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No. 72529-7-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BINGO INVESTMENTS, LLC, a Washington limited liability company, FRANCES P. GRAHAM, a single person, SCOTT BINGHAM and KELLEY BINGHAM, husband and wife, CHRISTOPHER G. BINGHAM and CHERISH BINGHAM, husband and wife, and DAVID S. BINGHAM and SHARON G. BINGHAM, husband and wife,
Appellants,

v.

MUFG UNION BANK, N.A., a national banking association,
Respondent.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

This Petition is by Defendants-Appellants Bingo Investments, LLC, Frances P. Graham, Scott Bingham, Kelley Bingham, Christopher G. Bingham, Cherish Bingham, David S. Bingham, and Sharon G. Bingham.

II. DECISION FOR REVIEW

Petitioners seek review of the published decision of the Court of Appeals in the above-captioned appeal, entered November 2, 2015, affirming the orders of the trial court entering summary judgment in favor of Respondent and denying reconsideration. A copy of the decision is appended hereto.

III. ISSUE PRESENTED FOR REVIEW

Where the loan agreements and guarantees at issue were created as part of a scheme by the lender, Frontier Bank, to deceive the FDIC in a vain attempt to avoid collapse, does 12 U.S.C. § 1823(e) immunize the FDIC's successor bank from the defense, which the Court of Appeals ignored, that the contracts at issue were fatally tainted by illegality? This question is fit for review under RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

Appellants incorporate the Statement of the Case from their brief to the Court of Appeals. A very brief summary follows.

When the real estate bubble popped in 2008, it took down many banks.[1] One such was Frontier Bank. The FDIC became the receiver of Frontier Bank and transferred its assets to Union Bank, N.A., in April 2010.

Before that, in a last-ditch effort to avoid regulatory shutdown, Frontier Bank had embarked on a scheme to prop up certain multi-million commercial real estate loans, even though the borrower had announced it was failing and had repudiated the loans, and the collateral was unsaleable. Two of these loans, totaling over $33 million, were already guaranteed by Defendants David and Sharon Bingham.[2] Frontier Bank agreed with the Defendants' dishonest investment manager, Centurion Financial Group, LLC, to let Centurion take over the borrower entities, in return for which Centurion delivered guarantees by the other Defendants, and Frontier Bank increased the loan amounts and agreed to additional loans, to provide an interest reserve to carry the failed loans. Frontier Bank failed to disburse the promised amounts, however, even as interest payments to itself, because the FDIC increased its scrutiny of suspect banks including Frontier Bank. The increased

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[1] According to the FDIC, 397 federally insured financial institutions failed in 2009–2011, including 17 in Washington. https://www.fdic.gov/bank/individual/failed/.

[2] The Court of Appeals failed to note that the 2008 agreements superseded those original guarantees, however.

loans were wholly improper on their face, with loan to value ratios up to 455 percent, more than six times the supervisory loan-to-value ratio of 75%. (CP 576) The FDIC in its eventual post-mortem analysis of the Bank's failure found that during this period, Frontier had engaged in high-risk banking including overinvestment in under-secured, poorly appraised commercial real estate and development loans, and that its problems as of the July 2008 FDIC audit specifically including "delayed recognition of problem loans." (CP 507.) Frontier Bank insisted on modifying the loans again to remove the undisbursed interest reserves, in an attempt to cover its tracks. All was for naught, and Union Bank acquired the loans and guarantees.

V. ARGUMENT

The Superior Court, and the Court of Appeals, made the same error: they treated this case as a borrower's attempt to enforce or validate a side-deal. The Court of Appeals held that such an attempt was barred by 12 U.S.C. § 1823(e), the statute which codifies the so-called "*D'Oench Duhme*" doctrine.[3]

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[3] The body of federal law under the statute is often still called by that name, but strictly speaking, "FIRREA as construed in *O'Melveny & Myers v. FDIC,* 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), preempted the common law *D'Oench* doctrine. *Kessler v. Nat'l Enterprises, Inc.*, 165 F.3d 596, 598 (8th Cir. 1999) ("district court erred in relying on *D'Oench* in dismissing plaintiffs' claims."); *and see Resolution Trust Corp. v.*

The statute provides, in relevant part: "No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be **valid** against the Corporation" unless written and signed by the parties. 12 U.S.C. § 1823(e) (emphasis added). That statute does not apply here for two reasons. First, where Defendants argue that the contract was illegal, they are not trying to deploy the contract as "valid against the Corporation." Quite the opposite, the point is that the contract was **not** valid. Second, Defendants also argued to the trial court and the Court of Appeals that the modification of the loans to remove the interest reserves was a change for the bank's benefit without consideration to the borrower and guarantors, and hence invalid, and without those modifications, the failure to disburse was a breach by the bank of the written, signed loan agreements, not of a side agreement. The Bank's internal memorandum,

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Kennelly, 57 F.3d 819, 822 (9th Cir. 1995) ("There is serious doubt whether *D'Oench, Duhme* survives *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). Because the issue was not briefed, we leave it for another day.")

and statements and promises, are offered as evidence, not for enforcement.

Essentially, the Court of Appeals and Union Bank are treating 12 U.S.C. § 1823(e) as if it made evidence of the bank's oral statements or internal documents inadmissible for all purposes. The statute on its face is narrower than that. It is not good construction or good public policy to construe the doctrine so broadly as to sweep in innocent guarantors who gained no benefit from an illegal scheme against the FDIC.

The Court of Appeals' error is of public importance because of the public's interest in maintaining an honest banking system, and the widespread harm done to borrowers and guarantors, both commercial and residential, during the most recent wave of bank failures. The risk to the public of schemes such as the one in this case is not merely historical: there is no reason to believe that financial institutions have suddenly ceased to take foolish risks or that they will stop breaking the law when times get rough. The Court of Appeals' overly broad application of 12 U.S.C. § 1823(e) should be corrected, so that investors, borrowers, and guarantors are not left entirely without recourse when banks fail after illegal conduct.

VI. CONCLUSION

For these reasons, and those set forth in Appellants' briefs in the courts below, the Court should accept review and reverse the grant of summary judgment by the trial court so that this matter may proceed to discovery and trial on the issues joined.

DATED this 2nd day of December, 2015.

/s/ R. Bruce Johnston
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PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On December 2, 2015, I served or caused to be served a copy of the foregoing document upon counsel for Respondent to be served by hand and/or email upon counsel of record for Respondent, Joseph E. Shickich, Jr. and Michael David Pierson, at

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SIGNED this 2nd day of December, 2015,

/s/ Emanuel Jacobowitz
Emanuel Jacobowitz

No. 72529-7-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BINGO INVESTMENTS, LLC, a Washington limited liability company, FRANCES P. GRAHAM, a single person, SCOTT BINGHAM and KELLEY BINGHAM, husband and wife, CHRISTOPHER G. BINGHAM and CHERISH BINGHAM, husband and wife, and DAVID S. BINGHAM and SHARON G. BINGHAM, husband and wife,
Appellants,

v.

MUFG UNION BANK, N.A., a national banking association,
Respondent.

APPENDIX TO APPELLANTS' PETITION FOR REVIEW

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APPENDIX

1. Opinion of Court of Appeals, Division 1, entered November 2, 2015
2. 12 U.S.C. § 1823

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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November 2, 2015

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CASE #: 72529-7-I
FRONTIER BANK, Respondent v. Bingo Investments et al, Appellant's
Snohomish County, Cause No. 09-2-09274-3

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure
c: The Honorable Bruce Weiss

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRONTIER BANK, a Washington banking corporation, Plaintiff, and UNION BANK, N.A., as successor-in-interest to the Federal Deposit Insurance Corporation, as receiver for Frontier Bank, Respondent, v. BINGO INVESTMENTS, LLC, a Washington limited liability company; SCOTT and KELLY BINGHAM, husband and wife; FRANCES GRAHAM, a single person; CHRISTOPHER G. BINGHAM, a single person; DAVID BINGHAM and SHARON BINGHAM, husband and wife, Appellants, and L224-1 BAYSIDE, LLC, a Washington limited liability company; L198-1 SINCLAIR RIDGE, LLC, a Washington limited liability company; L31-1 FENNER, LLC, a Washington limited liability company; L150-1 PATEY, LLC, a Washington limited liability company; THOMAS HAZELRIGG and JANE DOE HANZELRIGG, husband and wife; SCOTT SWITZER and JANE DOE SWITZER, husband and wife; and CENTURION FINANCIAL GROUP, LLC, a Washington limited liability company, Defendants.	No. 72529-7–I DIVISION ONE PUBLISHED FILED: November 2, 2015

Cox, J. — Frances Graham, Scott Bingham, Kelly Bingham, Christopher Bingham, Cherish Bingham, David Bingham, Sharon Bingham, and Bingo Investments LLC (collectively "the guarantors") appeal the trial court's grant of summary judgment to Union Bank. There are no genuine issues of material fact regarding either the validity or the enforceability of the guaranties they signed. Likewise, there are no genuine issues of material fact regarding the guarantors' affirmative defenses. Union Bank is entitled to judgment as a matter of law. We affirm.

Many of the relevant facts are undisputed. The guaranties that are central to the dispute before us were made in connection with promissory notes executed, respectively, by Bayside LLC, Sinclair Ridge LLC, Bingo Investments LLC, and Frances Graham ("the borrowers"). The loans financed the borrowers' residential developments in Kitsap County.

Bayside Loan and Guaranties

Bayside, LLC (Bayside) executed its promissory note dated November 15, 2006 in favor of Frontier Bank in the original principal amount of $22,050,000. By virtue of successive change in terms agreements, the principal amount of the note was reduced to $19,420,000.00, with a maturity date of March 31, 2009 (Bayside Note).

This note was secured by a recorded construction deed of trust that encumbered certain real property located in Kitsap County, Washington.

David Bingham and Sharon Bingham each executed a Commercial Guaranty dated November 15, 2006 in favor of Frontier Bank. This is an unconditional guaranty of payment of the Bayside Note.

Christopher Bingham also executed a Commercial Guaranty dated March 31, 2008 in favor of Frontier Bank. This is an unconditional guaranty of payment of the Bayside Note.

These guarantors also signed notices of final agreement in which they acknowledged that oral agreements in connection with loans are not enforceable under Washington law.[1]

Bayside defaulted on the Bayside Note when it failed to repay it upon maturity on March 31, 2009.

Union Bank is the holder and in possession of the Bayside Note and the unconditional commercial guaranties of payment of the Bayside Note from David Bingham, Sharon Bingham, and Christopher Bingham.

Sinclair Loans and Guaranties

Sinclair Ridge, LLC (Sinclair) executed its promissory note dated November 15, 2006 in favor of Frontier Bank in the original principal amount of $12,876,500.00. By virtue of successive change in terms agreements, the principal amount of the note was reduced to $12,158,761.92, with a maturity date of March 31, 2009 (Sinclair Note #1).

Sinclair Note #1 was secured by a recorded construction deed of trust that encumbered certain real property located in Kitsap County, Washington.

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[1] RCW 19.36.110 (specifying that a credit agreement "is not enforceable against the creditor unless the agreement is in writing and signed by the creditor."). RCW 19.36.100 defines a "credit agreement" as an "agreement, promise, or commitment" to do or refrain from doing certain activities in connection with a "debt or other extension of credit."

Sinclair executed its second promissory note dated March 16, 2007 in favor of Frontier Bank in the original principal amount of $113,750. By virtue of a change in terms agreement, this note was modified (Sinclair Note #2).

Sinclair Note #2 was secured by a recorded deed of trust that encumbered certain real property located in Kitsap County, Washington.

Sinclair executed its third promissory note in favor of Frontier Bank in the original principal amount of $227,500. By virtue of a change in terms agreement, this note was modified (Sinclair Note #3).

Sinclair Note #3 was secured by a recorded deed of trust that encumbered real property located in Kitsap County, Washington.

David Bingham and Sharon Bingham each executed a November 15, 2006 Commercial Guaranty in favor of Frontier Bank unconditionally guaranteeing payment of all Sinclair notes in favor of Frontier Bank.

These guarantors also signed notices of final agreement in which they acknowledged that oral agreements in connection with loans are not enforceable under Washington law.

Sinclair defaulted on all three Sinclair notes when it failed to repay them when they matured.

In August 2011, the Kitsap County Superior Court appointed a general receiver to take control of Sinclair Ridge LLC, with authority to market its assets. The state receiver listed, marketed, and sold the real property subject to the deeds of trust securing the loans by Frontier. The net sales proceeds were applied to the Sinclair notes, reducing the outstanding indebtedness evidenced by these notes and the guaranties of these notes.

Union Bank is the holder and in possession of the Sinclair notes and the unconditional commercial guaranties of payment of the Sinclair notes from David Bingham and Sharon Bingham.

Bingo Loans and Guaranties

Bingo Investments, LLC (Bingo) executed its promissory note dated March 31, 2008 in favor of Frontier Bank in the original principal amount of $2,000,000. The note was modified by a change in terms agreement (Bingo Note # 1). Bingo and Frances Graham also executed a promissory note dated March 31, 2008 in favor of Frontier Bank in the original principal amount of $5,500,000 (Bingo Note # 2).

Christopher Bingham, Frances Graham, and Scott Bingham each executed a Commercial Guaranty dated March 31, 2008 unconditionally guaranteeing payment of all notes owed by Bingo to Frontier Bank.

These guarantors also signed notices of final agreement in which they acknowledged that oral agreements in connection with loans are not enforceable under Washington law.

Bingo defaulted on Bingo Note #1 when it failed to repay it upon maturity on September 30, 2009. Bingo defaulted on Bingo Note #2 when it failed to repay it upon maturity on March 31, 2009.

Union Bank is the holder and in possession of the Bingo notes and the commercial guaranties from Christopher Bingham, Frances Graham, and Scott Bingham unconditionally guaranteeing payment of the Bingo notes.

On April 30, 2010, the Washington State Department of Financial Institutions closed Frontier. The Federal Deposit Insurance Corporation (FDIC)

was appointed as receiver of Frontier to liquidate the bank's assets and conclude its affairs.

Union Bank purchased certain assets of Frontier from the FDIC. These assets included the notes, guaranties, and other loan documents that are the subjects of this action.

In connection with the sale of certain assets of Frontier to Union Bank, the FDIC also granted to Union Bank the authority to assert rights under 12 U.S.C. § 1823(e).[2]

Thereafter, Union Bank became a party plaintiff in this action that Frontier previously commenced against the guarantors. Union Bank moved for summary judgment against the guarantors. After a hearing, the trial court granted this motion. The trial court subsequently denied the guarantors' motion for reconsideration.

This appeal followed.

THE GUARANTIES

The guarantors argue that the trial court erred by granting summary judgment to enforce the guaranties. They alleged that a "material dispute of fact [exists] as to whether the guarantees are void or voidable." Because there is no such issue of material fact, we disagree.

Summary judgment is appropriate "if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and

[2] Clerk's Papers at 599.

the moving party is entitled to judgment as a matter of law."[3] "A genuine issue of material fact exists if 'reasonable minds could differ on the facts controlling the outcome of the litigation.'"[4]

The party moving for summary judgment "bears the initial burden of showing the absence of a genuine issue of material fact."[5] If the moving party satisfies its burden, then the burden shifts to the nonmoving party.[6] "If the nonmoving party fails to make a showing sufficient to establish the existence of a genuine issue of material fact, then the trial court should grant the motion."[7]

"In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings" because "CR 56(e) requires that the response . . . 'set forth specific facts showing that there is a genuine issue for trial.'"[8] "[T]he court considers the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party."[9]

We review de novo a trial court's grant of summary judgment.[10]

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[3] Wash. Fed. v. Harvey, 182 Wn.2d 335, 340, 340 P.3d 846 (2015) (quoting Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)); accord CR 56(c).

