DEPOSITORY INSTITUTION EXAMINATION IMPROVEMENT ACT

TRUTH IN SAVINGS ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS SUPERVISION, REGULATION AND INSURANCE

OF THE

COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

ON

H.R. 2282

A BILL TO PROVIDE FOR THE UNIFORM DISCLOSURE OF THE RATES OF INTEREST WHICH ARE PAYABLE ON SAVINGS ACCOUNTS

AND

H.R. 3567

A BILL TO IMPROVE THE QUALITY OF EXAMINATIONS OF DEPOSITORY INSTITUTIONS, AND FOR OTHER PURPOSES

JUNE 4 AND 5, 1986

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U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

10 1986

MEMORANDUM TO JOHN H. CARLEY
General Counsel
Office of Management and Budget

Re: Applicability of the Apportionment Requirements of the Antideficiency Act to the Nonadministrative Funds of the Federal Deposit Insurance Corporation

The opinion request of January 31, 1985, from Michael J. Horowitz, former Counsel to the Director of Management and Budget, raised the issue whether the nonadministrative funds of the Federal Deposit Insurance Corporation ("FDIC") are subject to the apportionment requirements of the Antideficiency Act ("the Act"), as revised, codified and enacted in Pub. L. No. 97-258, 96 Stat. 877, 928-32, 31 U.S.C. 1511-1519. We conclude that the funds are subject to apportionment by the Office of Management and Budget, essentially for the same reasons that our opinion of February 18, 1983, concluded that the nonadministrative funds of the Federal Savings and Loans Insurance Corporation ("FSLIC") were subject to the apportionment requirements of the Act and for the additional reason that the legislative history of the 1950 Amendments to the Antideficiency Act conclusively demonstrates that Congress intended that the FDIC be covered by the requirements.

A. OLC Opinion of February 18, 1983

In the Memorandum to Michael J. Horowitz, Counsel to the Director of the Office of Management and Budget from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel (February 18, 1983) [hereinafter "Mem."], this Office concluded that the apportionment requirements of the Antideficiency Act apply to the nonadministrative funds of the FSLIC.[1] We observed

[1] A copy of this opinion is attached.

that apportionment requirements apply to all appropriations and funds of government agencies with three narrow exceptions. See 31 U.S.C. 1511.[2] The opinion noted that prior to 1950, the Antideficiency Act did not subject indefinite or permanent appropriations, including the nonadministrative funds of government corporations, to apportionment. See Mem. at 10. We maintained that the 1950 Amendments to Act, however, were specifically designed to enlarge the types of funds subject to apportionment to include not only Congress' annual appropriations but all appropriations or funds of government agencies, even if the spending of such appropriations or funds were not limited to a definite period of time. Id. We observed further that the 1950 Amendments also specifically included "any corporation wholly or partly owned by the United States which is an instrumentality of the United States" in its definition of the agencies whose funds were to be apportioned by the Bureau of the Budget. Act of Sept. 6, 1950, 1. 896, 64 Stat. 766 (codified at 31 U.S.C. 665(d)(2)

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[2] The statutory apportionment requirements do not apply to three narrow categories:

(1) funds for price support and surplus removal of agricultural commodities, including funds (under 7 U.S.C. 612(c)) to encourage exportation and domestic consumption of agricultural products;

(2) corporations getting amounts to make loans (except paid in capital amounts) without legal liability on the part of the United States Government; and

(3) the Senate, the House of Representatives, a committee of Congress, or an officer or employee of either House.

See 31 U.S.C. 1511(b).

(1976)).[3] The opinion emphasized that the legislative history of the 1950 Antideficiency Act Amendments supported the conclusion that an essential objective of the 1950 revisions was to subject funds of government corporations to apportionment. Mem. at 13-16.

The FSLIC argued that a provision in its enabling statute exempted it from complying with other laws governing the expenditure of public funds.[4] Nevertheless, we opined that both the plain language and legislative history of the 1950 Amendments to the Antideficiency Act demonstrated so clear an intent to apply the apportionment requirement to all government corporations that the general language in the FSLIC's prior enabling statute was not controlling. The opinion also specifically concluded that the FSLIC did not fall within the exemption from the Antideficiency Act created for corporations that obtain funds for making loans without incurring legal liability on the part of the United States. Mem. at 13.

