resolution of WaMu as "successful."[64]

The FDIC's decision would be hotly debated. Fed General Counsel Scott Alvarez told the FCIC that he agreed with Bair that "there should not have been intervention in WaMu."[65] But Treasury officials felt differently: "We were saying that's great, we can all be tough, and we can be so tough that we plunge the financial system into the Great Depression," Treasury's Neel Kashkari told the FCIC. "And so, I think, in my judgment that was a mistake. . . . [A]t that time, the economy was in such a perilous state, it was like playing with fire."[66]

WACHOVIA: "AT THE FRONT END OF THE DOMINOES AS OTHER DOMINOES FELL"

Wachovia, having bought Golden West, was the largest holder of payment-option ARMs, the same product that had helped bring down WaMu and Countrywide. Concerns about Wachovia—then the fourth-largest bank holding company—had also been escalating for some time. On September 9, the Merrill analyst Ed Najarian downgraded the company's stock to "underperform," pointing to weakness in its option ARM and commercial loan portfolios. On September 11, Wachovia executives met Fed officials to ask for an exemption from rules that limited holding companies' use of insured deposits to meet their liquidity needs. The Fed did not accede; staff believed that Wachovia's cash position was strong and that the requested relief was a "want" rather than a "need."[67]

But they changed their minds after the Lehman bankruptcy, immediately launching daily conference calls to discuss liquidity with Wachovia management. Depositor outflows increased. On September 19, the Fed supported the company's request to use insured deposits to provide liquidity to the holding company. On September 20, a Saturday, Wells Fargo Chairman Richard M. Kovacevich told Robert Steel, Wachovia's CEO and recently a Treasury undersecretary, that Wells might be interested in acquiring the besieged bank, and the two agreed to speak later in the week. The same day, Fed Governor Kevin Warsh suggested that Steel also talk to Goldman. As a former vice chairman of Goldman, Steel could easily approach the firm, but the ensuing conversations were short; Goldman was not interested.[68]

Throughout the following week, it became increasingly clear that Wachovia needed to merge with a stronger financial institution. Then, WaMu's failure on September 25 "raised creditor concern about the health of Wachovia," the Fed's Alvarez told the FCIC. "The day after the failure of WaMu, Wachovia Bank depositors accelerated the withdrawal of significant amounts from their accounts," Alvarez said. "In ad-

Exhibit H

Exhibit H

(See page 6)

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of Earliest Event Reported): September 7, 2008

WASHINGTON MUTUAL, INC.
(Exact name of Registrant as specified in its charter)

Washington	[redacted]	[redacted]
(State or other jurisdiction of incorporation)	(Commission File Number)	(I.R.S. Employer Identification No.)

1301 SECOND AVENUE
SEATTLE, WASHINGTON 98101
(Address of principal executive offices and Zip Code)

Registrant's telephone number, including area code: [redacted]

(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

SECTION 5 – CORPORATE GOVERNANCE AND MANAGEMENT

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

Departure of Chief Executive Officer and Director

On September 7, 2008, Washington Mutual, Inc. (the "Company") replaced Kerry Killinger as Chief Executive Officer of the Company with Alan H. Fishman. Mr. Killinger left the Company and resigned as a member of the Company's Board of Directors, effective September 7, 2008.

Exhibit H

F or purposes of each employment, equity compensation or benefit agreement, plan or arrangement of the Company and its subsidiaries to which Mr. Killinger is a party or otherwise participates, Mr. Killinger's departure constitutes a termination other than for "cause" (as such term is defined in any such applicable agreement, plan or arrangement).

Appointment of New Chief Executive Officer and Director

The Company issued a press release on September 8, 2008 (the "Press Release") announcing that the Company's Board of Directors has appointed Mr. Fishman, age 62, as Chief Executive Officer and as a member of the Company's Board of Directors to fill the vacancy created by Mr. Killinger's departure. The Board also appointed Mr. Fishman to serve as Chair of its Corporate Development Committee.

Before joining the Company, Mr. Fishman served since 2007 as Chairman of Meridian Capital Group, a commercial mortgage brokerage firm. From June 2006 through December 2006, Mr. Fishman served as President and Chief Operating Officer of Sovereign Bank, which he joined through Sovereign Bank's acquisition of Independence Community Bank in 2006, where he had been President and Chief Executive Officer since 2001.