[4] Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795, 321 P.3d 1275 (quoting Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)), review denied, 339 P.3d 635 (2014).

[5] Block v. City of Gold Bar, __ Wn. App. __, 355 P.3d 266, 270 (2015).

[6] Id.

[7] Id.

[8] Id. (quoting Young v. Key Pharms., Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989)).

[9] Id.

[10] Wash. Fed., 182 Wn.2d at 339.

We review for abuse of discretion a trial court's denial of a motion for reconsideration.[11]

Nature of Guaranty Obligations

"A guaranty 'is a promise to answer for the debt, default, or miscarriage of another person.' 'A contract of guaranty, being a collateral engagement for the performance of an undertaking of another, imports the existence of two different obligations, one being that of the principal debtor and the other that of the guarantor.'"[12] A guaranty "'is independent'" of the debt, "'and the responsibilities which are imposed by the . . . guaranty differ from those . . . created by the contract to which the guaranty is collateral.'"[13] "A written guarantee of payment of the principal's indebtedness . . . [is] governed by its own terms."[14]

Because guaranties are contracts, they are subject to the general rules of contract formation, interpretation, and construction.[15] Although these contracts "must be explicit and are strictly construed," courts "must also recognize the commercial context in which" guaranties are signed.[16]

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[11] Kenco Enters. Nw., LLC v. Wiese, 172 Wn. App. 607, 614, 291 P.3d 261, review denied, 177 Wn.2d 1011 (2013).

[12] Sauter ex rel. Sauter v. Houston Cas. Co., 168 Wn. App. 348, 356, 276 P.3d 358 (2012) (citation omitted) (internal quotation marks omitted) (quoting Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 707, 952 P.2d 590 (1998)).

[13] Wilson Court Ltd. P'ship, 134 Wn.2d at 707 (quoting Robey v. Walton Lumber Co., 17 Wn.2d 242, 255, 135 P.2d 95 (1943)); accord Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 661, 230 P.3d 625 (2010).

[14] McAllister v. Pier 67, Inc., 1 Wn. App. 978, 983, 465 P.2d 678 (1970).

[15] Wilson Court Ltd. P'ship, 134 Wn.2d at 699; accord Bellevue Square Managers v. Granberg, 2 Wn. App. 760, 766, 469 P.2d 969 (1970).

[16] Wilson Court Ltd. P'ship, 134 Wn.2d at 705.

"[W]here a guarantor freely and voluntarily guarantees the payment of another, and a creditor relies to its detriment on this guaranty, the law generally requires the guaranty to be enforced."[17] "'An absolute guaranty is an unconditional undertaking on the part of the guarantor that the person primarily obligated will make payment or will perform, and such a guarantor is liable immediately upon default of the principal without notice.'"[18] "An absolute and unconditional guaranty should be and is enforceable according to its terms. The courts are to enforce it as the parties meant it to be enforced, with full effect given to its contents, and without reading into it terms and conditions on which it is completely silent."[19]

Here, the parties do not dispute the guaranties' language. Each guaranty states:

> For good and valuable consideration, ***Guarantor absolutely and unconditionally guarantees full and punctual payment*** and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents. ***This is a guaranty of payment*** and performance and not of collection . . . . Guarantor will make any payments to Lender . . . on demand . . . ***without set-off or deduction or counterclaim,*** and will otherwise perform Borrower's obligations under the Note and Related Documents. Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.[20]

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[17] In re Spokane Concrete Prods., Inc., 126 Wn.2d 269, 278, 892 P.2d 98 (1995).

[18] Century 21 Prods. Inc. v. Glacier Sales, 129 Wn.2d 406, 414, 918 P.2d 168 (1996) (quoting Joe Heaston Tractor & Implement Co. v. Sec. Acceptance Corp., 243 F.2d 196 (10th Cir. 1957)); see also Grayson v. Platis, 95 Wn. App. 824, 826, 978 P.2d 1105 (1999).

[19] Nat'l Bank of Wash. v. Equity Inv'rs, 81 Wn.2d 886, 919, 506 P.2d 20 (1973).

[20] Clerk's Papers at 636, 640, 644, 710, 714, 733, 737, and 741 (emphasis added).

There can be no serious dispute that the express terms of the guaranties make them unconditional guaranties of payment. The promissory notes that these guaranties support are delinquent. Accordingly, the obligations of the guarantors are also delinquent and unpaid.

We next consider the guarantors' affirmative defenses. The nature of these defenses has shifted over time.

In their response below to Union Bank's motion for summary judgment, they identified five numbered issues.[21] On appeal, they abandoned two of those five, adding others for the first time.[22] Based on a fair reading of the actual arguments made in their opening brief on appeal, we conclude they have three main arguments on appeal.

First, they claim that Frontier fraudulently induced them to sign the guaranties and other loan documents in March and December 2008. Second, they claim Frontier acted in bad faith. Finally, they claim that the state and federal statutory bars to consideration of oral agreements that Union Bank asserts are inapplicable to their affirmative defenses.

Washington Statute of Frauds—Credit Agreements: RCW 19.36.110

As a threshold matter, Union Bank argues that the credit agreement statute of frauds bars considering the documents on which the guarantors rely for their affirmative defenses. We agree.

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[21] Id. at 347.

[22] Brief of Appellants at 2-3.

RCW 19.36.110, Washington's statute of frauds, bars the enforcement of "credit agreements" that are not in writing and signed by the creditor:

> A ***credit agreement*** is not enforceable against the creditor ***unless the agreement is in writing and signed by the creditor.*** The rights and obligations of the parties to a credit agreement ***shall be determined solely from the written agreement,*** and any prior or contemporaneous oral agreements between the parties are superseded by, merged into, and may not vary the credit agreement. Partial performance of a credit agreement does not remove the agreement from the operation of this section.

RCW 19.36.100 defines "credit agreement" as:

> an agreement, promise, or commitment to lend money, to otherwise extend credit, to forbear with respect to the repayment of any debt or the exercise of any remedy, to modify or amend the terms under which the creditor has lent money or otherwise extended credit, to release any guarantor or cosigner, or to make any other financial accommodation pertaining to a debt or other extension of credit.

Here, the guarantors primarily rely on two documents to support their affirmative defenses opposing the summary judgment motion. But the provisions of RCW 19.36.110 bar consideration of both documents.

Cowlitz Bank v. Leonard is instructive with respect to the application of these statutes to alleged oral agreements in connection with loans.[23] There, Cowlitz Bank loaned funds to Tytan International, Inc.[24] These loans were evidenced by a series of promissory notes and change in terms agreements.[25]

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[23] 162 Wn. App. 250, 253, 254 P.3d 194 (2011).

[24] Id. at 252.

[25] Id.

Mark Leonard was a guarantor of the promissory notes signed by Tytan.[26] The loans matured and neither Tytan nor Leonard paid them.[27]

The bank sued Leonard.[28] He asserted affirmative defenses and counterclaims.[29] Among them was the claim that the bank had fraudulently induced him into not changing banks by orally promising to continue increasing his loan amounts.[30] He also claimed the bank orally promised not to pursue collection of the loan.[31]

The bank moved for summary judgment, asserting "that RCW 19.36.110 bars the enforcement of any oral agreements not contained in the written loan documents."[32] The trial court granted the motion.[33] Division Two of this court affirmed on Leonard's appeal.[34] The court held that the "representations that Leonard alleges Cowlitz Bank made, even if proved, would constitute oral agreements to loan money, extend credit, or forbear from enforcing repayment."[35]

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[26] Id.

[27] Id.

[28] Id.

[29] Id.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] Id. at 254.

[35] Id. at 253.

Here, these guarantors also claim Frontier fraudulently induced them to sign the guaranties and other documents in March and December 2008. They do not make any claims that the guaranties they signed prior to that period are unenforceable for this reason. Thus, the guaranties dated November 15, 2006 are not at issue.

One document on which they rely is the Declaration of Scott Switzer dated January 19, 2010. This document, not signed by Frontier, chiefly states that there are alleged oral communications that affect the validity of the guaranties.

Examination of the declaration shows that it fails to evidence the existence of any genuine issue of material fact regarding fraudulent inducement of the guaranties. For example, Switzer testifies, in part, that:

> Given all of Frontier's assurances at the time the original loans were established, when the additional lines of credit were issued, and even after the interest reserves were cancelled, and after it filed suit, I was shocked that Frontier had reneged upon its agreement to forebear [collection of the loans].[36]

But such alleged "agreement to forebear" is not evidenced in any writing signed by Frontier.[37] Accordingly, it falls squarely within the definition of an alleged oral agreement that is not enforceable under the plain words of RCW 19.36.110.

The rest of the testimony in the declaration fares no better. The essence of most of this testimony is that Frontier made untrue oral representations concerning regulatory compliance of the loans to the borrowers that the

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[36] Clerk's Papers at 914.

[37] Id.

guarantors guaranteed. The guarantors claim that Frontier should have collected the loans before they became obligated to pay them under their unconditional guaranties of payment. They support this argument by relying on a copy of a document titled "Credit Limit Analysis-Frontier Bank," marked "Exhibit A."[38]

First, Exhibit A shows a list of borrowers, loan amounts, and guarantors. It says nothing about regulatory compliance of the guaranteed loans. Moreover, it does not show any representations by Frontier to the guarantors.

Second, Exhibit A is not signed by Frontier, the creditor. Thus, to the extent the guarantors seek to use it to support alleged oral representations by Frontier regarding the guaranteed loans, they cannot do so. The statute of frauds bars this.

Third, significantly, the Switzer declaration does not address any of the nine elements of fraud underlying the guarantors' affirmative defense that Frontier fraudulently induced them to sign the March and December 2008 documents. Likewise, it fails to show that he has any personal knowledge of what, if any, representations Frontier made to the guarantors about their guaranties.

"There are nine essential elements of fraud, all of which must be established by clear, cogent, and convincing evidence:

> (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of

[38] Id. at 917.

> the representation, (8) the right to rely upon it, and (9) consequent damage."[39]

As we just stated, there is a notable absence in Switzer's declaration of any evidence regarding oral representations by Frontier to the guarantors, as opposed to the borrowers. And, significantly, no guarantor submitted a declaration in opposition to the motion for summary judgment to evidence any of the nine elements of fraud allegedly committed by Frontier. For example, there is nothing from any guarantor to evidence the sixth, seventh, or eighth elements of their fraud claim. In the absence of such evidence, we must assume there is none. And absent any one of the nine elements, the claim fails.

The second document on which the guarantors rely to oppose summary judgment is a Frontier loan memorandum dated March 13, 2008. Notably, it predates the March 31, 2008 guaranties that are at issue here.

Nowhere does this document support the guarantors' conclusory arguments that Frontier fraudulently induced them to sign the March 2008 and December 2008 documents. It says nothing of representations by Frontier to the guarantors that support any of the nine elements of fraud that the guarantors must show exist.

In its briefs and at the hearing, the guarantors also mentioned the December 2010 Material Loss Review of Frontier that the FDIC performed after Frontier closed. But even that document fails to reflect either fraudulent schemes or fraudulent representations to the guarantors of these loans to the borrowers.

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[39] Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 166, 273 P.3d 965 (2012).

That Frontier failed does not entitle the guarantors to be relieved of their obligations under their guaranties.

Even if the affirmative defense of fraudulent inducement applied to bar enforcement of the guaranties and other documents signed in March and December 2008, certain of the guarantors executed their guaranties well before both of these dates. They do not argue why their previous guaranties are not enforceable. Absent such argument, we assume there is none to bar enforcement of their previous guaranties of the delinquent loans. In sum, there is no genuine issue of material fact regarding the enforceability of the prior guaranties.

As for the guarantors' claim that interest reserves for the loans to the borrowers should have been made available to those loans to keep them current, we are unpersuaded that this claim bars enforcement of the guaranties. First, the guaranties are unconditional guaranties of payment. Thus, the obligation is not contingent on interest reserves being made available to keep the loans to the borrowers current. Second, even if making the interest reserves available was relevant to the obligations of the guarantors, the substantial size of these loans could not have possibly been satisfied at maturity by interest reserves. The principal amounts of the loans plus delinquent interest would have far exceeded any interest reserves.

In sum, the guarantors have failed in their burden to show the existence of any genuine issue of material fact to support the claim that Frontier fraudulently induced them to sign their guaranties. The same is true for the claim that the use of interest reserves conditions their obligations on their guaranties.

12 U.S.C. § 1823(e) and the D'Oench Doctrine

Union Bank next argues that 12 U.S.C. § 1823(e) and the D'Oench doctrine also bar consideration of the two documents on which the guarantors rely to oppose summary judgment. We again agree.

12 U.S.C. § 1823(e)(1) provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—
>
> (A) is in ***writing***,
>
> (B) was executed by the depository institution ***and*** any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was ***approved by the board of directors of the depository institution or its loan committee***, which approval shall be reflected in the minutes of said board or committee, ***and***
>
> (D) has been, continuously, from the time of its execution, ***an official record of the depository institution***.[40]

Kanany v. Union Bank, N.A., a federal case from the Western District of Washington, is instructive on how this federal statute applies to facts very similar to those in this case.[41]

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[40] (Emphasis added.)

[41] No. C11-6062 RJB, 2012 WL 5258847 (W.D. Wash. Oct. 24, 2012). Pursuant to state GR 14.1(b), citation to an unpublished opinion from jurisdictions other than Washington State is allowed if citation "is permitted under the law of the jurisdiction of the issuing court." Federal Rule of Appellate Procedure 32.1(a) prohibits federal courts from restricting citation to unpublished opinions issued on or after January 1, 2007. Because Kanany was decided in October 2012, we cite that opinion here. See Duncan v. Alaska USA Fed. Credit Union, Inc., 148 Wn. App. 52, 67 n.54, 199 P.3d 991 (2008).

There, Robert Kanany obtained a number of loans from Frontier.[42] The loans were evidenced by promissory notes and secured by deeds of trust encumbering various properties.[43]

On April 30, 2010, the Washington State Department of Financial Institutions closed Frontier.[44] The FDIC became the receiver of Frontier.[45]

That same day, Union Bank acquired from the FDIC the loans to Kanany, Frontier's former assets.[46] This transfer was memorialized in a Purchase and Assumption Agreement.[47] According to the terms of that agreement:

> "[t]he Assuming Institution shall notify the Receiver in writing . . . prior to utilizing in any legal action any special legal power or right which the Assuming Institution derives as a result of having acquired an asset from the Receiver, and the Assuming Institution shall not utilize any such power unless the Receiver shall have consented in writing to the proposed usage."[48]
>
> According to the declaration of Matthew Turetsky, legal counsel for Union Bank, the FDIC has authorized Union Bank to assert special powers set forth in 12 U.S.C. § 1823(c) and 12 U.S.C. 1825(b)(3). Union Bank has thus acquired certain assets of Frontier Bank, in accord with statutory authority and pursuant to contract.[49]

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[42] Id. at *1.

[43] Id.