We cannot discern any distinction between the FSLIC and FDIC that would justify the conclusion that the apportionment requirements of the Act apply to former but not the latter. Both the

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[3] The 1982 recodification of Title 31, which was intended to enact technical revisions without making substantive changes, deletes this definition of agency. See Pub. L. No. 97-288, 96 Stat. 877. In its place, the general definitions included in Title 31 provide that an agency "means a department, agency, or instrumentality of the United States Government," 31 U.S.C. 101, and executive agency "means a department, agency, or instrumentality in the executive branch of the United States Government." 31 U.S.C. 102. Since the FSLIC does not belong to the legislative or judicial branches, we maintained the FDIC must be an executive agency under the present definition of agency. Mem. at 11 n.11. Similarly, the FDIC is an executive agency under the language of the present definition. For further discussion of whether the FDIC is an agency, see pp. 5-7, infra.

In the 1982 codification, the word "President" is substituted for "Director of the Office of Management and Budget," "Office of Management and Budget," and "Director" because sections 101 and 102(a) of Reorganization Plan No. 2 of 1970 (eff. July 1, 1970, 84 Stat. 2085) designated the Bureau of the Budget as the Office of Management and Budget and transferred all functions of the Bureau to the President. See H.R. Rep. No. 651, 97th Cong., 2d Sess. 75 (1982).

[4] This provision authorized the FSLIC to "determine its necessary expenditures under this chapter and the manner in which the same shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds." 12 U.S.C. 1725(c)(5).

FSLIC and FDIC are government corporations established to protect individual savings accounts and to strengthen public confidence in depository institutions. Compare S. Rep. 438, 74th Cong., 1st Sess. 2 (1935) (stating that creation of the FSLIC was designed to "stimulate the confidence of the public in home-financing institutions") with 77 Cong. Rec. 3728 (1933) (remarks of Sen. Glass) (arguing that the creation of the FDIC would prevent panic withdrawals from banks).[5] Both have authority to borrow from the United States Treasury in order to fulfill their obligations to insured institutions. Compare 12 U.S.C. 1725(i) (1982) (authorizing the FSLIC to borrow up to $750,000,000 from the Treasury) with 12 U.S.C. 1824 (authorizing the FDIC to borrow up to $3,000,000,000 from the Treasury).[6] In light of these pervasive similarities, there is no reason in law or logic not to follow the reasoning of our former opinion and apply the apportionment requirements to the FDIC.[7]

B. The Legislative History

Even were our former opinion not controlling, we would be constrained by the legislative history of the 1950 Antideficiency Act Amendments to conclude that the FDIC is subject to the

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[5] Both also have similar powers to obtain assets for their insurance fund, compare 12 U.S.C. 1727 (1982) (authorizing the FSLIC to assess insured savings institutions) with 12 U.S.C. 1817 (authorizing the FDIC to assess insured banks), and to prevent the default of insured institutions and to restructure these institutions. Compare 12 U.S.C. 1729(f), 1730a(m) (allowing the FSLIC to make loans and acquire and merge savings institutions in order to prevent default) with 1823(c), 1823(f) (allowing the FDIC to make loans, and acquire and merge banks in order to prevent defaults).

[6] The obligations to depositors in insured institutions are similar. Compare 12 U.S.C. 1724, 1726 (imposing duty on FSLIC to insure depositors in insured institutions to the limit of $100,000) with 12 U.S.C. 1821 (requiring FDIC to insure depositors in insured institutions to the limit of $100,000).

[7] One difference between the FDIC and FSLIC is that the FDIC is a "mixed-ownership Government corporation" while the FSLIC is a "wholly-owned Government corporation" under the definitions of 31 U.S.C. 9101. For a discussion of whether this difference constitutes a distinction for the purposes of apportionment requirements, see pp. 5-7, infra.

apportionment requirements of the Antideficiency Act. During the course of the debate on the floor, Representative Norrell, a sponsor of the Amendments and manager of the floor debate, explained the reason for the Antideficiency Act Amendments, 96 Cong. Rec. 6725 (1950) (remarks of Rep. Norrell):

> For years and years we have been creating corporations, giving them power to incur indebtedness on behalf of the Government and authorizing the Treasury Department to transfer money to them . . . . The idea is that the Bureau of the Budget and the Congress at the beginning of each year should have a look at the total indebtedness to be created during ensuing fiscal year [sic] by these independent corporations, so that we can weigh that with the indebtedness we create by virtue of our appropriation bills for such fiscal year.

