Washington Mutual

June 16, 2008

Via Mail and E-mail

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Covered Bond Policy Statement

Dear Mr. Feldman:

On behalf of Washington Mutual Bank ("WaMu"), I am submitting these comments regarding the Federal Deposit Insurance Corporation ("FDIC") Interim Final Covered Bond Policy Statement (73 Fed. Reg. 21949, April 23, 2008) (the "Policy Statement").

As the first U.S. financial institution to issue covered bonds, WaMu is vitally interested in the Policy Statement and its potential for furthering the ability of U.S. financial institutions to take advantage of this source of liquidity and successfully compete with other issuers in the international covered bond markets. While the Policy Statement does much in this regard, we have concerns that we believe would be useful to address when the FDIC issues a revised final policy statement.

First, WaMu would like to express our appreciation for the work of the FDIC staff, beginning with our first meeting with FDIC staff on March 16, 2006, through our presentation to them of the model structure for covered bond issuances by FDIC-insured depository institutions (as described in the Policy Statement at 73 Fed. Reg. 21950). The outcome of these discussions was WaMu's groundbreaking issuance of approximately €4.0 billion of covered bonds on September 27, 2006, generating over $5.0 billion in funding and further diversifying our sources of liquidity. It is in light of this positive working relationship that WaMu submits the following comments.

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Consent Provisions.

The Policy Statement, in paragraph (c) (73 Fed. Reg. 21952), provides for the expedited consent of the FDIC, as conservator or receiver, to the exercise of the contractual rights of a covered bond obligee over the collateral for covered bond transactions (conforming to certain limitations) in two circumstances: (1) in the case of a monetary default on an insured depository institution's obligation to the covered bond obligee, if the monetary default continues for ten business days after the obligee's filing of a written request pursuant to paragraph (d) of the Policy Statement; and (2) in the case of a repudiation by the conservator or receiver, failure by the FDIC to pay the damages provided by 12 U.S.C. §1821(e) within ten business days after the effective date of a written repudiation notice by the conservator or receiver to the covered bond obligee.

The effect of this expedited consent provision will be to assure covered bond investors that they will not be required to wait for the expiration of the forty-five day period after appointment of a conservator or the ninety day period after appointment of a receiver before the covered bond obligee exercises its contractual rights over the collateral. WaMu believes that this expedited access to the collateral is extremely important to enhance the acceptability to covered bond investors of covered bonds issued by FDIC-insured depository institutions. We also believe that the filing requirement (described in paragraph (d) of the Policy Statement) that will apply to events of monetary default will not unduly burden or delay the exercise of the rights of the covered bond obligees.

Also, the current structure for U.S. covered bond issuances includes a hedge provided by a third party designed to ensure that payments on the covered bonds continue to be made to covered bond investors for a designated period after the appointment of a conservator or receiver of the issuing depository institution. The expedited consent provision should result in a reduction of the costs of such hedges to U.S. issuers.

WaMu suggests that it would be helpful for the Policy Statement to clarify that the failure of a covered bond issuance to conform to the eligibility requirements of the Policy Statement (a "non-conforming covered bond") does not preclude the FDIC from providing consent as conservator prior to the expiration of the forty-five period or as receiver prior to the expiration of the ninety day period. For example, a covered bond issuance may be a non-conforming covered bond because the collateral does not conform to the definition of "eligible mortgages." While this may be viewed as stating the obvious, a statement to this effect will provide covered bond investors with some assurance that a covered bond obligee may, upon obtaining the FDIC's consent, be able to exercise its contractual rights with regard to non-conforming covered bonds more expeditiously. Such clarification should indicate that requests concerning non-conforming covered bonds should be filed in accordance with paragraph (d) of the Policy Statement.

Also, WaMu suggests that the FDIC permit issuers of covered bond obligations to submit requests concerning non-conforming covered bonds prior to the appointment of a conservator or receiver (for example, at or even before the time of the covered bond issuance). Upon review, the FDIC could designate the non-conforming covered bond as being eligible for consent under paragraph (c) despite the existence of certain non-conforming features in the covered transaction. This will encourage issuers to develop innovative structures and features and allow the FDIC the opportunity to review them prior to the appointment of a conservator or receiver. Such prior submissions will allow innovative issuances to be eligible for consent under paragraph (c) without the FDIC having to amend the Policy Statement.

Policy Statement Coverage and Eligibility.

Paragraph (b) of the Policy Statement (73 Fed. Reg. 21952) establishes that the Policy Statement and its consent provisions will apply only to covered bond issuances that conform to certain requirements. WaMu understands that some of these requirements are necessitated by the newness of covered bond issuances by FDIC-insured depository institutions (despite the fact that covered bonds, in one form or another, have been issued by European financial institutions for well over 100 years).