[44] Id. at *2.

[45] Id.

[46] Id.

[47] Id.

[48] Id. (citations omitted).

[49] Id. (citations omitted).

Kanany commenced an action against Union Bank, claiming breach of contract and breach of good faith and fair dealing, as well as other causes of action.[50] The breach of contract claim was based on alleged dealings with Frontier.[51] The case was removed to federal court on the basis of diversity of citizenship.[52]

Kanany argued that his primary contact in arranging the various loans with Frontier was a bank officer.[53] He claimed that this officer made various oral promises and assurances to him regarding his failure to make payments on certain loans.[54]

Union Bank moved for summary judgment.[55] In doing so, it argued that Kanany's claims were barred by D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.[56] and 12 U.S.C. § 1823(e).[57] The court discussed both the D'Oench doctrine and 12 U.S.C. § 1823(e):

> The federal D'Oench doctrine prohibits a party from asserting a cause of action against the FDIC or its assignees based upon unwritten agreements or other schemes alleged to be entered into by a failed bank. Langley v. FDIC, 484 U.S. 86, 92–93, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987). In D'Oench[,] Duhme & Co. v. FDIC, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), the United

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[50] Id. at *3.

[51] Id.

[52] Id.

[53] Id.

[54] Id.

[55] Id.

[56] 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942).

[57] Kanany, 2012 WL 5258847, at *3.

> States Supreme Court enunciated this doctrine, which is intended to protect the FDIC and its assignees from fraudulent schemes by borrowers of failed institutions. The doctrine also protects the FDIC by allowing bank representatives to rely solely on the records of the bank in evaluating the bank's financial condition, rather than leaving it exposed to suits founded on undisclosed conditions or deceptive documents. FDIC v. Zook Bros. Constr. Co., 973 F.2d 448, 1450–51 (9th Cir. 1992).
>
> The doctrine established in D'Oench was codified and expanded in 12 U.S.C. § 1823(e), as part of the Federal Deposit Insurance Act.[58]

The court quoted the provisions of the federal statute that we quoted earlier in this opinion. They set forth four requirements, all of which must exist in order for an "'agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it [from a failed financial institution] . . .'" to be effective.[59]

The court then stated who may assert the provisions of the doctrine and statute:

> Either the FDIC or an assignee of the FDIC can assert the D'Oench doctrine/ Section 1823 as an affirmative defense in litigation brought by a borrower who relies on oral conditions, promises, or agreements. See Fed. Fin. Co. v. Hall, 108 F.3d 46, 49 (4th Cir. 1997); Nw. Land & Inv., Inc. v. New W. Fed. Sav. & Loan Ass'n, 64 Wash.App. 938, 943–44, 827 P.2d 334 (1992). The statutory term "agreement" in 12 U.S.C. § 1823 is defined more broadly than a mere promise, and includes the "truthfulness of a warranted fact." Langley v. FDIC, 484 U.S. at 92–93. "Such [oral] contracts cannot be enforced even when a bank fraudulently induces a customer with oral misrepresentations, or when a customer is completely innocent." Nw Land & Inv., Inc., 64 Wash.App. at 944, 827 P.2d 334.[60]

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[58] Id. at *5.

[59] Id. (quoting 12 U.S.C. § 1823(e)(1)).

[60] Id. (some alternations in original).

Because Kanany could not show that any of the alleged agreements existed in writing and were signed by both him and Frontier, he failed to show the existence of any genuine issue of material fact for summary judgment purposes.

In the words of the court:

> [T]he law cannot allow his claims to go forward without written documentation of an executed agreement between himself and Frontier Bank.[61]

As the majority of the federal circuit courts have held "the D'Oench, Duhme rule protects the FDIC's assignees as well, even though § 1823(e) is silent with regard to assignees."[62] Here, the FDIC expressly authorized Union Bank to assert rights under this statute. Accordingly, Union Bank is entitled to the benefits of this statute.

The application of this federal statute to the guarantors' affirmative defenses is similar to what we discussed in our application of the state credit agreements statute of frauds. That is, the federal statute, for largely the same reasons, bars consideration of the two documents on which the guarantors primarily rely.

But there are additional reasons that apply only to the federal statute. To the extent that the guarantors rely on oral representations, they cannot do so unless they rely on a writing signed by ***both*** the guarantors and Frontier. They have no such document.

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[61] Id. at *6.

[62] Fed. Fin. Co. v. Hall, 108 F.3d 46, 49 (4th Cir. 1997); see also, e.g., Newton v. Uniwest Fin. Corp., 967 F.2d 340, 347 (9th Cir. 1992); Porras v. Petroplex Sav. Ass'n, 903 F.2d 379 (5th Cir. 1990); Carteret Sav. Bank v. Compton, Luther & Sons, 899 F.2d 340 (4th Cir. 1990); FDIC v. Newhart, 892 F.2d 47 (8th Cir. 1989).

Moreover, the record shows that they cannot meet any of the other three requirements of the federal statute. There is nothing in this record that even shows they have tried to do so.

As for their fraudulent inducement argument, the guarantors fail to deal with the leading case on whether such a claim can be successfully asserted under this federal statute. The United States Supreme Court has held that it cannot.

In Langley v. Federal Deposit Insurance Corp., the Court determined whether an alleged scheme, that a borrower in default on a commercial loan claimed existed, could be asserted against the FDIC.[63] The agency had succeeded to the failed bank's position as the holder of notes and guaranties for the loan the failed bank had made.[64]

The Court referred to its earlier decision in D'Oench. It stated:

> [This] Court held that this "secret agreement" could not be a defense to suit by the FDIC because it would tend to deceive the banking authorities. The Court stated that when the maker "lent himself to a *scheme or arrangement* whereby the banking authority . . . was likely to be misled," that scheme or arrangement could not be the basis for a defense against the FDIC. We can safely assume that Congress did not mean "agreement" in § 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC–acquired notes. Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in D'Oench, Duhme) or of the truthfulness of a warranted fact.[65]

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[63] 484 U.S. 86, 90, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987).

[64] Id. at 89.

[65] Id. at 92-93 (citations omitted).

Here, the guarantors assert the existence of a scheme by Frontier to mislead regulatory authorities and the guarantors regarding the guaranteed loans. But the guarantors fail to overcome Langley's express holding that such alleged schemes may not be asserted under § 1823(e).

The guarantors make a related argument that also fails. They contend that Union Bank knew of the deficiencies from the bank records that existed at the time it acquired the guaranties. Even if we assume this allegation, unsupported by any evidence in this record, is true, it is irrelevant to the analysis.

In Langley, the borrower made the same argument. The United States Supreme Court rejected it:

> Petitioners' fallback position is that even if a misrepresentation concerning an existing fact can sometimes constitute an agreement covered by § 1823(e), it at least does not do so when the misrepresentation was fraudulent and the FDIC had knowledge of the asserted defense at the time it acquired the note. We conclude, however, that neither fraud in the inducement nor knowledge by the FDIC is relevant to the section's application.
>
> No conceivable reading of the word "agreement" in § 1823(e) could cause it to cover a representation or warranty that is bona fide but to exclude one that is fraudulent. Petitioners effectively acknowledge this when they concede that the fraudulent nature of a *promise* would not cause it to lose its status as an "agreement." The presence of fraud could be relevant, however, to another requirement of § 1823(e), namely, the requirement that the agreement in question "ten[d] to diminish or defeat the right, title or interest" of the FDIC in the asset.[66]

Additionally, the guarantors argue that "the requirements imposed by state law, such as 'an implied covenant of good faith and fair dealing,' . . . are outside

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[66] Id. at 93 (alteration in original) (citation omitted).

the scope of 12 U.S.C. § 1821(e)."[67] They cite New Bank of New England, N.A. v. Callahan to support this argument.[68]

But that case does not establish what they assert. In that case, the third party defendant, the FDIC, sought dismissal of the defendant's claims by asserting the D'Oench doctrine.[69] But the court found the FDIC's argument unpersuasive because the defendant's claims, including breach of an implied covenant of good faith and fair dealing, did not rely on an agreement between the parties.[70] The court denied the FDIC's motion for summary judgment on that ground. Accordingly, that court did not state that implied covenants of good faith and fair dealing are outside the scope of 12 U.S.C. § 1821(e).

The guarantors also argue that these statutes "do[] not prevent the court from considering the context of a loan to see that there are issues of fact as to illegality, fraud, and failure of good faith . . . ."[71] Because this argument is not supported by any citation to authority or cogent argument, we need not address it further.[72]

In sum, for a second and independent statutory reason, we do not further consider the documents that the guarantors submit in opposition to Union Bank's

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[67] Brief of Appellants at 16-17; Reply Brief of Appellants at 22.

[68] 798 F. Supp. 73, 76 (D.N.H. 1992).

[69] Id.

[70] Id. at 77.

[71] Brief of Appellants at 17.

[72] See Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 248, 350 P.3d 647 (2015); RAP 10.3(a)(6).

motion for summary judgment. Accordingly, the guarantors fail to show the existence of a genuine issue of material fact for trial.

Duty of Good Faith

The guarantors argue that Frontier acted in bad faith because it had a duty to disclose, and failed to disclose, that the guarantors' "agent" was "dishonest" and "acting in his own interests."[73] They further argue that Union Bank used the alleged "conflict of interest" of the guarantors' fiduciary "to procure the [guarantors'] assent."[74] They also argue that Frontier concealed the fraudulent transaction leading to the March 2008 change in terms agreements. These arguments are not persuasive.

It is well-settled that "'a guarantor cannot rely upon the relationship between a lender and a borrower to create a fiduciary duty running from the lender to the guarantor.'"[75] Here, the guarantors attempt to create a duty for Union Bank by arguing that it had a duty to disclose to the guarantors the allegedly fraudulent transaction leading to the March 2008 change in terms agreements. But that transaction involved only Frontier, Bingo, a borrower of Frontier, and another entity that was also a borrower of Frontier. Thus, the guarantors improperly rely on Frontier's non-existent duty to Bingo, its borrower, in that transaction to argue that they, the guarantors, were owed a duty of disclosure.

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[73] Reply Brief of Appellants at 14.

[74] Brief of Appellants at 15.

[75] Grayson, 95 Wn. App. at 833 (quoting Miller v. U.S. Bank of Wash., N.A., 72 Wn. App. 416, 426, 865 P.2d 536 (1994)).

The guarantors cite Spokane Union Stockyards Co. v. Maryland Casualty Co.[76] to support their argument that "'the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it.'"[77] But they quote that case out of context. In that case, the appellant tried to avoid liability by arguing he executed a bond for a specific business.[78] Thus, the court had to determine for whom a bond was executed, not whether a party committed fraud or acted in bad faith.[79] Accordingly, that case is not analogous to this case. Consequently, the guarantors' argument is unpersuasive.

The guarantors also argue that they did not waive the "fundamental obligations of good faith and honesty."[80] We need not address waiver to reject this argument, as we do.

"'[A]n implied duty of good faith and fair dealing [is] imposed on the parties to a contract.'"[81] With guaranties, "the creditor's [implied] covenant of good faith is to diligently pursue collection of the debt, and the guarantor may be relieved of liability on the debt where the creditor does not exercise due diligence in collection of that debt."[82]

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[76] 105 Wash. 306, 178 P. 3 (1919).

[77] Reply Brief of Appellants at 21 (quoting Spokane Union Stockyards Co., 105 Wash. at 309).

[78] Spokane Union Stockyards Co., 105 Wash. at 314.

[79] Id. at 307-08.

[80] Reply Brief of Appellants at 22.

[81] Miller, 72 Wn. App. at 425 (quoting Betchard-Clayton, Inc. v. King, 41 Wn. App. 887, 890, 707 P.2d 1361 (1985)).

[82] Id.

But this court has "specifically limited claims by guarantors against lenders, including breach of good faith claims, to performance of specific contract terms."[83] Absolute guarantors lack "'any recourse against the lender unless it is alleged ***and proved*** that the lender acted in bad faith.'"[84] As previously stated, this court has held that "'a guarantor cannot rely upon the relationship between a lender and a borrower to create a fiduciary duty running from the lender to the guarantor.'"[85]

In sum, the common law duty of good faith does not require Union Bank to refrain from its rights under the guaranties.[86] It properly pursues its rights under the guaranties here.

Waiver

The guarantors argue that the guaranties they signed do not waive the affirmative defenses they assert. Union Bank argues to the contrary.

We need not address this point. Because of our prior discussion, there could be no genuine issues of material fact regarding waiver because the resolution of this dispute over the scope of waiver would not affect the outcome of this case.

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[83] Grayson, 95 Wn. App. at 833.

[84] Id. at 831 (emphasis added) (quoting Nat'l Bank of Wash., 81 Wn.2d at 920)).

[85] Id. at 833 (quoting Miller, 72 Wn. App. at 426).

[86] See GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 150, 317 P.3d 1074, review denied, 181 Wn.2d 1008 (2014).

RECONSIDERATION

The guarantors assign error to the court's denial of their motion for reconsideration. But there is no argument on this point.[87] Accordingly, they fail to show the trial court abused its discretion in denying their motion.

ATTORNEY FEES

Union Bank requests attorney fees on appeal based on the terms of the guaranties. Because it prevails on appeal, it is entitled to an award of reasonable attorney fees.

"The general rule in Washington is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity."[88]

Here, the guaranties state "Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. . . . Costs and expenses include Lender's attorneys' fees and legal expenses . . . for . . . appeals . . . ."[89]

Based on Union Bank prevailing on appeal in its enforcement of the guaranties, it is entitled to an award of reasonable attorney fees, subject to its compliance with RAP 18.1(d).

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[87] See Darkenwald, 183 Wn.2d at 248; RAP 10.3(a)(6).

[88] Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014).

[89] Clerk's Papers at 637, 641, 645, 711, 715, 734, 738, and 742.

We affirm the trial court's grant of summary judgment and the order denying reconsideration. We also award Union Bank attorney fees on appeal, subject to its compliance with RAP 18.1(d).

COX, J.

WE CONCUR:

Pub. L. 103-44, § 2, June 28, 1993, 107 Stat. 221, provided that:

"(a) IN GENERAL.—The amendments made by section 1 of this Act [amending this section] shall only apply with respect to institutions for which the Corporation has initiated the payment of insured deposits under section 11(f) of the Federal Deposit Insurance Act [12 U.S.C. 1821(f)] after the date of enactment of this Act [June 28, 1993].

"(b) SPECIAL RULE FOR RECEIVERSHIPS IN PROGRESS.—Section 12(e) of the Federal Deposit Insurance Act [12 U.S.C. 1822(e)] as in effect on the day before the date of enactment of this Act [June 28, 1993] shall apply with respect to insured deposits in depository institutions for which the Corporation was first appointed receiver during the period between January 1, 1989 and the date of enactment of this Act, except that such section 12(e) shall not bar any claim made against the Corporation by an insured depositor for an insured or transferred deposit, so long as such claim is made prior to the termination of the receivership.

"(c) INFORMATION TO STATES.—Within 120 days after the date of enactment of this Act [June 28, 1993], the Corporation shall provide, at the request of and for the sole use of any State, the name and last known address of any insured depositor (as shown on the records of the institution in default) eligible to make a claim against the Corporation solely due to the operation of subsection (b) of this section.

"(d) DEFINITION.—For purposes of this section, the term 'Corporation' means the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or the Federal Savings and Loan Insurance Corporation, as appropriate."