It is well settled that "explanatory statements in the nature of a supplemental report" made by a sponsor of a bill on the floor of a legislative body are compelling evidence of legislative intent. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 475 (1921). See also Lugar v. Edmonson Oil Co., 457 U.S. 922, 934 (1982) (using statements of manager of bill to establish legislative intent); United States v. Welden, 377 U.S. 95, 105 (1964) (same). J. Landis, A Note on "Statutory Interpretation", 43 Harv. L. Rev. 886, 888-89 (1930) (stating that "through. . . the explanation of the chairman [a legislator's vote] becomes in reality a concurrence in the expressed views of another.")

C. Arguments Advanced by the FDIC Against Application of the Apportionment Requirements

In light of both our prior opinion and the conclusive legislative history indicating Congress's intent to subject the FDIC to the apportionment requirements of the Antideficiency Act, the arguments advanced by the FDIC seeking to exclude itself from the apportionment requirements are unpersuasive. The FDIC observes that it, unlike the FSLIC, is defined as a "mixed-ownership government corporation." Compare 31 U.S.C. 9101(3)(E) (defining the FSLIC as wholly owned government corporation) with 31 U.S.C. 9101(2)(C) (defining the FDIC as mixed-ownership

government corporation).[8] The FDIC argues that because mixed-ownership government corporations are not specifically included in the definition of an agency contained in the 1950 Antideficiency Act Amendments, the FDIC is not covered by the Act. Memorandum on the Applicability of the Apportionment Provisions of the Antideficiency Act to the FDIC (July 11, 1985) [herinafter "FDIC Mem."] at 11-13.

When the Antideficiency Act was amended to encompass Government corporations, the definition of agency read, 31 U.S.C. (1976) 665(d)(2) (emphasis added)[9]:

> When used in the section, the term "agency" means any executive Department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the Government, <u>including any corporation wholly or partly owned by the United States which is an instrumentality of the United States</u>
> . . . .

At the time of the passage of the 1950 Antideficiency Act Amendments, the Government Corporation Control Act divided Government corporations into two categories: wholly owned corporations and mixed-ownership corporations. See 31 U.S.C. (1976) 846, 856. Because the terms "corporation partly owned by the United States" and "mixed-ownership Government corporation" have

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[8] The FDIC'S status as a mixed-ownership corporation is essentially a legal fiction: at present neither the government nor any other entity holds any equity in the FDIC. Although the FDIC was established in 1933 in corporate form with capital stock purchased by the United States Treasury and Federal Reserve Banks, by 1978 the FDIC had repaid the Treasury and the Federal Reserve Banks' subscriptions in full. FDIC Mem. at 4. We do not believe, however, that the FDIC's actual capitalization is relevant to whether it is covered by the apportionment requirements of the Antideficiency Act. As a matter of law the FDIC remains a mixed-ownership government corporation. Moreover, the FDIC's structure is today no different from what it was when the FDIC was specifically included as one of the government corporations covered by the 1958 Amendments to the Antideficiency Act. See pp. 4-5, <u>supra</u>. Finally, even if the United States does not own the FDIC, the FDIC may still potentially create liability for the United States Treasury through its authority to borrow funds. See pp. 7-8, <u>infra</u>.

[9] This definition of agency was deleted in the 1982 Amendments to the Act. See, <u>supra</u>, note 3. The FDIC contends (and we agree) that it is entitled to rely on the prior definition, because the 1982 Amendments were intended to be nonsubstantive. See H. Rep. No. 97-651, 97th Cong. 2d Sess. 1 (1982).

essentially the same connotation, it seems logical to infer that the inclusion of the term "corporation partly owned by the United States" in the definition of agency in the 1950 Antideficiency Act Amendments was intended to include corporations defined as "mixed-ownership" by the Government Corporation Control Act.