For example, paragraph (b) limits the coverage of the Policy Statement to covered bond obligations of an insured depository institution that comprises no more than 4% of the insured depository institution's total liabilities. WaMu agrees that this is a prudential starting point, although WaMu recommends that the cap be measured as a percentage of assets so as to be consistent with the European regime for covered bond regulation. It reflects the initial practice of the United Kingdom's Financial Services Authority ("FSA") which imposed a cap of 4% of an institution's assets (rather than its liabilities) in August, 2004. The FSA went on to modify this limitation in August 2005 by allowing issuances without notice below this cap; requiring notice to the FSA for issuances greater than 4% of assets; and allowing issuances (with prior notice) to exceed 20% of assets (although such greater issuances might carry additional capital requirements). WaMu suggests that the FDIC consider the progressive development of the FSA's requirements as a model for future amendments to the Policy Statement. Also, WaMu suggests that the FDIC clarify that the 4% cap be measured at the time of issuance of a covered bond obligation, rather than subsequent to such issuance or at the time of the appointment of a conservator or receiver. This will provide greater predictability to investors.

However, WaMu believes that some of the coverage and eligibility requirements of paragraph (b) of the Policy Statement will present uncertainties and consequences that will limit the usefulness of the Policy Statement.

For example, paragraph (b) limits the coverage of the Policy Statement only to covered bond issuances made with the consent of the insured depository institution's primary federal regulator. WaMu's primary federal regulator is the Office of Thrift Supervision ("OTS"). WaMu discussed its covered bond program with the OTS prior to the first issuance, but the OTS did not require WaMu to obtain the consent of the OTS prior to the issuance. As of the date of this comment letter, the OTS does not require savings associations to obtain its consent to covered bond issuances and does not have an approval process in place for covered bond transactions. Hence, on its face, in the absence of such an approval process, this requirement would disqualify all covered bond issuances by any savings association whose primary regulator is the OTS from obtaining the benefits of the Policy Statement. WaMu suggests that, rather than mandating that the OTS establish a consent requirement that the OTS might otherwise find unnecessary, the FDIC revise the Policy Statement to eliminate this requirement. Alternatively, WaMu suggests that the Policy Statement be revised to require the prior consent of the primary regulator only if the primary regulator has adopted a regulatory requirement to obtain its consent to covered bond issuances.

Similarly, paragraph (b) limits the coverage of the Policy Statement to "eligible mortgages" as defined in paragraph (a)(1) (73 Fed. Reg. 21952). One of the factors in determining whether a covered bond meets the "eligible mortgages" requirement is whether the mortgages were underwritten

> ". . . in accordance with existing supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the *Interagency Statement on Subprime Mortgage Lending, July 10, 2007,* and such other guidance applicable at the time such covered bonds are issued by any [insured depository institution]."

As noted above, WaMu's first issuance of covered bonds occurred on September 27, 2006, prior to the issuance of the Interagency Guidance and Interagency Statement cited in paragraph (a)(2) of the Policy Statement. Hence, WaMu could not have complied with this requirement since it did not exist at the time WaMu initiated its covered bond program. Moreover, all covered bonds issued by FDIC-insured depository institutions to date were issued prior to April 23, 2008, the effective date of the Policy Statement. As a result, WaMu and Bank of America, NA (the only other U.S. depository institution to issue covered bonds) could not have anticipated the eligibility requirements of paragraph (a)(2). WaMu suggests that the Policy Statement be revised so that all mortgage loans identified as part of the cover pool prior to the effective date of the Policy Statement be deemed to be "eligible mortgages" under the Policy Statement, effectively grandfathering those mortgage loans. This action would be consistent with the intent of paragraph (h) of the Policy Statement (73 Fed. Reg. 21953) that any changes to

the Policy Statement shall not apply to any covered bonds issued before the change becomes effective.

The definition of "eligible mortgages" also raises a number of interpretive questions.

- Is the definitional requirement that such mortgages be "performing mortgages" applicable at the time of covered bond issuance or also at the time of the appointment of a conservator or receiver? In other words, if the pool of mortgages securing the covered bond issuance were all performing mortgages at the time of issuance, but some became non-performing between the time of issuance of the covered bonds and the time of the appointment of the conservator or receiver, would the mortgages continue to be eligible mortgages? WaMu urges the FDIC to clarify that the performing loan requirement applies only at the time of issuance with a reasonable grace period after issuance to allow substitution of performing for non-performing mortgages. A grace period of 120 days would be consistent with the federal banking agencies' capital requirements, which excludes from treatment as a credit enhancing recourse obligation any early default clause permitting the return of certain mortgage loans within 120 days of transfer.