§ 1823. Corporation monies

(a) Investment of Corporation's funds

(1) Authority

Funds held in the Deposit Insurance Fund or the FSLIC Resolution Fund, that are not otherwise employed shall be invested in obligations of the United States or in obligations guaranteed as to principal and interest by the United States.

(2) Limitation

The Corporation shall not sell or purchase any obligations described in paragraph (1) for its own account, at any one time aggregating in excess of $100,000, without the approval of the Secretary of the Treasury. The Secretary may approve a transaction or class of transactions subject to the provisions of this paragraph under such conditions as the Secretary may determine.

(b) Depository accounts

The depository accounts of the Corporation shall be kept with the Treasurer of the United States, or, with the approval of the Secretary of the Treasury, with a Federal Reserve bank, or with a depository institution designated as a depository or fiscal agent of the United States: *Provided*, That the Secretary of the Treasury may waive the requirements of this subsection under such conditions as he may determine: *And provided further*, That this subsection shall not apply to the establishment and maintenance in any depository institution for temporary purposes of depository accounts not in excess of $50,000 in any one depository institution, or to the establishment and maintenance in any depository institution of any depository accounts to facilitate the payment of insured deposits, or the making of loans to, or the purchase of assets of, insured depository institutions. When designated for that purpose by the Secretary of the Treasury, the Corporation shall be a depositary of public moneys, except receipts from customs, under such regulations as may be prescribed by the said Secretary, and may also be employed as a financial agent of the Government. It shall perform all such reasonable duties as depositary of public moneys and financial agent of the Government as may be required of it.

(c) Assistance to insured depository institutions

(1) The Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe, to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured depository institution—

(A) if such action is taken to prevent the default of such insured depository institution;

(B) if, with respect to an insured bank in default, such action is taken to restore such insured bank to normal operation; or

(C) if, when severe financial conditions exist which threaten the stability of a significant number of insured depository institutions or of insured depository institutions possessing significant financial resources, such action is taken in order to lessen the risk to the Corporation posed by such insured depository institution under such threat of instability.

(2)(A) In order to facilitate a merger or consolidation of another[1] insured depository institution described in subparagraph (B) with another insured depository institution or the sale of any or all of the assets of such insured depository institution or the assumption of any or all of such insured depository institution's liabilities by another insured depository institution, or the acquisition of the stock of such insured depository institution, the Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe—

(i) to purchase any such assets or assume any such liabilities;

(ii) to make loans or contributions to, or deposits in, or purchase the securities of, such other insured depository institution or the company which controls or will acquire control of such other insured depository institution;

(iii) to guarantee such other insured depository institution or the company which controls or will acquire control of such other insured depository institution against loss by reason of such insured institution's merging or consolidating with or assuming the liabilities and purchasing the assets of such insured depository institution or by reason of such company acquiring control of such insured depository institution; or

(iv) to take any combination of the actions referred to in subparagraphs (i) through (iii).

(B) For the purpose of subparagraph (A), the insured depository institution must be an insured depository institution—

[1] So in original. Probably should be "an".

(i) which is in default;

(ii) which, in the judgment of the Board of Directors, is in danger of default; or

(iii) which, when severe financial conditions exist which threaten the stability of a significant number of insured depository institutions or of insured depository institutions possessing significant financial resources, is determined by the Corporation, in its sole discretion, to require assistance under subparagraph (A) in order to lessen the risk to the Corporation posed by such insured depository institution under such threat of instability.

(C) Any action to which the Corporation is or becomes a party by acquiring any asset or exercising any other authority set forth in this section shall be stayed for a period of 60 days at the request of the Corporation.

(3) The Corporation may provide any person acquiring control of, merging with, consolidating with or acquiring the assets of an insured depository institution under subsection (f) or (k) of this section with such financial assistance as it could provide an insured institution under this subsection.

(4) LEAST-COST RESOLUTION REQUIRED.—

(A) IN GENERAL.—Notwithstanding any other provision of this chapter, the Corporation may not exercise any authority under this subsection or subsection (d), (f), (h), (i), or (k) with respect to any insured depository institution unless—

(i) the Corporation determines that the exercise of such authority is necessary to meet the obligation of the Corporation to provide insurance coverage for the insured deposits in such institution; and

(ii) the total amount of the expenditures by the Corporation and obligations incurred by the Corporation (including any immediate and long-term obligation of the Corporation and any direct or contingent liability for future payment by the Corporation) in connection with the exercise of any such authority with respect to such institution is the least costly to the Deposit Insurance Fund of all possible methods for meeting the Corporation's obligation under this section.

(B) DETERMINING LEAST COSTLY APPROACH.—In determining how to satisfy the Corporation's obligations to an institution's insured depositors at the least possible cost to the Deposit Insurance Fund, the Corporation shall comply with the following provisions:

(i) PRESENT-VALUE ANALYSIS; DOCUMENTATION REQUIRED.—The Corporation shall—

(I) evaluate alternatives on a present-value basis, using a realistic discount rate;

(II) document that evaluation and the assumptions on which the evaluation is based, including any assumptions with regard to interest rates, asset recovery rates, asset holding costs, and payment of contingent liabilities; and

(III) retain the documentation for not less than 5 years.

(ii) FOREGONE TAX REVENUES.—Federal tax revenues that the Government would forego as the result of a proposed transaction, to the extent reasonably ascertainable, shall be treated as if they were revenues foregone by the Deposit Insurance Fund.

(C) TIME OF DETERMINATION.—

(i) GENERAL RULE.—For purposes of this subsection, the determination of the costs of providing any assistance under paragraph (1) or (2) or any other provision of this section with respect to any depository institution shall be made as of the date on which the Corporation makes the determination to provide such assistance to the institution under this section.

(ii) RULE FOR LIQUIDATIONS.—For purposes of this subsection, the determination of the costs of liquidation of any depository institution shall be made as of the earliest of—

(I) the date on which a conservator is appointed for such institution;

(II) the date on which a receiver is appointed for such institution; or

(III) the date on which the Corporation makes any determination to provide any assistance under this section with respect to such institution.

(D) LIQUIDATION COSTS.—In determining the cost of liquidating any depository institution for the purpose of comparing the costs under subparagraph (A) (with respect to such institution), the amount of such cost may not exceed the amount which is equal to the sum of the insured deposits of such institution as of the earliest of the dates described in subparagraph (C), minus the present value of the total net amount the Corporation reasonably expects to receive from the disposition of the assets of such institution in connection with such liquidation.

(E) DEPOSIT INSURANCE FUND AVAILABLE FOR INTENDED PURPOSE ONLY.—

(i) IN GENERAL.—After December 31, 1994, or at such earlier time as the Corporation determines to be appropriate, the Corporation may not take any action, directly or indirectly, with respect to any insured depository institution that would have the effect of increasing losses to the Deposit Insurance Fund by protecting—

(I) depositors for more than the insured portion of deposits (determined without regard to whether such institution is liquidated); or

(II) creditors other than depositors.

(ii) DEADLINE FOR REGULATIONS.—The Corporation shall prescribe regulations to implement clause (i) not later than January 1, 1994, and the regulations shall take effect not later than January 1, 1995.

(iii) PURCHASE AND ASSUMPTION TRANSACTIONS.—No provision of this subparagraph shall be construed as prohibiting the Corporation from allowing any person who acquires any assets or assumes any liabilities of any insured depository institution for which the Corporation has been appointed conservator or receiver to acquire uninsured deposit liabilities of such institution so long as the insurance fund does not incur any loss with respect to such deposit liabilities in an amount greater than the loss which would have been incurred with respect to such li-

abilities if the institution had been liquidated.

(F) DISCRETIONARY DETERMINATIONS.—Any determination which the Corporation may make under this paragraph shall be made in the sole discretion of the Corporation.

(G) SYSTEMIC RISK.—

(i) EMERGENCY DETERMINATION BY SECRETARY OF THE TREASURY.—Notwithstanding subparagraphs (A) and (E), if, upon the written recommendation of the Board of Directors (upon a vote of not less than two-thirds of the members of the Board of Directors) and the Board of Governors of the Federal Reserve System (upon a vote of not less than two-thirds of the members of such Board), the Secretary of the Treasury (in consultation with the President) determines that—

(I) the Corporation's compliance with subparagraphs (A) and (E) with respect to an insured depository institution for which the Corporation has been appointed receiver would have serious adverse effects on economic conditions or financial stability; and

(II) any action or assistance under this subparagraph would avoid or mitigate such adverse effects,

the Corporation may take other action or provide assistance under this section for the purpose of winding up the insured depository institution for which the Corporation has been appointed receiver as necessary to avoid or mitigate such effects.

(ii) REPAYMENT OF LOSS.—

(I) IN GENERAL.—The Corporation shall recover the loss to the Deposit Insurance Fund arising from any action taken or assistance provided with respect to an insured depository institution under clause (i) from 1 or more special assessments on insured depository institutions, depository institution holding companies (with the concurrence of the Secretary of the Treasury with respect to holding companies), or both, as the Corporation determines to be appropriate.

(II) TREATMENT OF DEPOSITORY INSTITUTION HOLDING COMPANIES.—For purposes of this clause, sections 1817(c)(2) and 1828(h) of this title shall apply to depository institution holding companies as if they were insured depository institutions.

(III) REGULATIONS.—The Corporation shall prescribe such regulations as it deems necessary to implement this clause. In prescribing such regulations, defining terms, and setting the appropriate assessment rate or rates, the Corporation shall establish rates sufficient to cover the losses incurred as a result of the actions of the Corporation under clause (i) and shall consider: the types of entities that benefit from any action taken or assistance provided under this subparagraph; economic conditions, the effects on the industry, and such other factors as the Corporation deems appropriate and relevant to the action taken or the assistance provided. Any funds so collected that exceed actual losses shall be placed in the Deposit Insurance Fund.

(iii) DOCUMENTATION REQUIRED.—The Secretary of the Treasury shall—

(I) document any determination under clause (i); and

(II) retain the documentation for review under clause (iv).

(iv) GAO REVIEW.—The Comptroller General of the United States shall review and report to the Congress on any determination under clause (i), including—

(I) the basis for the determination;

(II) the purpose for which any action was taken pursuant to such clause; and

(III) the likely effect of the determination and such action on the incentives and conduct of insured depository institutions and uninsured depositors.

(v) NOTICE.—

(I) IN GENERAL.—Not later than 3 days after making a determination under clause (i), the Secretary of the Treasury shall provide written notice of any determination under clause (i) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

(II) DESCRIPTION OF BASIS OF DETERMINATION.—The notice under subclause (I) shall include a description of the basis for any determination under clause (i).

(H) RULE OF CONSTRUCTION.—No provision of law shall be construed as permitting the Corporation to take any action prohibited by paragraph (4) unless such provision expressly provides, by direct reference to this paragraph, that this paragraph shall not apply with respect to such action.

(5) The Corporation may not use its authority under this subsection to purchase the voting or common stock of an insured depository institution. Nothing in the preceding sentence shall be construed to limit the ability of the Corporation to enter into and enforce covenants and agreements that it determines to be necessary to protect its financial interest.

(6)(A) During any period in which an insured depository institution has received assistance under this subsection and such assistance is still outstanding, such insured depository institution may defer the payment of any State or local tax which is determined on the basis of the deposits held by such insured depository institution or of the interest or dividends paid on such deposits.

(B) When such insured depository institution no longer has any outstanding assistance, such insured depository institution shall pay all taxes which were deferred under subparagraph (A). Such payments shall be made in accordance with a payment plan established by the Corporation, after consultation with the applicable State and local taxing authorities.

(7) The transfer of any assets or liabilities associated with any trust business of an insured depository institution in default under subparagraph (2)(A) shall be effective without any State or Federal approval, assignment, or consent with respect thereto.

(8) ASSISTANCE BEFORE APPOINTMENT OF CONSERVATOR OR RECEIVER.—

(A) IN GENERAL.—Subject to the least-cost provisions of paragraph (4), the Corporation shall consider providing direct financial assistance under this section for depository institutions before the appointment of a conservator or receiver for such institution only under the following circumstances:

(i) TROUBLED CONDITION CRITERIA.—The Corporation determines—

(I) grounds for the appointment of a conservator or receiver exist or likely will exist in the future unless the depository institution's capital levels are increased; and

(II) it is unlikely that the institution can meet all currently applicable capital standards without assistance.

(ii) OTHER CRITERIA.—The depository institution meets the following criteria:

(I) The appropriate Federal banking agency and the Corporation have determined that, during such period of time preceding the date of such determination as the agency or the Corporation considers to be relevant, the institution's management has been competent and has complied with applicable laws, rules, and supervisory directives and orders.

(II) The institution's management did not engage in any insider dealing, speculative practice, or other abusive activity.

(B) PUBLIC DISCLOSURE.—Any determination under this paragraph to provide assistance under this section shall be made in writing and published in the Federal Register.

(9) Any assistance provided under this subsection may be in subordination to the rights of depositors and other creditors.

(10) In its annual report to the Congress, the Corporation shall report the total amount it has saved, or estimates it has saved, by exercising the authority provided in this subsection.

(11) UNENFORCEABILITY OF CERTAIN AGREEMENTS.—No provision contained in any existing or future standstill, confidentiality, or other agreement that, directly or indirectly—

(A) affects, restricts, or limits the ability of any person to offer to acquire or acquire,

(B) prohibits any person from offering to acquire or acquiring, or

(C) prohibits any person from using any previously disclosed information in connection with any such offer to acquire or acquisition of,

all or part of any insured depository institution, including any liabilities, assets, or interest therein, in connection with any transaction in which the Corporation exercises its authority under section 1821 of this title or this section, shall be enforceable against or impose any liability on such person, as such enforcement or liability shall be contrary to public policy.

(d) Sale of assets to Corporation

(1) In general

Any conservator, receiver, or liquidator appointed for any insured depository institution in default, including the Corporation acting in such capacity, shall be entitled to offer the assets of such depository institutions for sale to the Corporation or as security for loans from the Corporation.

(2) Proceeds

The proceeds of every sale or loan of assets to the Corporation shall be utilized for the same purposes and in the same manner as other funds realized from the liquidation of the assets of such depository institutions.

(3) Rights and powers of Corporation

(A) In general

With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all of the rights, powers, privileges, and authorities of the Corporation as receiver under sections 1821 and 1825(b) of this title.

(B) Rule of construction

Such rights, powers, privileges, and authorities shall be in addition to and not in derogation of any rights, powers, privileges, and authorities otherwise applicable to the Corporation.

(C) Fiduciary responsibility

In exercising any right, power, privilege, or authority described in subparagraph (A), the Corporation shall continue to be subject to the fiduciary duties and obligations of the Corporation as receiver to claimants against the insured depository institution in receivership.

(D) Disposition of assets

In exercising any right, power, privilege, or authority described in subparagraph (A) regarding the sale or disposition of assets sold to the Corporation pursuant to paragraph (1), the Corporation shall conduct its operations in a manner which—

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

(4) Loans

The Corporation, in its discretion, may make loans on the security of or may purchase and liquidate or sell any part of the assets of an insured depository institution which is now or may hereafter be in default.