The FDIC argues, to the contrary, that "mixed-ownership Government corporation" is a term of art and that because Congress did not include the term in its definition of agency, Congress meant to exclude mixed-ownership corporations from the ambit of the Antideficiency Act. FDIC Mem. at 12. The difficulty with this interpretation is that it renders ineffective the clause "corporation partly owned by the United States," because no government corporation is defined in the Government Corporation Control Act or, to our knowledge, elsewhere as "partly owned by the United States." Because it is an elementary rule of statutory construction that effect must be given, if possible, to every word or clause of a statute (see United States v. Menasche, 348 U.S. 528, 538 (1959)), the better view is that the term "corporations partly owned by the United States" applies to corporations defined as "mixed-ownership Government corporations" under the Government Corporation Control Act.

The FDIC's other argument against the application of the apportionment requirements of the Antideficiency Act is that the FDIC is exempted from the Act by 31 U.S.C. 1511(b)(2), which provides:

> This subchapter does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability on the part of the United States Government.

The FDIC argues that it is covered by the clause because its insurance activities often involve making loans to distressed institutions and because it funds these activities from assessments imposed on insured banks and therefore does not create liabilities against the United States. FDIC Mem. at 13-16.

This argument does not successfully distinguish the FDIC's position from that of the FSLIC, which also funds its activities by assessments imposed upon insured institutions. Moreover, both the FDIC and the FSLIC have the contingent authority to borrow substantial amounts from the Treasury. Compare 12 U.S.C. 1725(i) with 12 U.S.C. 1824. The legislative history of the 1950 Amendments clearly indicates Congress's intention to apply the apportionment requirements to corporations that have contingent borrowing authority from the Treasury. The sponsor of the Amendments was concerned about corporations that could potentially create liability by obtaining funds from the Treasury, as well as corporations that received direct appropriations. See 96 Cong. Rec. 6725 (1950) (remarks of Rep. Norrell) (emphasis

added) ("For years and years we have been creating corporations giving them power to incur indebtness on behalf of the Government and authorizing the Treasury to transfer money to them").[10] Our opinion of February 18, 1983, therefore specifically concluded that the FSLIC was not entitled to an exemption. Moreover, the FDIC's eligibility for the exemption is foreclosed by specific legislative history in the 1950 Antideficiency Act Amendments. When Rep. Norrell listed the FDIC as one of the corporations which would be covered by the Amendments, he specifically alluded to $3 billion which the FDIC possessed and still possesses as a standby line of credit from the Treasury. 96 Cong. Rec. 6725 (1950) (remarks of Rep. Norrell).[11]

D. Exercise of Apportionment Authority

In our opinion of February 18, 1983, we expressed no formal opinion on how OMB was to exercise its apportionment authority over the FSLIC. Mem. at 21. We noted, however, that legislative

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[10] Another Congressman stated 96 Cong. Rec. 6728 (1950) (remarks of Rep. Keefe) (emphasis added):

> [W]hat is sought to be accomplished by one provision of this rule is to give the Committee on Appropriations and the Congress the opportunity to look at the operation of these Government corporations that do not operate on direct appropriations, but which are given the authority to transfer their bonds directly to the Treasury and thus secure the money to carry on their operation without any look or supervision so far as the Congress is concerned at the expenditure of those funds[.]

[11] The FDIC also suggests that the apportionment requirements should not apply because it is an "independent regulatory agency." The FDIC stresses that the legislative history of the Federal Depository Insurance Corporation contains many expressions of congressional intent that the FDIC be financially independent. However, such general expressions of legislative intent cannot be deemed controlling in light of plain language of the subsequent 1950 Antideficiency Act Amendments and the specific legislative history that indicates an intent to apply the apportionment requirements to the FDIC.

history of the 1950 amendments made clear that "Congress, in subjecting corporations to budgetary supervision, did not intend to alter the duties and obligations of those corporations as set forth in their enabling acts." Id. We therefore suggested that the FSLIC's statutory powers to prevent default and its statutory obligation to make payment on each insured account in the event of an insured institution's default be weighed appropriately in the apportionment process. Id. We believe that the FDIC's similar statutory powers and obligations should also be weighed in the apportionment process.[12]

CONCLUSION

Accordingly, we conclude that OMB, acting on behalf of the President, has the authority to apportion the nonadministrative funds of the FDIC. We express no opinion on how that authority should be exercised.