Employment Agreement of Alan H. Fishman

On September 7, 2008, the Company and Mr. Fishman entered into an employment agreement (the " Employment Agreement ") with respect to Mr. Fishman's appointment as Chief Executive Officer and as a director of the Company commencing on September 7, 2008 (the " Effective Date "). The Employment Agreement expires on December 31, 2011. The financial terms of the Employment Agreement include: (1) an annual base salary of $1,000,000, subject to discretionary increases from time to time by the Human Resources Committee of the Board of Directors (the " Committee "); (2) commencing with respect to the 2009 fiscal year, a target annual bonus of 365% of Mr. Fishman's annual base salary; and (3) the opportunity to receive long-term incentive awards as determined by the Committee. In 2009, assuming Mr. Fishman remains as Chief Executive Officer for the full year, Mr. Fishman will be entitled to receive a long-term incentive award having an aggregate grant value of not less than $8,000,000.

For 2008, Mr. Fishman will also receive sign-on cash and equity inducement awards consisting of: (A) options to purchase 5,000,000 shares of Company common stock (the " Inducement Options "); (B) 612,500 restricted shares (the " Inducement Shares "); and (C) a sign-on cash inducement bonus of $7,500,000, which Mr. Fishman will be obligated to repay in full, or in part, if he terminates his employment other than due to a "constructive termination" or if his employment is terminated by the Company with "cause" (each as defined in the Employment Agreement) within certain periods of time after the Effective Date.

The Inducement Shares will generally vest at an annual rate of 33 1/3% over three years (subject to continued employment); provided that applicable performance targets (to be mutually agreed by Mr. Fishman and the Committee no later than 60 days after the Effective Date) in respect of each annual period are also satisfied. The Inducement Options will have a term of seven years and a per share exercise price equal to the closing trading price of the Company's common stock on the date of the grant. The Inducement Options will vest based on the achievement of a combination of service and Company performance criteria (each, subject to continued employment through the satisfaction of the applicable vesting event). One-quarter of the Inducement Options, or 1,250,000 shares, will be time vesting and will vest on the first anniversary of the Effective Date. The performance vesting criteria for the remaining Inducement Options will be as follows:

- 1,250,000 shares, if the Company's average closing stock price over 20 consecutive trading days equals or exceeds $10.00 per share;
- 1,250,000 shares, if the Company's average closing stock price over 20 consecutive trading days equals or exceeds $14.00 per share; and
- 1,250,000 shares, if the Company's average closing stock price over 20 consecutive trading days equals or exceeds $18.00 per share.

The Employment Agreement provides that if Mr. Fishman is terminated without "cause" or if he resigns as a result of "constructive termination" (each as defined in the Employment Agreement), then subject to execution and delivery of a general release of claims (the " Release ") and compliance by Mr. Fishman with the restrictive covenants contained in the Employment Agreement, Mr. Fishman will be entitled to receive a lump sum payment, payable within 10 business days following the effective date of the Release, equal to 2.5 times the sum of (x) Mr. Fishman's then applicable base salary and (y) his annual bonus payable in respect of the immediately preceding year (or, in the case of a termination occurring in 2008 or 2009, 365% of his base salary for such year). In addition, upon such an event,

Exhibit H

- all unvested Inducement Options held by Mr. Fishman that vest based solely on continued service will become immediately vested and exercisable and will remain outstanding for up to 12 months;

- all unvested Inducement Options held by Mr. Fishman that vest based on the stock price of the Company will remain outstanding as unvested and unexercisable options until the later of (i) the third anniversary of the Effective Date and (ii) 12 months after the termination date (but in no event later than the seventh anniversary of the applicable grant date), and, in either case, shall become vested and exercisable solely if the applicable price targets have been satisfied within such time period; and

- the vesting of Mr. Fishman's Inducement Shares will automatically be accelerated if the applicable performance targets shall have been satisfied within 12 months of the termination date.

If Mr. Fishman is subject to golden parachute excise taxes in connection with a change in control, Mr. Fishman will also be entitled to certain tax gross-up payments. In the case of a termination of employment due to "disability" (as defined in the Employment Agreement), or death, the Employment Agreement provides that, other than payments made by insurers under policies of life and disability insurance and any sums which may become available under any employee benefit plan, Mr. Fishman will not be entitled to any further compensation, but upon such an event, all of Mr. Fishman's vested stock options will remain exercisable for one year following the effective date of his termination arising from such event.