(e) Agreements against interests of Corporation

(1) In general

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a

loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

(2) Exemptions from contemporaneous execution requirement

An agreement to provide for the lawful collateralization of—

(A) deposits of, or other credit extension by, a Federal, State, or local governmental entity, or of any depositor referred to in section 1821(a)(2) of this title, including an agreement to provide collateral in lieu of a surety bond;

(B) bankruptcy estate funds pursuant to section 345(b)(2) of title 11;

(C) extensions of credit, including any overdraft, from a Federal reserve bank or Federal home loan bank; or

(D) one or more qualified financial contracts, as defined in section 1821(e)(8)(D) of this title,

shall not be deemed invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or because of pledges, delivery, or substitution of the collateral made in accordance with such agreement.

(f) Assisted emergency interstate acquisitions

(1) This subsection shall apply only to an acquisition of an insured bank or a holding company by an out-of-State bank[2] savings association or out-of-State holding company for which the Corporation provides assistance under subsection (c).

(2)(A) Whenever an insured bank with total assets of $500,000,000 or more (as determined from its most recent report of condition) is in default, the Corporation, as receiver, may, in its discretion and upon such terms and conditions as the Corporation may determine, arrange the sale of assets of the bank in default and the assumption of the liabilities of the bank in default, including the sale of such assets to and the assumption of such liabilities by an insured depository institution located in the State where the bank in default was chartered but established by an out-of-State bank or holding company. Where otherwise lawfully required, a transaction under this subsection must be approved by the primary Federal or State supervisor of all parties thereto.

(B)(i) Before making a determination to take any action under subparagraph (A), the Corporation shall consult the State bank supervisor of the State in which the insured bank in default was chartered.

(ii) The State bank supervisor shall be given a reasonable opportunity, and in no event less than forty-eight hours, to object to the use of the provisions of this paragraph. Such notice may be provided by the Corporation prior to its appointment as receiver, but in anticipation of an impending appointment.

(iii) If the State supervisor objects during such period, the Corporation may use the authority of this paragraph only by a vote of 75 percent of the Board of Directors. The Board of Directors shall provide to the State supervisor, as soon as practicable, a written certification of its determination.

(3) EMERGENCY INTERSTATE ACQUISITIONS OF INSURED BANKS IN DANGER OF DEFAULT.—

(A) ACQUISITION OF INSURED BANKS IN DANGER OF DEFAULT.—One or more out-of-State banks or out-of-State holding companies may acquire and retain all or part of the shares or assets of, or otherwise acquire and retain—

(i) an insured bank in danger of default which has total assets of $500,000,000 or more; or

(ii) 2 or more affiliated insured banks in danger of default which have aggregate total assets of $500,000,000 or more, if the aggregate total assets of such banks is equal to or greater than 33 percent of the aggregate total assets of all affiliated insured banks.

(B) ACQUISITION OF A HOLDING COMPANY OR OTHER BANK AFFILIATE.—If one or more out-of-State banks or out-of-State holding companies acquire 1 or more affiliated insured banks under subparagraph (A) the aggregate total assets of which is equal to or greater than 33 percent of the aggregate total assets of all affiliated insured banks, any such out-of-State bank or out-of-State holding company may also, as part of the same transaction, acquire and retain the shares or assets of, or otherwise acquire and retain—

(i) the holding company which controls the affiliated insured banks so acquired; or

(ii) any other affiliated insured bank.

(C) REQUEST FOR ASSISTANCE BY CORPORATE BOARD OF DIRECTORS.—The Corporation may assist an acquisition or merger authorized under subparagraph (A) only if the board of directors or trustees of each insured bank in danger of default which is being acquired has requested in writing that the Corporation assist the acquisition or merger.

(D) CERTAIN ACQUISITIONS AUTHORIZED AFTER ASSISTANCE IS PROVIDED.—Notwithstanding paragraph (1), if—

(i) at any time after August 10, 1987, the Corporation provides any assistance under subsection (c) to an insured bank; and

(ii) at the time such assistance is granted, the insured bank, the holding company which controls the insured bank (if any), or any affiliated insured bank is eligible to be acquired by an out-of-State bank or out-of-State holding company under this paragraph,

the insured bank, the holding company, and such other affiliated insured bank shall re-

[2] So in original. Probably should be followed by "or".

main eligible, subject to such terms and conditions as the Corporation (in the Corporation's discretion) may impose, to be acquired by an out-of-State bank or out-of-State holding company under this paragraph as long as any portion of such assistance remains outstanding.

(E) STATE BANK SUPERVISOR APPROVAL.—The Corporation may take no final action in connection with any acquisition under this paragraph unless the State bank supervisor of the State in which the bank in danger of default is located approves the acquisition.

(F) OTHER REQUIREMENTS NOT AFFECTED.—This paragraph does not affect any other requirement under Federal or State law for regulatory approval of an acquisition under this paragraph.

(G) ACQUISITION MAY BE CONDITIONED ON RECEIPT OF CONSIDERATION FOR CORPORATION'S ASSISTANCE.—Any acquisition described in subparagraph (D) may be conditioned on the receipt of such consideration for the Corporation's assistance as the Board of Directors deems appropriate.

(4)(A) ACQUISITIONS NOT SUBJECT TO CERTAIN OTHER LAWS.—Section 1842(d) of this title, any provision of State law, and section 1730a(e)(3)[3] of this title shall not apply to prohibit any acquisition under paragraph (2) or (3), except that an out-of-State bank may make such an acquisition only if such ownership is otherwise specifically authorized.

(B) Any subsidiary created by operation of this subsection may retain and operate any existing branch or branches of the institution merged with or acquired under paragraph (2) or (3), but otherwise shall be subject to the conditions upon which a national bank may establish and operate branches in the State in which such insured institution is located.

(C) No insured institution acquired under this subsection shall after it is acquired move its principal office or any branch office which it would be prohibited from moving if the institution were a national bank.

(D) SUBSEQUENT NONEMERGENCY INTERSTATE ACQUISITIONS SUBJECT TO STATE LAW.—

(i) IN GENERAL.—Any out-of-State bank holding company which acquires control of an insured bank in any State under paragraph (2) or (3) may acquire any other insured bank and establish branches in such State to the same extent as a bank holding company whose insured bank subsidiaries' operations are principally conducted in such State may acquire any other insured bank or establish branches.

(ii) DELAYED DATE OF APPLICABILITY.—Clause (i) shall not apply with respect to any out-of-State bank holding company referred to in such clause before the earlier of—

(I) the end of the 2-year period beginning on the date the acquisition referred to in such clause with respect to such company is consummated; or

(II) the end of any period established under State law during which such out-of-State bank holding company may not be treated as a bank holding company whose insured bank subsidiaries' operations are principally conducted in such State for purposes of acquiring other insured banks or establishing bank branches.

(iii) DETERMINATION OF PRINCIPALLY CONDUCTED.—For purposes of this subparagraph, the State in which the operations of a holding company's insured bank subsidiaries are principally conducted is the State determined under section 1842(d) of this title with respect to such holding company.

(E) CERTAIN STATE INTERSTATE BANKING LAWS INAPPLICABLE.—Any holding company which acquires control of any insured bank or holding company under paragraph (2) or (3) or subparagraph (D) of this paragraph shall not, by reason of such acquisition, be required under the law of any State to divest any other insured bank or be prevented from acquiring any other bank or holding company.

(5) In determining whether to arrange a sale of assets and assumption of liabilities or an acquisition or a merger under the authority of paragraph (2) or (3), the Corporation may solicit such offers or proposals as are practicable from any prospective purchasers or merger partners it determines, in its sole discretion, are both qualified and capable of acquiring the assets and liabilities of the bank in default or the bank in danger of default.

(6)(A) If, after receiving offers, the offer presenting the lowest expense to the Corporation, that is in a form and with conditions acceptable to the Corporation (hereinafter referred to as the "lowest acceptable offer"), is from an offeror that is not an existing in-State bank of the same type as the bank that is in default or is in danger of default (or, where the bank is an insured bank other than a mutual savings bank, the lowest acceptable offer is not from an in-State holding company), the Corporation shall permit the offeror which made the initial lowest acceptable offer and each offeror who made an offer the estimated cost of which to the Corporation was within 15 per centum or $15,000,000, whichever is less, of the initial lowest acceptable offer to submit a new offer.

(B) In considering authorizations under this subsection, the Corporation shall give consideration to the need to minimize the cost of financial assistance and to the maintenance of specialized depository institutions. The Corporation shall authorize transactions under this subsection considering the following priorities:

(i) First, between depository institutions of the same type within the same State.

(ii) Second, between depository institutions of the same type—

(I) in different States which by statute specifically authorize such acquisitions; or

(II) in the absence of such statutes, in different States which are contiguous.

(iii) Third, between depository institutions of the same type in different States other than the States described in clause (ii).

(iv) Fourth, between depository institutions of different types in the same State.

(v) Fifth, between depository institutions of different types—

[3] See References in Text note below.

(I) in different States which by statute specifically authorize such acquisitions; or

(II) in the absence of such statutes, in different States which are contiguous.

(vi) Sixth, between depository institutions of different types in different States other than the States described in clause (v).

(C) MINORITY BANK PRIORITY.—In the case of a minority-controlled bank, the Corporation shall seek an offer from other minority-controlled banks before proceeding with the bidding priorities set forth in subparagraph (B).

(D) In determining the cost of offers and reoffers, the Corporation's calculations and estimations shall be determinative. The Corporation may set reasonable time limits on offers and reoffers.

(7) No sale may be made under the provisions of paragraph (2) or (3)—

(A) which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States;

(B) whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Corporation finds that the anticompetitive effects of the proposed transactions are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served; or

(C) if in the opinion of the Corporation the acquisition threatens the safety and soundness of the acquirer or does not result in the future viability of the resulting depository institution.

(8) As used in this subsection—

(A) the term "in-State depository institution or in-State holding company" means an existing insured depository institution currently operating in the State in which the bank in default or the bank in danger of default is chartered or a company that is operating an insured depository institution subsidiary in the State in which the bank in default or the bank in danger of default is chartered;

(B) the term "acquire" means to acquire, directly or indirectly, ownership or control through—

(i) an acquisition of shares;

(ii) an acquisition of assets or assumption of liabilities;

(iii) a merger or consolidation; or

(iv) any similar transaction;

(C) the term "affiliated insured bank" means—

(i) when used in connection with a reference to a holding company, an insured bank which is a subsidiary of such holding company; and

(ii) when used in connection with a reference to 2 or more insured banks, insured banks which are subsidiaries of the same holding company; and

(D) the term "subsidiary" has the meaning given to such term in section 1841(d) of this title.

(9) NO ASSISTANCE AUTHORIZED FOR CERTAIN SUBSIDIARIES OF HOLDING COMPANIES.—

(A) IN GENERAL.—The Corporation shall not provide any assistance to a subsidiary, other than a subsidiary that is an insured depository institution, of a holding company in connection with any acquisition under this subsection.

(B) INTERMEDIATE HOLDING COMPANY PERMITTED.—This paragraph does not prohibit an intermediate holding company or an affiliate of an insured depository institution from being a conduit for assistance ultimately intended for an insured bank.

(10) ANNUAL REPORT.—

(A) REQUIRED.—In its annual report to Congress the Corporation shall include a report on the acquisitions under this subsection during the preceding year.

(B) CONTENTS.—The report required under subparagraph (A) shall contain the following information:

(i) The number of acquisitions under this subsection.

(ii) A brief description of each such acquisition and the circumstances under which such acquisition occurred.

(11) DETERMINATION OF TOTAL ASSETS.—For purposes of this subsection, the total assets of any insured bank shall be determined on the basis of the most recent report of condition of such bank which is available at the time of such determination.

(12) ACQUISITION OF MINORITY BANK BY MINORITY BANK HOLDING COMPANY WITHOUT REGARD TO ASSET SIZE.—

(A) IN GENERAL.—For the purpose of ensuring continued minority control of a minority-controlled bank, paragraphs (2) and (3) shall apply with respect to the acquisition of a minority-controlled bank by an out-of-State minority-controlled depository institution or depository institution holding company without regard to the fact that the total assets of such minority-controlled bank are less than $500,000,000.

(B) DEFINITIONS.—For purposes of this paragraph:

(i) MINORITY BANK.—The term "minority bank" means any depository institution described in clause (i), (ii), or (iii) of section 461(b)(1)(A) of this title—

(I) more than 50 percent of the ownership or control of which is held by one or more minority individuals; and

(II) more than 50 percent of the net profit or loss of which accrues to minority individuals.

(ii) MINORITY.—The term "minority" means any Black American, Native American, Hispanic American, or Asian American.

(g) Payment of interest on stock subscriptions

Prior to July 1, 1951, the Corporation shall pay out of its capital account to the Secretary of the Treasury an amount equal to 2 per centum simple interest per annum on amounts advanced to the Corporation on stock subscriptions by the Secretary of the Treasury and the Federal Reserve banks, from the time of such advances

until the amounts thereof were repaid. The amount payable hereunder shall be paid in two equal installments, the first installment to be paid prior to December 31, 1950.

(h) Reopening or aversion of closing of insured branch of foreign bank

The powers conferred on the Board of Directors and the Corporation by this section to take action to reopen an insured depository institution in default or to avert the default of an insured depository institution may be used with respect to an insured branch of a foreign bank if, in the judgment of the Board of Directors, the public interest in avoiding the default of such branch substantially outweighs any additional risk of loss to the Deposit Insurance Fund which the exercise of such powers would entail.

(i) Repealed. Pub. L. 97–320, title II, § 206, Oct. 15, 1982, 96 Stat. 1496

(j) Loan loss amortization for certain banks

(1) Eligibility

The appropriate Federal banking agency shall permit an agricultural bank to take the actions referred to in paragraph (2) if it finds that—

(A) there is no evidence that fraud or criminal abuse on the part of the bank led to the losses referred to in paragraph (2); and

(B) the agricultural bank has a plan to restore its capital, not later than the close of the amortization period established under paragraph (2), to a level prescribed by the appropriate Federal banking agency.

(2) Seven-year loss amortization

(A) Any loss on any qualified agricultural loan that an agricultural bank would otherwise be required to show on its annual financial statement for any year between December 31, 1983, and January 1, 1992, may be amortized on its financial statements over a period of not to exceed 7 years, as provided in regulations issued by the appropriate Federal banking agency.

(B) An agricultural bank may reappraise any real estate or other property, real or personal, that it acquired coincident to the making of a qualified agricultural loan and that it owned on January 1, 1983, and any such additional property that it acquires prior to January 1, 1992. Any loss that such bank would otherwise be required to show on its annual financial statements as the result of any such reappraisal may be amortized on its financial statements over a period of not to exceed 7 years, as provided in regulations issued by the appropriate Federal banking agency.

(3) Regulations

Not later than 90 days after August 10, 1987, the appropriate Federal banking agency shall issue regulations implementing this subsection with respect to banks that it supervises, including regulations implementing the capital restoration requirement of paragraph (1)(B).

(4) Definitions

As used in this subsection—

(A) the term "agricultural bank" means a bank—

(i) the deposits of which are insured by the Federal Deposit Insurance Corporation;

(ii) which is located in an area the economy of which is dependent on agriculture;

(iii) which has assets of $100,000,000 or less; and

(iv) which has—

(I) at least 25 percent of its total loans in qualified agricultural loans; or

(II) fewer than 25 percent of its total loans in qualified agricultural loans but which the appropriate Federal banking agency or State bank commissioner recommends to the Corporation for eligibility under this section, or which the Corporation, on its motion, deems eligible; and

(B) the term "qualified agricultural loan" means a loan made to finance the production of agricultural products or livestock in the United States, a loan secured by farmland or farm machinery, or such other category of loans as the appropriate Federal banking agency may deem eligible.