Samuel A. Alito, Jr.
Deputy Assistant Attorney General
Office of Legal Counsel

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[12] Our opinion also did not undertake to answer whether expenses incurred by the FSLIC pursuant to statutory authority to overt the default of an insured institution would constitute "an emergency involving . . . the protection of property, or the immediate welfare of individuals . . ." 31 U.S.C. 1515(b)(1)(B) or whether the FSLIC's insurance assessments qualify as a "trust or working fund" which may be exempted from apportionment. See 31 U.S.C. 1516. We also pretermit the similar questions with respect to the FDIC.

APPLICABILITY OF THE ANTIDEFICIENCY ACT OF 1950
TO THE FEDERAL DEPOSIT INSURANCE CORPORATION

APPLICABILITY OF THE ANTIDEFICIENCY ACT OF 1950
TO THE FEDERAL DEPOSIT INSURANCE CORPORATION

This memorandum discusses the applicability of the apportionment requirements of the Antideficiency Act of 1950 ("Antideficiency Act"), 31 U.S.C. §§ 1511-1519, to funds of the Federal Deposit Insurance Corporation ("FDIC"). By memorandum dated January 10, 1986, the Office of Legal Counsel ("OLC") of the Department of Justice concluded that the apportionment requirements may be applied to the nonadministrative expenses of the FDIC. The OLC memorandum does not address whether the administrative expenses of the FDIC are also subject to apportionment. The OLC memorandum was in response to a January 31, 1985 letter from the General Counsel of the Office of Management and Budget ("OMB") requesting OLC's views on whether "the apportionment provisions of the Antideficiency Act" apply to "the nonadministrative funds of the FDIC."[1/]

Summary of Conclusions

In our judgment, the apportionment provisions of the Antideficiency Act do not apply to the FDIC for two independent reasons. First, the FDIC is not covered by the Antideficiency Act because it is a nonappropriated government corporation outside the

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[1/] It should be noted that even the OLC opinion--which the FDIC believes is in error--would not allow OMB to apportion any administrative funds of the FDIC. The OLC opinion applies by its terms to nonadministrative funds of the FDIC, and thus does not support any apportionment of any FDIC administrative funds.

executive branch. Second, Congress has directly addressed the question of whether the FDIC should be subject to executive branch budget supervision and, after comprehensive study, repeatedly refused to alter the 53-year history of FDIC independence.

When Congress created the FDIC, it provided for the funding of all FDIC expenses through statutory assessments upon all FDIC-insured banks. This system provided a means for insured banks mutually to guarantee the deposits of each other. See H.R. Rep. No. 150, 73d Cong., 1st Sess., 5 (1933). Congress did not provide for the FDIC to receive appropriated funds. 12 U.S.C. § 1817. Thus, since its creation in 1933, the FDIC has not been subject to the usual executive branch appropriations review process applicable to most governmental entities. If OMB were to implement OLC's conclusion, the budget process of a government corporation which Congress established as independent would become subject to potential executive branch interference.

Although OMB and its predecessor agencies have frequently recommended that Congress expand the role of OMB over the FDIC, OMB has never previously asserted authority by means of the Antideficiency Act. In order to reach the conclusion sought by OMB, OLC's conclusion is based upon a re-interpretation of a little-noted 1950 amendment to the Antideficiency Act. The OLC re-interpretation is not supported by the Act's language or its legislative history, or a comparison of FDIC with the Federal Savings and Loan Insurance Corporation ("FSLIC"). It is inconsistent with a variety of

statutes and other later expressions of congressional intent, and it ignores the thirty-six years of experience that Congress and the executive branch have had in interpreting the amendment.[1/]

The Antideficiency Act of 1950 Does Not Address the Budget Process of FDIC

The antideficiency provisions are contained in Chapter 15 of Title 31 of the U.S. Code. This chapter, entitled "Appropriations Accounting," is essentially inapplicable to the FDIC and other governmental entities that obtain operating funds through deposit assessments or trust-type funds and do not receive legislative appropriations.[2/] The Antideficiency Act is directed at requiring appropriated agencies to apportion their spending and obligations throughout the fiscal year "to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period." 31 U.S.C. § 1512(a). It provides discipline for government officials of appropriated entities in the executive branch who obligate the United States

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[1/] The executive branch has always previously acknowledged that it does not have any authority over the budget of the FDIC. A recent OMB Circular No. A-11, § 11.1 (July 1985), for example, explicitly states that "the general policies, justification requirements, and instructions on additional data and hearings are not applicable to the budgets not subject to executive branch review. These include the legislative branch, the judiciary, the Federal Deposit Insurance Corporation...." (emphasis added)

[2/] FDIC assessments establish a trust fund in part to provide a means for payment of depositors of failed insured banks. Trust-type funds of the FDIC are not subjects of appropriations or apportionment. 31 U.S.C. §§ 1321(b), 1516. See also S. Rep. No. 1195, 73d Cong., 2d Sess. (1933).

without regard to apportionment guidelines. 31 U.S.C. §§ 1517-1519. It is not the principal statute governing the budget process of any governmental entity.