Mr. Fishman is eligible to participate in all employee benefit plans (including pension, retirement and insurance plans) of the Company available to other senior officers of the Company. In addition, the Company will pay reasonable legal fees and expenses (not to exceed $50,000) incurred by Mr. Fishman in connection with the negotiation of the Employment Agreement, and will reimburse Mr. Fishman for reasonable expenses related to his establishment of a residence in the Seattle metropolitan area consistent with the Company's applicable relocation policy and practices.

Mr. Fishman is also subject to certain standard covenants relating to confidentiality and assignment of intellectual property rights and two year post-employment non-solicitation and non-competition covenants (except in the case of a termination without "cause" or if Mr. Fishman resigns as a result of "constructive termination," in which case Mr. Fishman may elect to terminate his non-solicitation and non-competition covenants in exchange for waiving his rights to specified severance benefits).

SECTION 8 – OTHER EVENTS

Item 8.01 Other Events.

The Company also announced in the Press Release that it has entered into a Memorandum of Understanding with the Office of Thrift Supervision (" OTS ") concerning aspects of Washington Mutual Bank's operations, principally in several areas of its risk management and compliance functions, including its Bank Secrecy Act compliance program. In addition, the Company has committed to provide the OTS an updated, multi-year business plan and forecast for its earnings, asset quality, capital and business segment performance. The business plan will not require the Company to raise capital, increase liquidity or make changes to the products and services it provides to customers.

A copy of the Press Release has been filed as Exhibit 99.1 to this Current Report on Form 8-K and is incorporated herein by reference.

SECTION 9 - FINANCIAL STATEMENTS AND EXHIBITS

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

Exhibit H

99.1 Press Release, dated September 8, 2008

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: September 11, 2008

WASHINGTON MUTUAL, INC.

By: /s/ Michael S. Solender

Michael S. Solender
Executive Vice President

EXHIBIT INDEX

Exhibit No.	Description
99.1	Press Release, dated September 8, 2008

Exhibit H

Exhibit 99.1

September 8, 2008
FOR IMMEDIATE RELEASE

ALAN H. FISHMAN JOINS WASHINGTON MUTUAL AS CHIEF EXECUTIVE OFFICER

KERRY KILLINGER TO RETIRE AFTER 18 YEARS AS CEO

SEATTLE, WA, September 8, 2008 -- Washington Mutual, Inc. (NYSE:WM), one of the nation's leading banks for consumers and small businesses, announced today that Alan H. Fishman has been appointed chief executive officer and has joined WaMu's Board of Directors.

Fishman, 62, has more than 25 years of experience as a senior executive in banking and financial services. He was previously president and chief operating officer of Sovereign Bank and president and chief executive officer of Independence Community Bank. He succeeds Kerry Killinger, who is leaving the company after serving as WaMu's chief executive officer since 1990.

Stephen E. Frank, chair of the Board, said, "We believe Alan Fishman is the ideal executive to succeed Kerry Killinger and lead WaMu through its current challenges. Alan has had a distinguished career in many aspects of the financial services business and brings a unique combination of in-depth industry knowledge, an entrepreneurial approach, and strong management skills that make him the right choice to be CEO of WaMu at this critical juncture."

Frank continued, "On behalf of the Board, I would like to thank Kerry Killinger for all of his contributions over the past 25 years. Kerry is a visionary who built WaMu into a nationally recognized brand and one of the country's largest banks. We wish him well in his retirement."

Fishman said, "WaMu's strong brand and irreplaceable retail banking franchise have enormous potential, especially in today's environment, and I am thrilled to have this opportunity to create value for shareholders. I look forward to working with WaMu's dedicated management team and talented employees who have done a remarkable job weathering the storm in the housing and mortgage markets. I intend to hit the ground running here in Seattle with a focus on building on WaMu's strengths, addressing its weaknesses, and returning the company to profitability as quickly as possible."