(5) Maintenance of portfolio

As a condition of eligibility under this subsection, the agricultural bank must agree to maintain in its loan portfolio a percentage of agricultural loans which is not lower than the percentage of such loans in its loan portfolio on January 1, 1986.

(k) Emergency acquisitions

(1) In general

(A) Acquisitions authorized

(i) Transactions described

Notwithstanding any provision of State law, upon determining that severe financial conditions threaten the stability of a significant number of savings associations, or of savings associations possessing significant financial resources, the Corporation, in its discretion and if it determines such authorization would lessen the risk to the Corporation, may authorize—

(I) a savings association that is eligible for assistance pursuant to subsection (c) to merge or consolidate with, or to transfer its assets and liabilities to, any other savings association or any insured bank,

(II) any other savings association to acquire control of such savings association, or

(III) any company to acquire control of such savings association or to acquire the assets or assume the liabilities thereof.

The Corporation may not authorize any transaction under this subsection unless the Corporation determines that the authorization will not present a substantial risk to the safety or soundness of the savings association to be acquired or any acquiring entity.

(ii) Terms of transactions

Mergers, consolidations, transfers, and acquisitions under this subsection shall be

on such terms as the Corporation shall provide.

(iii) Approval by appropriate agency

Where otherwise required by law, transactions under this subsection must be approved by the appropriate Federal banking agency of every party thereto.

(iv) Acquisitions by savings associations

Any Federal savings association that acquires another savings association pursuant to clause (i) may, with the concurrence of the Comptroller of the Currency, hold that savings association as a subsidiary notwithstanding the percentage limitations of section 1464(c)(4)(B) of this title.

(v) Dual service

Dual service by a management official that would otherwise be prohibited under the Depository Institution Management Interlocks Act [12 U.S.C. 3201 et seq.] may, with the approval of the Corporation, continue for up to 10 years.

(vi) Continued applicability of certain State restrictions

Nothing in this subsection overrides or supersedes State laws restricting or limiting the activities of a savings association on behalf of another entity.

(B) Consultation with State official

(i) Consultation required

Before making a determination to take any action under subparagraph (A), the Corporation shall consult the State official having jurisdiction of the acquired institution.

(ii) Period for State response

The official shall be given a reasonable opportunity, and in no event less than 48 hours, to object to the use of the provisions of this paragraph. Such notice may be provided by the Corporation prior to its appointment as receiver, but in anticipation of an impending appointment.

(iii) Approval over objection of State official

If the official objects during such period, the Corporation may use the authority of this paragraph only by a vote of 75 percent or more of the voting members of the Board of Directors. The Corporation shall provide to the official, as soon as practicable, a written certification of its determination.

(2) Solicitation of offers

(A) In general

In considering authorizations under this subsection, the Corporation may solicit such offers or proposals as are practicable from any prospective purchasers or merger partners it determines, in its sole discretion, are both qualified and capable of acquiring the assets and liabilities of the savings association.

(B) Minority-controlled institutions

In the case of a minority-controlled depository institution, the Corporation shall seek an offer from other minority-controlled depository institutions before seeking an offer from other persons or entities.

(3) Determination of costs

In determining the cost of offers under this subsection, the Corporation's calculations and estimations shall be determinative. The Corporation may set reasonable time limits on offers.

(4) Branching provisions

(A) In general

If a merger, consolidation, transfer, or acquisition under this subsection involves a savings association eligible for assistance and a bank or bank holding company, a savings association may retain and operate any existing branch or branches or any other existing facilities. If the savings association continues to exist as a separate entity, it may establish and operate new branches to the same extent as any savings association that is not affiliated with a bank holding company and the home office of which is located in the same State.

(B) Restrictions

(i) In general

Notwithstanding subparagraph (A), if—

(I) a savings association described in such subparagraph does not have its home office in the State of the bank holding company bank subsidiary, and

(II) such association does not qualify as a domestic building and loan association under section 7701(a)(19) of title 26, or does not meet the asset composition test imposed by subparagraph (C) of that section on institutions seeking so to qualify,

such savings association shall be subject to the conditions upon which a bank may retain, operate, and establish branches in the State in which the savings association is located.

(ii) Transition period

The Corporation, for good cause shown, may allow a savings association up to 2 years to comply with the requirements of clause (i).

(5) Assistance before appointment of conservator or receiver

(A) Assistance proposals

The Corporation shall consider proposals by savings associations for assistance pursuant to subsection (c) before grounds exist for appointment of a conservator or receiver for such member under the following circumstances:

(i) Troubled condition criteria

The Corporation determines—

(I) that grounds for appointment of a conservator or receiver exist or likely will exist in the future unless the member's tangible capital is increased;

(II) that it is unlikely that the member can achieve positive tangible capital without assistance; and

(III) that providing assistance pursuant to the member's proposal would be likely to lessen the risk to the Corporation.

(ii) Other criteria

The member meets the following criteria:

(I) Before August 9, 1989, the member was solvent under applicable regulatory accounting principles but had negative tangible capital.

(II) The member's negative tangible capital position is substantially attributable to its participation in acquisition and merger transactions that were instituted by the Federal Home Loan Bank Board or the Federal Savings and Loan Insurance Corporation for supervisory reasons.

(III) The member is a qualified thrift lender (as defined in section 1467a(m) of this title) or would be a qualified thrift lender if commercial real estate owned and nonperforming commercial loans acquired in acquisition and merger transactions that were instituted by the Federal Home Loan Bank Board or the Federal Savings and Loan Insurance Corporation for supervisory reasons were excluded from the member's total assets.

(IV) The appropriate Federal banking agency has determined that the member's management is competent and has complied with applicable laws, rules, and supervisory directives and orders.

(V) The member's management did not engage in insider dealing or speculative practices or other activities that jeopardized the member's safety and soundness or contributed to its impaired capital position.

(VI) The member's offices are located in an economically depressed region.

(B) Corporation consideration of assistance proposal

If a member meets the requirements of clauses (i) and (ii) of subparagraph (A), the Corporation shall consider providing direct financial assistance.

(C) "Economically depressed region" defined

For purposes of this paragraph, the term "economically depressed region" means any geographical region which the Corporation determines by regulation to be a region within which real estate values have suffered serious decline due to severe economic conditions, such as a decline in energy or agricultural values or prices.

(Sept. 21, 1950, ch. 967, § 2[13], 64 Stat. 888; Pub. L. 95–369, § 6(c)(24), Sept. 17, 1978, 92 Stat. 619; Pub. L. 97–320, title I, §§ 111, 113(m), 116, 141(a)(1), (3), title II, §§ 203, 206, Oct. 15, 1982, 96 Stat. 1469, 1474, 1476, 1488, 1489, 1492, 1496; Pub. L. 97–457, §§ 1(a), 4, 10(a), Jan. 12, 1983, 96 Stat. 2507, 2508; Pub. L. 98–29, § 1(a), May 16, 1983, 97 Stat. 189; Pub. L. 100–86, title V, §§ 502(a)–(g), (i), 509(a), title VIII, § 801, Aug. 10, 1987, 101 Stat. 623–627, 629, 635, 656; Pub. L. 101–73, title II, §§ 201(a), 217, Aug. 9, 1989, 103 Stat. 187, 254; Pub. L. 102–242, title I, §§ 123(b), 141(a)(1), (e), Dec. 19, 1991, 105 Stat. 2252, 2273, 2278; Pub. L. 103–325, title III, § 317, title VI, § 602(a)(34)–(42), Sept. 23, 1994, 108 Stat. 2223, 2289, 2290; Pub. L. 104–208, div. A, title II, § 2704(d)(14)(M), Sept. 30, 1996, 110 Stat. 3009–492; Pub. L. 109–8, title IX, § 909, Apr. 20, 2005, 119 Stat. 183; Pub. L. 109–171, title II, § 2102(b), Feb. 8, 2006, 120 Stat. 9; Pub. L. 109–173, §§ 3(a)(8), 8(a)(19), Feb. 15, 2006, 119 Stat. 3606, 3613; Pub. L. 110–343, div. A, title I, § 126(c), Oct. 3, 2008, 122 Stat. 3795; Pub. L. 111–22, div. A, title II, § 204(d), May 20, 2009, 123 Stat. 1650; Pub. L. 111–203, title III, § 363(6), title XI, § 1106(b), July 21, 2010, 124 Stat. 1553, 2125.)

REFERENCES IN TEXT

Section 1730a of this title, referred to in subsec. (f)(4)(A), was repealed by Pub. L. 101–73, title IV, § 407, Aug. 9, 1989, 103 Stat. 363.

The Depository Institution Management Interlocks Act, referred to in subsec. (k)(1)(A)(v), is title II of Pub. L. 95–630, Nov. 10, 1978, 92 Stat. 3672, which is classified principally to chapter 33 (§ 3201 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3201 of this title and Tables.

PRIOR PROVISIONS

Section is derived from subsec. (n) of former section 264 of this title. See Codification note set out under section 1811 of this title.

AMENDMENTS

2010—Subsec. (c)(4)(G)(i). Pub. L. 111–203, § 1106(b)(1)(B), inserted "for the purpose of winding up the insured depository institution for which the Corporation has been appointed receiver" after "provide assistance under this section" in concluding provisions.

Subsec. (c)(4)(G)(i)(I). Pub. L. 111–203, § 1106(b)(1)(A), inserted "for which the Corporation has been appointed receiver" before "would have serious".

Subsec. (c)(4)(G)(v)(I). Pub. L. 111–203, § 1106(b)(2), substituted "Not later than 3 days after making a determination under clause (i), the" for "The".

Subsec. (k)(1)(A)(iv). Pub. L. 111–203, § 363(6), substituted "Comptroller of the Currency" for "Director of the Office of Thrift Supervision".

2009—Subsec. (c)(4)(G)(ii). Pub. L. 111–22 amended cl. (ii) generally. Prior to amendment, text read as follows: "The Corporation shall recover the loss to the Deposit Insurance Fund arising from any action taken or assistance provided with respect to an insured depository institution under clause (i) expeditiously from 1 or more emergency special assessments on insured depository institutions equal to the product of—

"(I) an assessment rate established by the Corporation; and

"(II) the amount of each insured depository institution's average total assets during the assessment period, minus the sum of the amount of the institution's average total tangible equity and the amount of the institution's average total subordinated debt."

2008—Subsec. (c)(11). Pub. L. 110–343 added par. (11).

2006—Subsec. (a)(1). Pub. L. 109–173, § 8(a)(19)(B), substituted "Deposit Insurance Fund" for "Bank Insurance Fund, the Savings Association Insurance Fund,".

Pub. L. 109–171 repealed Pub. L. 104–208, § 2704(d)(14)(M)(i). See 1996 Amendment note below.

Subsec. (c)(4)(A)(ii), (B). Pub. L. 109–173, § 8(a)(19)(A), substituted "Deposit Insurance Fund" for "deposit insurance fund" wherever appearing.

Subsec. (c)(4)(E). Pub. L. 109–173, § 8(a)(19)(C)(i), substituted "fund" for "funds" in heading.

Pub. L. 109–171 repealed Pub. L. 104–208, § 2704(d)(14)(M)(ii). See 1996 Amendment note below.

Subsec. (c)(4)(E)(i). Pub. L. 109–173, § 8(a)(19)(C)(ii), substituted "the Deposit Insurance Fund" for "any insurance fund" in introductory provisions.

Subsec. (c)(4)(G)(ii). Pub. L. 109–173, §8(a)(19)(D)(i), (ii), in introductory provisions, substituted "Deposit Insurance Fund" for "appropriate insurance fund" and "insured depository institutions" for "the members of the insurance fund (of which such institution is a member)".

Pub. L. 109–171 repealed Pub. L. 104–208, §2704(d)(14)(M)(iii). See 1996 Amendment note below.

Subsec. (c)(4)(G)(ii)(II). Pub. L. 109–173, §8(a)(19)(D)(iii), (iv), substituted "the institution's" for "the member's" in two places and substituted "each insured depository institution's" for "each member's".

Pub. L. 109–173, §3(a)(8), substituted "assessment period" for "semiannual period".

Subsec. (c)(11). Pub. L. 109–173, §8(a)(19)(E), struck out par. (11) which read as follows: "Payments made under this subsection shall be made—

"(A) from the Bank Insurance Fund in the case of payments to or on behalf of a member of such Fund; or

"(B) from the Savings Association Insurance Fund or from funds made available by the Resolution Trust Corporation in the case of payments to or on behalf of any Savings Association Insurance Fund member."

Pub. L. 109–171 repealed Pub. L. 104–208, §2704(d)(14)(M)(iv). See 1996 Amendment note below.

Subsec. (h). Pub. L. 109–173, §8(a)(19)(F), substituted "Deposit Insurance Fund" for "Bank Insurance Fund".

Pub. L. 109–171 repealed Pub. L. 104–208, §2704(d)(14)(M)(v). See 1996 Amendment note below.

Subsec. (k)(4)(B)(i). Pub. L. 109–173, §8(a)(19)(G), substituted "savings association is" for "Savings Association Insurance Fund member is" in concluding provisions.

Pub. L. 109–171 repealed Pub. L. 104–208, §2704(d)(14)(M)(vi). See 1996 Amendment note below.

Subsec. (k)(5)(A). Pub. L. 109–173, §8(a)(19)(H), substituted "savings associations" for "Savings Association Insurance Fund members" in introductory provisions.

Pub. L. 109–171 repealed Pub. L. 104–208, §2704(d)(14)(M)(vii). See 1996 Amendment note below.

2005—Subsec. (e)(2). Pub. L. 109–8 amended heading and text of par. (2) generally. Prior to amendment, text read as follows: "An agreement to provide for the lawful collateralization of deposits of a Federal, State, or local governmental entity or of any depositor referred to in section 1821(a)(2) of this title shall not be deemed to be invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or with any changes in the collateral made in accordance with such agreement."

1996—Subsec. (a)(1). Pub. L. 104–208, §2704(d)(14)(M)(i), which directed substitution of "Deposit Insurance Fund, the Special Reserve of the Deposit Insurance Fund," for "Bank Insurance Fund, the Savings Association Insurance Fund,", was repealed by Pub. L. 109–171. See Effective Date of 1996 Amendment note below and 2006 Amendment note above.

Subsec. (c)(4)(E). Pub. L. 104–208, §2704(d)(14)(M)(ii), which directed substitution of "fund" for "funds" in heading and "the Deposit Insurance Fund" for "any insurance fund" in cl. (i), was repealed by Pub. L. 109–171. See Effective Date of 1996 Amendment note below and 2006 Amendment note above.

Subsec. (c)(4)(G)(ii). Pub. L. 104–208, §2704(d)(14)(M)(iii), which directed substitution of "Deposit Insurance Fund" for "appropriate insurance fund", "insured depository institutions" for "the members of the insurance fund (of which such institution is a member)", "each insured depository institution's" for "each member's", and "the institution's" for "the member's" in two places, was repealed by Pub. L. 109–171. See Effective Date of 1996 Amendment note below and 2006 Amendment note above.

Subsec. (c)(11). Pub. L. 104–208, §2704(d)(14)(M)(iv), which directed striking out par. (11), was repealed by Pub. L. 109–171. See Effective Date of 1996 Amendment note below and 2006 Amendment note above.