The Government Corporation Control Act Establishes the Budget Process of Government Corporations

It is the comprehensive Government Corporation Control Act of 1945 ("GCCA") that establishes the degree of executive branch supervision over the budgets of government corporations. 31 U.S.C. 9101. Under GCCA, government corporations are divided into two categories: "wholly owned" and "mixed-ownership." The labels are not necessarily descriptive of the actual nature of ownership. Rather than providing standard definitions or criteria, the law simply enumerates the corporations included in each group. The FDIC is placed in the "mixed-ownership" group despite the fact that it does not now have any private ownership.[1/] FSLIC, although it has many characteristics in common with the FDIC, is classified as "wholly owned".[2/]

[1/] The FDIC was created as a stock corporation and some of its stock was originally held by Federal Reserve banks and some by the United States Government. When the last of the FDIC's stock was retired in 1948, pursuant to law, the FDIC ceased to be owned in the usual sense of ownership. See Section 4 of the Act of August 5, 1947, Pub. L. No. 363, 61 Stat. 773.

[2/] Other "mixed-ownership" banking corporations, including the Regional Banks for Cooperatives, Federal Intermediate Credit Banks, and Federal Land Banks, are essentially privately owned. Their boards of directors represent primarily the private sector, and their capital stock is owned by private members or private associations. The U.S. Railway Association, which is primarily federal, is also classified as "mixed-ownership." See Comptroller General, Report to Congress: Congress Should Consider Revising Basic Corporate Control Laws, 11, 12 (1983).

The GCCA categorization is significant, however, in one important respect. Only "wholly owned" corporations are required to submit annual budgets for executive branch review. 31 U.S.C. § 9103. "Mixed-ownership" corporations, on the other hand, are not required to submit to executive branch budget oversight. To the contrary, Section 10(a) of the Federal Deposit Insurance Act ("FDI Act") gives the Board of Directors of the FDIC independent authority to "determine and prescribe the manner in which its obligations are incurred and its expenses allowed and paid." 12 U.S.C. § 1820(a).[1/]

Independent budget authority enjoyed by "mixed-ownership" corporations has received repeated consideration over the years. OMB and its predecessor agencies have long advocated subjecting all government entities including the FDIC to the full range of budget controls, including executive budget supervision. Congress has reviewed this matter on a number of occasions, both in hearings and congressional reports. The attached appendix lists proposals which, if approved, would have accomplished greater executive branch supervision of the FDIC's budget. Yet Congress has refused to alter the existing independent process and subject the FDIC to executive

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[1/] The Federal Deposit Insurance Act was reenacted on September 21, 1950, two weeks after enactment of the 1950 amendments to the Antideficiency Act. Before then, the FDI Act was a part of 1933 amendments to the Federal Reserve Act, 12 U.S.C. § 264 (1940).

budget control. It has explicitly refused to place the FDIC in the "wholly owned" category of the GCCA which would subject the FDIC to executive branch budget review.[1/]

As recently as the 1970s, Congress reaffirmed its desire to retain the "mixed-ownership" category as a vehicle to allow certain governmental entities financial independence.[2/]

By refusing to amend the GCCA in the face of a number of OMB attempts, Congress has reaffirmed its intention to keep the FDIC free from any executive branch budget oversight. When Congress has refused to enact OMB's express proposals to amend the GCCA, OMB cannot be permitted to achieve budget control indirectly by using the Antideficiency Act.

Neither the Language nor the Legislative History of the Antideficiency Act Supports OMB Apportionment Authority

Contrary to OLC's assertion that the apportionment requirements of the Antideficiency Act apply to all government agencies "with

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1/ See Bank Supervision, Bank Directors and Conflicts of Interest: Hearings on S.71 Before the Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess.,29,32 (1978), (statement of George LeMaistre, Director, FDIC).