Fishman has spent his entire career in the financial services industry as both an operator and an investor. Until 2007, he was president and chief operating officer of Sovereign Bank. He joined Sovereign through its 2006 acquisition of Independence Community Bank, a leading community bank and multifamily lender in the New York area, where he had been president and chief executive officer since 2001. Recently he has been involved in a variety of business and civic activities, including serving as chairman of Meridian Capital Group, one of the nation's largest commercial mortgage brokerage firms, and as chairman of the Brooklyn Academy of Music. He holds a bachelors degree from Brown University and a master's degree in economics from Columbia University.

Exhibit H

WaMu also announced that it has entered into a Memorandum of Understanding (MOU) with the Office of Thrift Supervision (OTS) concerning aspects of the bank's operations, principally in several areas of its risk management and compliance functions, including its Bank Secrecy Act compliance program. In addition, WaMu has committed to provide the OTS an updated, multi-year business plan and forecast for its earnings, asset quality, capital and business segment performance. The business plan will not require the company to raise capital, increase liquidity or make changes to the products and services it provides to customers.

About WaMu

WaMu, through its subsidiaries, is one of the nation's leading consumer and small business banks. At June 30, 2008, WaMu and its subsidiaries had assets of $309.7 billion. The company has a history dating back to 1889 and its subsidiary banks currently operate approximately 2,300 consumer and small business banking stores throughout the nation. WaMu's financial reports and news releases are available at www.wamu.com/ir.

Conference Call and Webcast Information

A conference call to discuss today's announcement will be held on Monday, September 8, 2008, at 9:00 a.m. ET and will be hosted by Steve Frank, chair of the board and Alan Fishman, chief executive officer. The conference call is available by telephone or on the Internet. The dial-in number for the live conference call is 800.798.2796. Participants calling from outside the United States may dial 617.614.6204. The passcode "WaMu" is required to access the call. Via the Internet, the conference call is available on the Investor Relations portion of the company's web site at www.wamu.com/ir. A recording of the conference call will be available from approximately 11:00 a.m. ET on Monday, Sep. 8, 2008 through 5:00 p.m. on Monday, Sep. 15, 2008. The recorded message will be available at 888-286-8010. Callers from outside the United States may dial 617-801-6888.

Contact:

Washington Mutual, Inc.
Media Contact
Derek Aney
206-500-6094 (Seattle)
212-326-6075 (New York)
derek.aney@wamu.net

Washington Mutual, Inc.
Investor Relations Contact
Alan Magleby
206-500-4148 (Seattle)
212-702-6955 (New York)
alan.magleby@wamu.net

Sard Verbinnen & Co.
Paul Kranhold
Diane Henry
415-618-8750 or 310-962-3173 (San Francisco)
Robin Weinberg
212-687-8080 or 917-443-7576 (New York)

###

Exhibit I

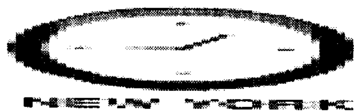
Exhibit I

- Shows
- Schedule
- More
  - Video
  - Paul Kedrosky
  - Podcasts
  - Mobile Apps
  - Businessweek.com
  - Insights Series
  - Inside Bloomberg.com
  - Feedback

Search Quotes and News

Bloomberg

- Anywhere
- Professional
- Solutions
- About



- Log in

DB2. As low as 1/3 the cost of Oracle Database.

WaMu's Bank Split From Holding Company, Sparing FDIC (Update1)

By Linda Shen - September 26, 2008 15:53 EDT

Sept. 26 (Bloomberg) -- Washington Mutual Inc.'s holding company was detached from its branches and deposits when JPMorgan Chase & Co. bought the assets, helping the Federal Deposit Insurance Corp. dodge the bill for the lender's failure.

WaMu's collapse, the largest U.S. bank failure, came at a ``zero cost'' to the insurance fund for deposits, said FDIC Chairman Sheila Bair in an interview with Bloomberg Television. A ``clean, seamless transfer'' of the Seattle-based lender's banking unit helped shield the $45 billion fund, Bair said.

The FDIC's fund, drained by 12 other failures so far this year, was spared because WaMu's corporate structure let the agency seize only the bank. The holding company retained the liabilities, including senior and subordinated debt and equity.

``A wide swath of investors are going to be harmed by this, but the FDIC fund is going to come out of this unscathed," said Chip MacDonald, a partner in the capital markets group at Jones Day in Atlanta. ``That's the happy part."