Subsec. (h). Pub. L. 104–208, §2704(d)(14)(M)(v), which directed substitution of "Deposit Insurance Fund" for "Bank Insurance Fund", was repealed by Pub. L. 109–171. See Effective Date of 1996 Amendment note below and 2006 Amendment note above.

Subsec. (k)(4)(B)(i). Pub. L. 104–208, §2704(d)(14)(M)(vi), which directed substitution of "Deposit Insurance Fund" for "Savings Association Insurance Fund", was repealed by Pub. L. 109–171. See Effective Date of 1996 Amendment note below and 2006 Amendment note above.

Subsec. (k)(5)(A). Pub. L. 104–208, §2704(d)(14)(M)(vii), which directed substitution of "Deposit Insurance Fund" for "Savings Association Insurance Fund", was repealed by Pub. L. 109–171. See Effective Date of 1996 Amendment note below and 2006 Amendment note above.

1994—Subsec. (c)(1)(B). Pub. L. 103–325, §602(a)(34), substituted "an insured bank in default" for "a in default insured bank" and "such insured bank" for "such in default insured bank".

Subsec. (c)(2)(A). Pub. L. 103–325, §602(a)(35), substituted "with another insured depository institution" for "with an insured institution" and "by another depository institution" for "by an insured institution".

Subsec. (e). Pub. L. 103–325, §317, designated existing provisions as par. (1) and inserted heading, redesignated former pars. (1) to (4) as subpars. (A) to (D) of par. (1), respectively, and added par. (2).

Subsec. (f)(2)(B)(i). Pub. L. 103–325, §602(a)(36), substituted "the insured bank in default" for "the in default insured bank".

Subsec. (f)(2)(B)(iii). Pub. L. 103–325, §602(a)(37), substituted "of" for "of of" after "percent".

Subsec. (f)(3). Pub. L. 103–325, §602(a)(38), substituted "DEFAULT" for "CLOSING" in heading.

Subsec. (f)(6)(A). Pub. L. 103–325, §602(a)(39), substituted "bank that is in default" for "bank that has in default".

Subsec. (f)(6)(B)(i). Pub. L. 103–325, §602(a)(40), inserted period for semicolon at end.

Subsec. (f)(7)(A), (B). Pub. L. 103–325, §602(a)(41), struck out "or" at end of subpar. (A) and substituted "; or" for period at end of subpar. (B).

Subsec. (f)(12)(A). Pub. L. 103–325, §602(a)(42), substituted "are" for "is".

1991—Subsec. (c)(4) to (10). Pub. L. 102–242, §141(a)(1), (e), redesignated former pars. (5) to (9) as (6) to (10), respectively, redesignated subpar. (B) of par. (4) as par. (5), amended par. (4)(A) generally and redesignated it as par. (4), further redesignated pars. (8) to (10) as (9) to (11), respectively, and added par. (8). Prior to amendment, par. (4)(A) read as follows: "No assistance shall be provided under this subsection in an amount in excess of that amount which the Corporation determines to be reasonably necessary to save the cost of liquidating, including paying the insured accounts of, such insured depository institution, except that such restriction shall not apply in any case in which the Corporation determines that the continued operation of such insured depository institution is essential to provide adequate depository services in its community. In calculating the cost of assistance, the Corporation shall include (i) the immediate and long-term obligations of the Corporation with respect to such assistance, including contingent liabilities, and (ii) the Federal tax revenues foregone by the Government, to the extent reasonably ascertainable."

Subsec. (d)(3)(D). Pub. L. 102–242, §123(b), added subpar. (D).

1989—Subsec. (a). Pub. L. 101–73, §217(1), added heading and text of subsec. (a) and struck out former subsec. (a) which read as follows: "Money of the Corporation not otherwise employed shall be invested in obligations of the United States or in obligations guaranteed as to principal and interest by the United States: *Provided*, That the Corporation shall not sell or purchase any such obligations for its own account and in its own right and interest, at any one time aggregating in excess of $100,000, without the approval of the Sec-

retary of the Treasury: *And provided further*, That the Secretary of the Treasury may waive the requirement of his approval with respect to any transaction or classes of transactions subject to the provisions of this subsection for such period of time and under such conditions as he may determine."

Subsec. (b). Pub. L. 101–73, § 217(2), substituted "depository accounts of the Corporation", "temporary purposes of depository accounts", and "depository accounts to facilitate" for "banking or checking accounts of the Corporation", "temporary purposes of banking and checking accounts", and "banking and checking accounts to facilitate", respectively, and substituted "depository institution" for "bank" in four places.

Pub. L. 101–73, § 201(a), substituted "insured depository institutions" for "insured banks".

Subsec. (c)(1). Pub. L. 101–73, § 201(a), substituted reference to insured depository institution for reference to insured bank in introductory provisions.

Subsec. (c)(1)(A). Pub. L. 101–73, § 217(3)(A), substituted "default" for "closing".

Pub. L. 101–73, § 201(a), substituted reference to insured depository institution for reference to insured bank.

Subsec. (c)(1)(B). Pub. L. 101–73, § 217(3)(C), which directed the amendment of subsec. (c) by substituting "insured depository institution in default" for "in default insured depository institution" wherever appearing, could not be executed because phrase "in default insured depository institution" did not appear in text.

Pub. L. 101–73, § 217(3)(B), which directed the amendment of subsec. (c) by substituting "a" for "an" wherever appearing before "closed insured bank", could not be executed because "an" did not appear before "closed insured bank" in text.

Pub. L. 101–73, § 217(3)(A), substituted "in default" for "closed" in two places.

Subsec. (c)(1)(C). Pub. L. 101–73, § 201(a), substituted references to insured depository institutions for references to insured banks wherever appearing.

Subsec. (c)(2)(A). Pub. L. 101–73, § 217(3)(D)(i), substituted "such other insured depository institution" for "such insured institution" wherever appearing in cls. (ii) and (iii) and "another insured depository institution" for "an insured depository institution" in introductory provisions.

Pub. L. 101–73, § 217(3)(D)(ii), (iii), in introductory provisions, substituted "the sale of any or all of the assets" for "the sale of assets" and "or the assumption of any or all" for "and the assumption".

Pub. L. 101–73, § 201(a), substituted "insured depository institution" and "insured depository institution's" for "insured bank" and "insured bank's" wherever appearing.

Subsec. (c)(2)(B). Pub. L. 101–73, § 217(3)(A), substituted "in default" for "closed" in cl. (i) and "default" for "closing" in cl. (ii).

Pub. L. 101–73, § 201(a), substituted references to insured depository institutions for references to insured banks wherever appearing.

Subsec. (c)(2)(C). Pub. L. 101–73, § 217(3)(E), added subpar. (C).

Subsec. (c)(3). Pub. L. 101–73, § 217(3)(F), substituted "subsection (f) or (k) of this section" for "subsection (f) of this section".

Pub. L. 101–73, § 201(a), substituted reference to insured depository institution for reference to insured bank.

Subsec. (c)(4)(A). Pub. L. 101–73, § 217(3)(G), substituted "depository services" for "banking services" and inserted sentence at end relating to calculation of the cost of assistance.

Pub. L. 101–73, § 201(a), substituted references to insured depository institutions for references to insured banks wherever appearing.

Subsec. (c)(4)(B). Pub. L. 101–73, § 201(a), substituted reference to insured depository institution for reference to insured bank.

Subsec. (c)(5). Pub. L. 101–73, § 201(a), substituted references to insured depository institutions for references to insured banks wherever appearing.

Subsec. (c)(6). Pub. L. 101–73, § 217(3)(J), added par. (6). Former par. (6) redesignated (7).

Subsec. (c)(7). Pub. L. 101–73, § 217(3)(I), redesignated par. (6) as (7). Former par. (7) redesignated (8).

Subsec. (c)(8). Pub. L. 101–73, § 217(3)(H), (I), redesignated par. (7) as (8) and struck out former par. (8) which read as follows: "For purposes of this subsection, the term 'insured institution' means an insured bank as defined in section 1813 of this title or an insured institution as defined in section 1724 of this title."

Subsec. (c)(9). Pub. L. 101–73, § 217(3)(K), added par. (9).

Subsec. (d). Pub. L. 101–73, § 217(4), added subsec. (d) and struck out former subsec. (d), changing the structure of the subsection from a single unnumbered paragraph to one consisting of four numbered paragraphs.

Subsec. (e). Pub. L. 101–73, § 217(4), added subsec. (e) and struck out former subsec. (e) which read as follows: "No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank."

Subsec. (f)(1). Pub. L. 101–73, § 217(5)(C), inserted "savings association" after "out-of-State bank".

Subsec. (f)(2)(A). Pub. L. 101–73, § 217(5)(A), (B), substituted "is in default" for "is closed", and "bank in default" for "closed bank" in three places.

Subsec. (f)(2)(B). Pub. L. 101–73, § 217(5)(A), (D), substituted "in default insured bank" for "closed insured bank" in cl. (i), and "a vote of 75 percent of" for "a unanimous vote" in cl. (iii).

Subsec. (f)(3)(A)(i), (ii), (C), (E). Pub. L. 101–73, § 217(5)(A), substituted "danger of default" for "danger of closing".

Subsec. (f)(4)(A). Pub. L. 101–73, § 217(5)(E), struck out "the constitution of any State," after "State law,".

Subsec. (f)(5). Pub. L. 101–73, § 217(5)(A), (B), substituted "danger of default" for "danger of closing" and "bank in default" for "closed bank".

Subsec. (f)(6)(A). Pub. L. 101–73, § 217(5)(A), (F), substituted "the bank that has in default or is in danger of default" for "the bank that has closed or is in danger of closing" and "the Corporation shall permit the offeror which made the initial lowest acceptable offer and" for "the Corporation shall permit".

Subsec. (f)(7)(C). Pub. L. 101–73, § 217(5)(G), added subpar. (C).

Subsec. (f)(8)(A). Pub. L. 101–73, § 217(5)(H), redesignated subpar. (C) as (A) and struck out former subpar. (A) which read as follows: "the term 'receiver' means the Corporation when it has been appointed the receiver of a closed insured bank;".

Pub. L. 101–73, § 217(5)(A), (B), substituted "danger of default" for "danger of closing" in two places and "bank in default" for "closed bank" in two places.

Subsec. (f)(8)(B). Pub. L. 101–73, § 217(5)(H), redesignated subpar. (E) as (B) and struck out former subpar. (B) which read as follows: "the term 'insured depository institution' means an insured bank or an association or savings bank insured by the Federal Savings and Loan Insurance Corporation;".

Subsec. (f)(8)(C). Pub. L. 101–73, § 217(5)(H), redesignated subpar. (F) as (C). Former subpar. (C) redesignated (A).

Subsec. (f)(8)(D). Pub. L. 101–73, § 217(5)(H), redesignated subpar. (G) as (D) and struck out former subpar. (D) which read as follows: "the term 'bank in danger of closing' means an insured bank with respect to which the appropriate Federal or State chartering authority certifies in writing that—

"(i)(I) the bank is not likely to be able to meet the demands of such bank's depositors or pay the obliga-

tions of the bank in the normal course of business, and

"(II) there is no reasonable prospect that the bank will be able to meet such demands or pay such obligations without Federal assistance; or

"(ii)(I) the bank has incurred or is likely to incur losses that will deplete all or substantially all of the capital of the bank, and

"(II) there is no reasonable prospect for the replenishment of the bank's capital without Federal assistance;".

Subsec. (f)(8)(E) to (G). Pub. L. 101–73, § 217(5)(H), redesignated subpars. (E) to (G) as (B) to (D), respectively.

Subsec. (f)(9). Pub. L. 101–73, § 217(5)(I), substituted "certain subsidiaries" for "nonbank subsidiaries" in heading, "subsidiary, other than a subsidiary that is an insured depository institution," for "subsidiary" and "holding company" for "holding company which is not an insured bank" in subpar. (A), and "intermediate holding company or an affiliate of an insured depository institution" for "intermediate holding company" in subpar. (B).

Subsec. (f)(12). Pub. L. 101–73, § 217(5)(J), added par. (12).

Subsec. (h). Pub. L. 101–73, § 217(6), substituted "an insured depository institution in default" for "a closed insured depository institution", "default" for "closing", and "Bank Insurance Fund" for "insurance fund".

Pub. L. 101–73, § 201(a), substituted "insured depository institution" for "insured bank" wherever appearing.

Subsec. (i)(1)(A). Pub. L. 101–73, § 217(7)(A), inserted "depository" before "institution" in three places.

Subsec. (i)(1)(C). Pub. L. 101–73, § 217(7)(B), substituted "Corporation" for "corporation" where first appearing, "chartered depository institution" for "chartered bank", "State member bank, a savings association," for "State member bank", and "Federal Reserve System or the Director of the Office of Thrift Supervision" for "Federal Reserve System".

Subsec. (i)(1)(D). Pub. L. 101–73, § 217(7)(A), inserted "depository" before "institution" in two places.

Subsec. (i)(2). Pub. L. 101–73, § 217(7)(A), (C), inserted "depository" before "institution" in two places, and struck out "or insured or guaranteed under State law" after "insured under this chapter".

Subsec. (i)(3) to (9). Pub. L. 101–73, § 217(7)(A), inserted "depository" before "institution" wherever appearing.

Subsec. (i)(10). Pub. L. 101–73, § 217(7)(D), struck out par. (10) which read as follows: "Notwithstanding any other Federal or State law, net worth certificates purchased by the Corporation under this subsection shall be deemed to be net worth for statutory and regulatory purposes."

Subsec. (i)(11). Pub. L. 101–73, § 217(7)(A), inserted "depository" before "institution".

Subsec. (i)(12). Pub. L. 101–73, § 217(7)(D), struck out par. (12) which read as follows: "The Corporation may provide assistance to a qualified institution which is not an insured institution only if the State fund which insures or guarantees the deposits of such qualified institution enters into an agreement with the Corporation which provides that—

"(A) the State fund will indemnify the Corporation for any losses which the Corporation may incur as a result of providing assistance under this subsection to such qualified institution; and

"(B) during any period when such qualified institution has outstanding capital instruments issued in accordance with this subsection, the State insurance fund maintains a level of assessments on its members which results in costs to its members which are at least equivalent to the premium assessments paid to the Corporation by insured institutions during such period."

Subsec. (i)(13). Pub. L. 101–73, § 217(7)(A), inserted "depository" before "institution" in two places.

Subsec. (k). Pub. L. 101–73, § 217(8), added subsec. (k).

1987—Pub. L. 100–86, § 509(a), repealed Pub. L. 97–320, § 141. See 1982 Amendment notes below.

Subsec. (f)(1). Pub. L. 100–86, § 502(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "Nothing contained in paragraph (2) or (3) shall be construed to limit the Corporation's powers in subsection (c) of this section to assist a transaction under paragraph (2) or (3)."

Subsec. (f)(3). Pub. L. 100–86, § 502(b), amended par. (3) generally, substituting subpars. (A) to (G) relating to emergency interstate acquisitions of insured banks in danger of closing for former subpars. (A) to (C) which authorized merger, purchase of assets, or assumption of liabilities of insured bank organized in mutual form with total assets of $500,000,000 or more upon Corporation's determination it was in danger of closing.