2/ In response to the collapse of northeastern railroads, Congress created the U.S. Railway Association ("USRA") to oversee the organization and route selections of Consolidated Rail Corporation ("Conrail"). USRA is government controlled and funded by appropriations. It was purposefully defined as "mixed-ownership" to avoid subjecting it to the budget and other controls applicable to "wholly owned" corporations. Comptroller General, Report to Congress: Congress Should Consider Revising Basic Corporate Control Laws 11 n.1 (1983).

three narrow exceptions," the statute applies only to entities "in the executive branch" and to those receiving legislative appropriations. See 31 U.S.C. § 1513. OLC cites no authority--and indeed there is none--that defines the FDIC as an executive branch agency for any budgetary purpose.[9/]

OLC's discussion analogizes the FDIC to the FSLIC. However, unlike the FDIC, the FSLIC is explicitly defined as being in the executive branch. 12 U.S.C. § 1437(b). Its statute distinguishes "nonadministrative expenses" from "administrative expenses"; because the FSLIC is part of the Federal Home Loan Bank Board ("FHLBB"), a ceiling on the FSLIC's administrative expenses is established through the appropriations process. FHLBB's administrative expenses have long been subject to the usual executive oversight of budget submissions pursuant to the GCCA, 31 U.S.C. § 9101, 1904. The 1983 OLC opinion concluded that FSLIC's nonadministrative expenses should also be subject to apportionment. The FDIC's statute, on the other hand, does not distinguish between nonadministrative expenses and administrative expenses.[10/]

[9/] For a discussion of the Supreme Court's view of Congress' authority to create independent government corporations, see Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 516, 518 (1939).

[10/] A more apt analogy for budgetary purposes is between the FDIC and the Federal Reserve Board. Members of Congress have made this comparison in describing the FDIC's budgetary independence. Senator Vandenberg, one of the sponsors of the Banking Act of 1933 which created the FDIC, compared the FDIC to the Federal Reserve Board as follows:

> The FDIC is on all fours with the Federal Reserve System with respect to the fiscal structure of the American economy. No one has yet had the temerity

There is no statutory basis for OLC's reliance on "logic" to characterize the FDIC as "partly owned by the United States" and therefore covered by the Antideficiency Act. The FDIC is controlled by the United States through the presidential appointment process, but is not legally "owned" in the usual sense of that term since the FDIC's capital stock was retired by an Act of Congress in 1948. Even assuming arguendo that the FDIC were "partly owned by the United States," it would still not be subject to executive apportionment because, as noted above, it is not "in the executive branch."

Moreover, even if the FDIC were within the executive branch, the FDIC is excluded from the apportionment process because it is a corporation which, among other activities, makes loans without legal liability on the part of the United States. See Garn-St Germain Depository Institutions Act of 1982, codified at 12 U.S.C. § 1823(c)(1). Such entities are specifically exempted from apportionment requirements. 31 U.S.C. § 1511(b)(2).

Footnote 10 continued

> to propose that the Federal Reserve System should be robbed of its independence and subordinated to a political bureau of the Government. Yet here is an institution which is even more sensitive with respect to the necessities for its independence and we confront a conference report which for the first time proposes to make it possible for political controls to determine what happens.

93 Cong. Rec. 10123 (1949).

Senator Vandenberg's views were shared by a majority of Congress. The FDIC's budget independence was not changed in response to the referenced conference report proposal.

Similarly, the OLC conclusion is not supported by "legislative history". When Congress passed the Antideficiency Act of 1950, there were brief hearings held but no reports issued. The Act was passed as an amendment to an appropriations bill.[11/] The "legislative history" cited consists of random comments by two legislators. Those comments are interspersed with comments by others on totally unrelated matters, including the alleged risk posed by communists and homosexuals in the State Department. Contrary to the OLC conclusion, it was not Congress' intent to alter the relationship between the executive and congressionally authorized independent agencies, since that issue was not even debated.[12/]

Congressman Norrell, whose comments are highlighted by OLC, was apparently chiefly concerned about two matters: first, the sometimes irresponsible unapportioned spending by appropriated governmental entities; and second, the risk of government corporations obligating the federal government through their authorized but unapportioned borrowings from the U.S. Treasury. Nothing in his comments could be stretched to conclude that OMB should be authorized to apportion the FDIC's expenses. At most his comments could be interpreted as an expression of belief that FDIC

11/ General Appropriations Act, Pub. L. No. 81-759, § 1211, 64 Stat. 595, 765-767 (1951).