The FDIC seized WaMu's banking units, ``cherry-picked a little bit" and merged the Washington Mutual Federal Savings Bank into JPMorgan without transferring all the liabilities, MacDonald said. ``The FDIC has nothing to do with the holding company."

JPMorgan, which said in an investor presentation it would write down $31 billion of the acquired assets, won't report a loss because the transferred assets exceeded liabilities by the same amount. WaMu's shareholders and bondholders will absorb the debt JPMorgan didn't buy. WaMu had $30 billion in shareholder's equity on June 30, which would be wiped out by the writedown, leaving some losses for bondholders.

Lawsuits

Lawsuits against WaMu will remain at the FDIC or the holding company, Standard & Poor's analyst Tanya Azarchs said.

Washington Mutual has been sued by investors who said the company committed securities fraud by over-inflating home appraisals while also inflating prices, according to a note from Sandler O'Neill & Partners LP analyst Jeffrey Harte.

The lender was deemed ``unsound" by the Office of Thrift Supervision after customers withdrew $16.7 billion in deposits since Sept. 15. WaMu, which had $188 billion in deposits and $307 billion in assets when it was seized, put itself up for sale last week after its credit rating was slashed to junk and its stock price tumbled.

Deposit Fund

When the FDIC seizes bank units, holding companies ``go their merry way," said William Seidman, who served as chairman of the FDIC from 1985 to 1991. ``If they have a lot of other banks, they may run them. If they have nothing else, they may just go out of business."

The FDIC deposit insurance fund fell 14 percent to $45.2 billion in the quarter ended June 30, with the July 11 failure of IndyMac Bancorp Inc. costing about $8.9 billion, the agency said. An increase in insurance premiums paid by banks will be considered Oct. 7, Bair said this week.

Washington Mutual's holding company ``basically got cut loose," said Sterne Agee & Leach Inc. analyst Adam Barkstrom. ``The way WaMu and JPMorgan Chase worked, that's the way the system is supposed to work. The banks that made crappy loans and have crappy portfolios need to pay."

To contact the reporter on this story: Linda Shen in New York at lshen21@bloomberg.net

To contact the editor responsible for this story: Rick Green at rgreen18@bloomberg.net.

- Recommend
- 0

Exhibit J

Exhibit J

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION

In the Matter of **WASHINGTON MUTUAL BANK,** Henderson, Nevada. OTS Docket No.: 08551	Order No.: WE-07-008 Effective Date: October 17, 2007

STIPULATION AND CONSENT TO ISSUANCE OF
AN ORDER OF ASSESSMENT OF A CIVIL MONEY PENALTY

WHEREAS, the Office of Thrift Supervision (OTS), based upon information derived from the exercise of its regulatory responsibilities, is of the opinion that grounds exist to initiate a civil money penalty assessment proceeding against Washington Mutual Bank, Henderson, Nevada, OTS Docket No. 08551 (Institution), pursuant to 42 U.S.C. § 4012a(f); and

WHEREAS, the Institution desires to cooperate with the OTS and to avoid the time and expense of such administrative proceeding; and

WHEREAS, the Institution enters into this Stipulation and Consent to the Issuance of an Order of Assessment of a Civil Money Penalty (Stipulation): (1) without any adjudication on the merits; (ii) without admitting or denying that grounds exist to initiate an administrative cease and desist proceedings; and (iii) without admitting or denying the Findings of Fact, except as to jurisdiction (¶1 below), which jurisdiction is admitted;

Exhibit J

NOW, THEREFORE, the Institution hereby stipulates and agrees as follows:

1. **Jurisdiction.**

(a) The Institution is a "savings association" within the meaning of 12 U.S.C. § 1813(b) and 12 U.S.C. § 1462(4) and a "regulated lending institution" as that term is defined at 12 U.S.C. § 4003(a)(10).

(b) Pursuant to 12 U.S.C. § 1813(q) and 42 U.S.C. § 4003(a)(5), the Director of the OTS is the "appropriate Federal Banking agency" and the "Federal entity for lending regulation" to initiate and maintain a civil money penalty proceeding against the Institution pursuant to 42 U.S.C. § 4012a(f).

(c) The Director of the OTS has delegated to the Regional Director of the West Region of the OTS or his designee (Regional Director) the authority to issue civil money penalty assessment orders where a savings association has consented to the issuance of the order.