Subsec. (f)(4). Pub. L. 100–86, § 502(c)(1), redesignated cls. (i) to (iii) as subpars. (A) to (C), amended subpar. (A) generally, and added subpars. (D) and (E). Prior to amendment, subpar. (A), as so redesignated, read as follows: "Notwithstanding section 1842(d) of this title or any other provision of law, State or Federal, or the constitution of any State, an institution that merges with or acquires an insured bank under paragraph (2) or (3) is authorized to be and shall be operated as a subsidiary of an out-of-State bank or bank holding company, except that an out-of-State bank may operate the resulting institution as a subsidiary only if such ownership is otherwise specifically authorized."

Subsec. (f)(5). Pub. L. 100–86, § 502(i)(1), struck out "to permit" before "an acquisition".

Subsec. (f)(6)(A). Pub. L. 100–86, § 502(i)(2), substituted "where the bank" for "where the closed bank" and "in-State holding company" for "in-State bank holding company".

Subsec. (f)(6)(B). Pub. L. 100–86, § 502(c)(2)(A), added cls. (ii) to (vi) and struck out former cls. (ii) to (iv) which read as follows:

"(ii) Second, between depository institutions of the same type in different States;

"(iii) Third, between depository institutions of different types in the same State; and

"(iv) Fourth, between depository institutions of different types in different States."

Subsec. (f)(6)(C). Pub. L. 100–86, § 502(c)(2)(B), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: "In considering offers from different States, the Corporation shall give a priority to offers from adjoining States."

Subsec. (f)(8)(D) to (G). Pub. L. 100–86, § 502(d)–(g), added subpars. (D) to (G).

Subsec. (f)(9) to (11). Pub. L. 100–86, § 502(c)(3)–(5), added pars. (9) to (11).

Subsec. (j). Pub. L. 100–86, § 801, added subsec. (j).

1983—Subsec. (i)(1)(D). Pub. L. 98–29 inserted provision that issuance of net worth certificates in accordance with this subsection shall not constitute a default under the terms of any debt obligations subordinated to the claims of general creditors which were outstanding when such net worth certificates were issued.

1983—Subsec. (c)(5)(A). Pub. L. 97–457, § 1(a), inserted "or dividends" after "interest".

Subsec. (f)(1). Pub. L. 97–457, § 4, substituted "paragraph" for "paragraphs" wherever appearing.

Subsec. (i)(9). Pub. L. 97–457, § 10, inserted "or dividends" after "interest".

1982—Subsec. (c). Pub. L. 97–320, § 111, substituted provisions contained in numbered pars. (1) through (8) relating to the Corporation's authority to assist insured banks for prior provisions contained in a single undesignated paragraph authorizing the Corporation, in order to reopen a closed insured bank or, when the Corporation had determined that an insured bank was in danger of closing, in order to prevent such closing, in the discretion of its Board of Directors, to make loans to, or purchase the assets of, or make deposits in, such insured bank, upon such terms and conditions as the Board of Directors might prescribe, when in the opinion of the Board of Directors the continued operation of such bank was essential to provide adequate banking service in the community, with such loans and deposits to be in subordination to the rights of depositors and other creditors.

Pub. L. 97–320, § 141(a)(1), which directed the repeal of par. (5) effective Oct. 13, 1986, was repealed by Pub. L. 100–86, § 509(a). See Effective and Termination Dates of 1982 Amendment note and Extension of Emergency Acquisition and Net Worth Guarantee Provisions of Pub. L. 97–320 note set out under section 1464 of this title.

Subsec. (e). Pub. L. 97–320, § 113(m)(2), inserted "(e)" before "No agreement" and struck out provision authorizing the Board of Directors, for the purpose of averting loss to the Corporation and facilitating a merger of an insured bank or facilitating the sale of an insured bank's assets and assumption of its liabilities by another insured bank, to make secured loans or to purchase the insured bank's assets or to guarantee another insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an insured bank, and authorizing national or District banks or the Corporation as receiver thereof to contract for such sales or loans and to pledge assets to secure such loans.

Subsecs. (f) to (h). Pub. L. 97–320, §§ 113(m)(1), 116, added subsec. (f) and redesignated former subsecs. (f) and (g) as (g) and (h), respectively.

Pub. L. 97–320, § 141(a)(3), which directed that, effective Oct. 13, 1986, the provisions of law amended by section 116 of Pub. L. 97–320 shall be amended to read as they would without such amendment, was repealed by Pub. L. 100–86, § 509(a). See Effective and Termination Dates of 1982 Amendment note and Extension of Emergency Acquisition and Net Worth Guarantee Provisions of Pub. L. 97–320 note set out under section 1464 of this title.

Subsec. (i). Pub. L. 97–320, §§ 203, 206, added subsec. (i), relating to net worth certificates, and provided for its prospective repeal. See Effective Date of 1982 Amendment note below.

1978—Subsec. (g). Pub. L. 95–369 added subsec. (g).

CHANGE OF NAME

Committee on Banking, Finance and Urban Affairs of House of Representatives treated as referring to Committee on Banking and Financial Services of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Banking and Financial Services of House of Representatives abolished and replaced by Committee on Financial Services of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred from Committee on Energy and Commerce of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by section 363(6) of Pub. L. 111–203 effective on the transfer date, see section 351 of Pub. L. 111–203, set out as a note under section 906 of Title 2, The Congress.

Amendment by section 1106(b) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of this title.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by section 3(a)(8) of Pub. L. 109–173 effective Jan. 1, 2007, see section 3(b) of Pub. L. 109–173, set out as a note under section 1817 of this title.

Amendment by section 8(a)(19) of Pub. L. 109–173 effective Mar. 31, 2006, see section 8(b) of Pub. L. 109–173, set out as a note under section 1813 of this title.

Amendment by Pub. L. 109–171 effective no later than the first day of the first calendar quarter that begins after the end of the 90-day period beginning Feb. 8, 2006, see section 2102(c) of Pub. L. 109–171, set out as a Merger of BIF and SAIF note under section 1821 of this title.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under Title 11, Bankruptcy, before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of Title 11.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–208 effective Jan. 1, 1999, if no insured depository institution is a savings association on that date, see section 2704(c) of Pub. L. 104–208, formerly set out as a note under section 1821 of this title.

EFFECTIVE DATE OF 1983 AMENDMENTS

Pub. L. 98–29, § 1(b), May 16, 1983, 97 Stat. 189, provided that: "The amendment made by subsection (a) [amending this section] shall be deemed to have taken effect on the date of enactment of the Garn-St Germain Depository Institutions Act of 1982 [Oct. 15, 1982]."

Pub. L. 97–457, § 1(b), Jan. 12, 1983, 96 Stat. 2507, provided that: "The amendment made by subsection (a) [amending this section] shall be deemed to have taken effect upon the enactment of Public Law 97–320 [Oct. 15, 1982]."

Pub. L. 97–457, § 10(b), Jan. 12, 1983, 96 Stat. 2508, provided that: "The amendment made by subsection (a) [amending this section] shall be deemed to have taken effect upon the enactment of Public Law 97–320 [Oct. 15, 1982]."

EFFECTIVE DATE OF 1982 AMENDMENT

Pub. L. 97–320, title II, § 206, Oct. 15, 1982, 96 Stat. 1496, as amended by Pub. L. 97–457, § 11, Jan. 12, 1983, 96 Stat. 2508; Pub. L. 99–120, § 6(b), Oct. 8, 1985, 99 Stat. 504; Pub. L. 99–278, § 1(b), Apr. 24, 1986, 100 Stat. 397; Pub. L. 99–400, § 1(b), Aug. 27, 1986, 100 Stat. 902; Pub. L. 99–452, § 1(b), Oct. 8, 1986, 100 Stat. 1140; Pub. L. 100–86, title V, § 509(b), Aug. 10, 1987, 101 Stat. 635, provided that:

"(a) On October 13, 1991, section 406(f)(5) of the National Housing Act [12 U.S.C. 1729(f)(5)] and section 13(i) of the Federal Deposit Insurance Act [12 U.S.C. 1823(i)] are repealed.

"(b) The repeal by subsection (a) shall have no effect on any action taken or authorized pursuant to the amendments made by this title [see Short Title of 1982 Amendments note set out under section 1811 of this title] by or for a qualified institution while such amendments were in effect and while net worth certificates issued pursuant to these amendments are outstanding."

GAO COMPLIANCE AUDIT

Pub. L. 102–242, title I, § 141(a)(2), Dec. 19, 1991, 105 Stat. 2276, as amended by Pub. L. 104–316, title I, § 106(b), Oct. 19, 1996, 110 Stat. 3830, provided that: "The Comptroller General of the United States shall audit, under such conditions as the Comptroller General determines to be appropriate, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation to determine the extent to which such corporations are complying with section 13(c)(4) of the Federal Deposit Insurance Act [12 U.S.C. 1823(c)(4)]."

EARLY RESOLUTION OF TROUBLED INSURED DEPOSITORY INSTITUTIONS

Pub. L. 102–242, title I, § 143, Dec. 19, 1991, 105 Stat. 2281, provided that:

"(a) IN GENERAL.—It is the sense of the Congress that the Federal banking agencies should facilitate early resolution of troubled insured depository institutions whenever feasible if early resolution would have the least possible long-term cost to the deposit insurance fund, consistent with the least-cost and prompt corrective action provisions of the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.].

"(b) GENERAL PRINCIPLES.—In encouraging the Federal banking agencies to pursue early resolution strategies, the Congress contemplates that any resolution transaction under section 13(c) of that Act [12 U.S.C. 1823(c)] would observe the following general principles:

"(1) COMPETITIVE NEGOTIATION.—The transaction should be negotiated competitively, taking into account the value of expediting the process.

"(2) RESULTING INSTITUTION ADEQUATELY CAPITALIZED.—Any insured depository institution created or assisted in the transaction (hereafter the 'resulting institution') and any institution acquiring the troubled institution should meet all applicable minimum capital standards.

"(3) SUBSTANTIAL PRIVATE INVESTMENT.—The transaction should involve substantial private investment.

"(4) CONCESSIONS.—Preexisting owners and debtholders of any troubled institution or its holding company should make substantial concessions.

"(5) QUALIFIED MANAGEMENT.—Directors and senior management of the resulting institution should be qualified to perform their duties, and should not include individuals substantially responsible for the troubled institution's problems.

"(6) FDIC'S PARTICIPATION.—The transaction should give the Federal Deposit Insurance Corporation an opportunity to participate in the success of the resulting institution.

"(7) STRUCTURE OF TRANSACTION.—The transaction should, insofar as practical, be structured so that—

"(A) the Federal Deposit Insurance Corporation—

"(i) does not acquire a significant proportion of the troubled institution's problem assets;

"(ii) succeeds to the interests of the troubled institution's preexisting owners and debtholders in proportion to the assistance the Corporation provides; and

"(iii) limits the Corporation's assistance in term and amount; and

"(B) new investors share risk with the Corporation.

"(c) REPORT.—Two years after the date of enactment of this Act [Dec. 19, 1991], the Federal Deposit Insurance Corporation shall submit a report to Congress analyzing the effect of early resolution on the deposit insurance funds."

EXTENSION OF EMERGENCY ACQUISITION AND NET WORTH GUARANTEE PROVISIONS OF PUB. L. 97–320

No amendment made by section 141(a) of Pub. L. 97–320, set out as a note under section 1464 of this title, or section 206(a) of Pub. L. 97–320, set out as a note above, as in effect before Aug. 10, 1987, to any other provision of law to be deemed to have taken effect before such date and any such provision of law to be in effect as if no such amendment had been made before such date, see section 509(c) of Pub. L. 100–86, set out as a note under section 1464 of this title.

No amendment made by section 141(a) or section 206(a) of Pub. L. 97–320, set out as notes under sections 1464 and 1729 of this title, respectively, as in effect on the day before Oct. 8, 1986, to any other provision of law to be deemed to have taken effect before such date and any such provision of law to be in effect as if no such amendment had taken effect before such date, see section 1(c) of Pub. L. 99–452, set out as a note under section 1464 of this title.

Sections 141(a) and 206(a) of Pub. L. 97–320, which are set out as notes under sections 1464 and 1729 of this title, as such sections were in effect on the day after Aug. 27, 1986, applicable as if such sections had been included in Pub. L. 97–320 on Oct. 15, 1982, with no amendment made by any such section to any other provision of law to be deemed to have taken effect before Aug. 27, 1986, and any such provision of law to be in effect as if no such amendment had taken effect before Aug. 27, 1986, see section 1(c) of Pub. L. 99–400, set out as a note under section 1464 of this title.

ANNUAL REPORTS TO CONGRESS BY FEDERAL HOME LOAN BANK BOARD AND FEDERAL DEPOSIT INSURANCE CORPORATION ON PURCHASES OF NET WORTH CERTIFICATES

Pub. L. 97–320, title II, § 204, Oct. 15, 1982, 96 Stat. 1495, provided that: "The Federal Home Loan Bank Board and the Board of Directors of the Federal Deposit Insurance Corporation shall each transmit an annual report to each House of the Congress specifying the types and amounts of net worth certificates purchased from each depository institution and the conditions imposed on each such depository institution."

[For termination, effective May 15, 2000, of reporting provisions relating to the Federal Deposit Insurance Corporation in section 204 of Pub. L. 97–320, set out above, see section 3003 of Pub. L. 104–66, set out as a note under section 1113 of Title 31, Money and Finance, and page 167 of House Document No. 103–7.]

SEMIANNUAL AUDIT BY COMPTROLLER GENERAL OF NET WORTH CERTIFICATE PROGRAMS OF FEDERAL DEPOSIT INSURANCE CORPORATION AND FEDERAL HOME LOAN BANK BOARD

Pub. L. 97–320, title II, § 205, Oct. 15, 1982, 96 Stat. 1495, provided that: "The Comptroller General of the United States shall conduct on a semiannual basis an audit of the net worth certificate programs of the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board. A report on each such audit shall be transmitted to each House of the Congress."

[For termination, effective May 15, 2000, of reporting provisions in section 205 of Pub. L. 97–320, set out above, see section 3003 of Pub. L. 104–66, set out as a note under section 1113 of Title 31, Money and Finance, and page 3 of House Document No. 103–7.]

§ 1824. Borrowing authority

(a) Borrowing from Treasury

(1) In general

The Corporation is authorized to borrow from the Treasury, and the Secretary of the Treasury is authorized and directed to loan to the Corporation on such terms as may be fixed by the Corporation and the Secretary, such funds as in the judgment of the Board of Directors of the Corporation are from time to time required for insurance purposes, not exceeding in the aggregate $100,000,000,000 outstanding at any one time, subject to the approval of the Secretary of the Treasury: *Provided*, That the rate of interest to be charged in connection with any loan made pursuant to this subsection shall not be less than an amount determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. For such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds of the sale of any securities hereafter issued under chapter 31 of title 31, and the purposes for which securities may be issued under chapter 31 of title 31 are extended to include such loans. Any such loan shall be used by the Corporation solely in carrying out its functions with respect to such insurance. All loans and repayments under this subsection shall be treated as public-debt transactions of the United States. The Corporation may employ any funds obtained under this section for purposes of the Deposit Insurance Fund and the borrowing shall become a liability of the Deposit Insurance Fund to the extent funds are employed therefor.

(2) Funding

There are hereby appropriated to the Secretary, for fiscal year 1989 and each fiscal year