- Would second-lien home equity loans and home equity lines of credit qualify as eligible mortgages? These second-lien mortgage loans are not explicitly covered by the Interagency Statement on Subprime Mortgage Lending (except with respect to risk-layering) and HELOCs are explicitly not covered by the Interagency Guidance on Non-Traditional Mortgage Products (other than the section on simultaneous second lien loans) because (according to the Guidance) they are already covered by the May 2005 Interagency Credit Risk Management Guidance for Home Equity Lending. WaMu recommends that the Policy Statement be clarified to include these forms of mortgage loans.

- Would the accumulation of cash (from the payment of principal and interest on the mortgage loans) in a deposit account pledged as part of the covered bond obligation disqualify the covered bond from coverage under the Policy Statement? Would the substitution of assets in the form of cash or cash equivalent securities (such as those securities eligible for zero risk weight under the agencies' capital regulations not arising from collections on the covered pool disqualify the covered bond? Would the existence of other guarantees or pledges (including guarantees by the issuing depository institution, its affiliates or unaffiliated third parties) also disqualify the covered bond? WaMu recommends that the Policy Statement be revised to allow coverage of covered bonds secured in part by cash and other guarantees or pledges, which are not uncommon in covered bonds issued by European entities.

WaMu also believes that the FDIC should anticipate future innovations by not limiting the coverage of the Policy Statement to mortgages on one-to-four family residential properties. Covered bonds secured by credit card receivables or by multifamily and commercial real estate loans are a possibility that should be considered, if not in the first revision to the Policy Statement, then perhaps sometime in the future. Otherwise, the Policy Statement may have the unintended consequence of stifling innovation in the covered bond market.

Insurance Assessments.

The FDIC requested comments on whether an institution's percentage of secured liabilities to total liabilities should be factored into an institution's insurance assessment or included in the assessment base (73 Fed. Reg.21951). WaMu believes that the development of a policy statement regarding covered bonds is not an appropriate place to seek public comment on these issues. FDIC-Insured depository institutions make use of many different forms of secured borrowing. Institutions whose insurance assessment might be impacted (for example, an institution with secured advances from a Federal Home Loan Bank) may not be considering issuing covered bonds and so may not be aware of the request for comments attendant to the Policy Statement. WaMu urges the FDIC to address this issue, if at all, in a separate request for comments.

Other Comments.

WaMu notes that the covered bond market currently consists primarily of European investors, and that rating agencies and regulators (such as central bankers) who have analyzed the U.S. programs to date have generally been based in Europe and have not had a complete or correct understanding of the FDIC's receivership process or fully understood the possible outcomes for U.S. covered bonds in an FDIC receivership. One of the unfortunate consequences of this lack of understanding has been Moody's recent decision to impose a "timely payment indicator" test on the U.S. covered bond structure, which is meant to measure the probability that the structure will be able to continue to sustain uninterrupted payments during the receivership process. The application of this test on WaMu's covered bond structure and an incomplete understanding of the FDIC receivership process has resulted in WaMu's program being assigned a timely payment indicator of "improbable," the second worst category.

WaMu has spent a great deal of time describing the U.S. receivership process to rating agencies, investors and other constituencies as part of its investor relations efforts. The lack of a single, definitive statement which describes how the receivership process will apply to an insured depository institution's covered bond obligations, and the timing and possible outcomes of such process, has proven to be a significant handicap in dealing with rating agencies and other constituencies and opening non-U.S. investor markets to

covered bonds issued by U.S. banks. For these reasons, we respectfully request that the FDIC include in the revised final policy statement a summary describing its process for addressing covered bond obligations in the receivership of a U.S. bank, including the timing for that process and specific examples of the possible outcomes.

Specifically, we request that the FDIC address, in the revised policy statement, the actual direct compensatory damages payable in the event of repudiation by the conservator or receiver. We suggest that the FDIC state that such damages will be equal to the outstanding principal amount of the covered bonds plus accrued and unpaid interest to the date of the appointment of the conservator or receiver, in circumstances where the value of the collateral in the cover pool is equal to or greater than the amount of principal and accrued interest owed on the covered bonds at the time of such appointment. Alternatively, a description in the revised policy statement of the different possible scenarios in a conservatorship or receivership, including those that would result in the payment of actual direct compensatory damages of principal plus accrued interest to the date of appointment, would be extremely helpful in bringing clarity to the market for covered bonds.

We also respectfully ask the FDIC to make itself available to engage in discussions directly with rating agencies and non-US regulators for the purpose of educating them regarding the details of the U.S. receivership process with respect to U.S. covered bonds.

Conclusion.

The Policy Statement is an important step in furthering the development of U.S. financial institution participation as issuers in the international covered bond market. While there are areas with potential for improvement, WaMu applauds the FDIC for its efforts. We appreciate the opportunity to comment and would be willing to meet with the FDIC staff to elaborate on our suggestions.

Sincerely yours,

Robert J. Williams

SENIOR VICE PRESIDENT AND TREASURER