2. **OTS Findings of Fact.** The Institution failed to comply with the requirements set forth in 42 U.S.C. §§ 4001-4128, and the OTS implementing regulations set forth at 12 C.F.R. Part 572. Specifically, the OTS finds that, despite knowing that one hundred and fifty-seven (157) designated loans had no or inadequate flood insurance, the Institution failed to notify the respective borrowers of the need to obtain flood insurance, or, if the borrowers were so notified and did not obtain flood insurance, failed to purchase insurance on the borrowers' behalf as required by 42 U.S.C. § 4012a(e) and 12 C.F.R. § 572.7. The OTS finds that such behavior constituted a pattern or practice of violations under 42 U.S.C. § 4012a(f)(1).

3. **Consent.** The Institution consents to the issuance by the OTS of the accompanying Consent Order of Assessment of a Civil Money Penalty (Order). The Institution

Exhibit J

further agrees to comply with the terms of the Order upon issuance and stipulates that the Order complies with all requirements of law.

4. **Finality**. This Order is issued by the OTS under the authority of 42 U.S.C. §§ 4012a(f)(1) and 4012a(f)(5). Upon its issuance by the Regional Director, it shall be a final order, effective and fully enforceable by the OTS pursuant to 12 U.S.C. § 1818(i) and 42 U.S.C. § 4012a(f).

5. **Waivers**. The Institution waives the following:

(a) The right to be served with a written notice of OTS's assessment of a civil money penalty against it as provided by 12 U.S.C. § 1818(i) and 42 U.S.C. § 4012a(f)(4);

(b) The right to an administrative hearing of the OTS's charges against it as provided by 12 U.S.C. § 1818(i), 12 C.F.R. Part 509, and 42 U.S.C. § 4012a(f)(4);

(c) The right to seek judicial review of the Order or otherwise to challenge the validity of the Order; and

(d) Any and all claims against the OTS, including its employees and agents, and any other governmental entity for the award of fees, costs, or expenses related to this OTS enforcement matter and/or the Order, whether arising under common law, or under the term of any statutes including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504, or 28 U.S.C. § 2412.

6. **OTS Authority Not Affected**. Nothing in this Stipulation or accompanying Order shall inhibit, estop, bar or otherwise prevent the OTS from taking any other action affecting the Institution if at any time OTS deems it appropriate to do so to fulfill the responsibilities placed upon OTS by law.

Exhibit J

7. **Other Governmental Actions Not Affected**. Institution acknowledges and agrees that its consent to the issuance of the Order does not release, discharge, compromise, settle, dismiss, resolve, or in any way affect any actions, charges against, or liability of the Institution that arise pursuant to this action or otherwise, and that may be or have been brought by any other government entity other than the OTS.

8. **Miscellaneous.**

(a) The laws of the United States of America shall govern the construction and validity of this Stipulation and of the Order.

(b) If any provision of this Stipulation and the Order is ruled to be invalid, illegal, or unenforceable by the decision of any Court of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions hereof shall not in any way be affected or impaired thereby, unless the Regional Director in his sole discretion determines otherwise;

(c) All references to the OTS in this Stipulation and the Order shall also mean any of the OTS's predecessors, successors, and assigns.

(d) The section and paragraph headings in this Stipulation and the Order are for convenience only, and such headings shall not affect the interpretation of this Stipulation or the Order.

(e) The terms of this Stipulation and the Order represent the final agreement of the parties with respect to the subject matters hereof and constitute the sole agreement of the parties with respect to such subject matters.

9. **Signature of Directors.**

Each Director signing this Stipulation attests that he or she voted in favor of a resolution

Exhibit J

authorizing the consent of the Institution to the issuance of the Order and the execution of the Stipulation.

WHEREFORE, the Institution, by a majority of its directors, executes this Stipulation and Consent to Issuance of an Order of Assessment of a Civil Money Penalty.

Washington Mutual Bank
Henderson, Nevada

Accepted by a majority of its directors:

By:

/s/
Director

/s/
Director

/s/
Director

/s/
Director

/s/
Director

/s/
Director

Director

Office of Thrift Supervision
West Region

By: /s/
Darrel W. Dochow
Regional Director, West

Dated:

/s/
Director

/s/
Director

(Wamu CMP Stip)