12/ Congress considered and rejected proposals which would have subjected FDIC to greater budget oversight in 1947, 1949, 1950, 1958, 1960 and 1978. See attached appendix.

should be required to apportion its use of its authority to borrow from the U.S. Treasury pursuant to 12 U.S.C. § 1824.[11/]

Congressman Keefe's comments, the only other "legislative history" cited by OLC, are particularly inapposite. He was concerned solely about the lack of congressional budget oversight of corporations. His comments do not support executive apportionment oversight.

This scant "legislative history" is far less persuasive evidence of congressional intent than subsequent congressional rejection of explicit proposals to subject FDIC to executive budget oversight. See attached Appendix.

The 1950 Amendments to the Budget and Accounting Act Support the Conclusion That FDIC Funds Are Not "Appropriations" as Used in the Antideficiency Act

The Budget and Accounting Act of 1921 governs the budget process of government agencies not covered by the GCCA or other legislation. Like the Antideficiency Act, it includes the term "funds" as one of the definitions of "appropriations". The

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11/ With regard to the FDIC, Congressman Norrell specified $3 billion, the amount the FDIC was then and is now authorized to borrow pursuant to 12 U.S.C. § 1824, as the figure that arguably might be subject to the Antideficiency Act. The FDIC has never used or projected the need to use the $3 billion line of credit. Further, if the FDIC were to draw on that line of credit, such a loan would not create a legal liability on the part of the United States. The obligation would be a debt of the FDIC payable to the U.S. Treasury. The existence of the line of credit does not constitute a present or actual legal liability of the United States. See e.g., 77 Cong. Rec. 3729 (May 19, 1933) (statement of Sen. Glass); 77 Cong. Rec. 3964-3965 (May 22, 1933) (statement of Rep. Ayers); H.R. Rep. No. 150, 73d Cong., 1st Sess. 5 (1933); FDIC v. Stensland, 15 N.W. 2d 8 (S.D. 1944).

legislative history of the 1950 Amendments to the Budget and Accounting Act resolves any question about whether the FDIC's assessments and income are such "funds." The Conference Report states:

> The funds of the Federal Deposit Insurance Corporation are received from assessments on insured banks and are used only for the purposes of deposit insurance. These funds have never been under the Budget and Accounting Act for the reason that they are not Government moneys or appropriations and there was no intention of including such funds.... (emphasis added)

Conf. Rep. No. 3002, 81st Cong., 2d Sess., reprinted in 1950 U.S. Code Cong. Service, 3729, 3730.

OMB Apportionment Authority Is Inconsistent With FDIC Independence

Exercise of apportionment power by OMB is inconsistent with many other congressional actions designed to insulate the FDIC from executive control.[14/] For example, in 1974 Congress enacted legislation that prohibits the executive branch from screening the FDIC's (and other financial institution regulators') legislative recommendations, or testimony, or comments on legislation prior to submission to Congress. 12 U.S.C. § 250. The congressional purpose in enacting this section was to "preserve and strengthen the independence of these agencies, which were originally created by

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14/ Our prior memorandum discusses this point in considerable detail at p. 5-10. For convenience, a copy of our earlier memorandum is attached.

Congress to be free of control by the executive branch." "Because Congress delegated its own legislative power to these independent agencies, it is important to prevent executive usurpation of their powers." Independence from the executive branch was necessary if the agencies were to be "effective in their vital role of preserving the integrity of our financial institutions."[11/]

When Congress enacted the Garn-St Germain Depository Institutions Act of 1982 to give the FDIC expanded authority, flexibility, and discretion to assist failing institutions, it specified that such assistance decisions be made independently without review by the executive branch. The Act specifies that:

> The Corporation is authorized, in its sole discretion and upon such terms 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 bank *** (Emphasis added).

12 U.S.C. § 1823(c)(1) (1985).

Executive control of the budget process, even so far as apportionment is concerned, poses at least as great a risk to FDIC independence as executive review of legislative recommendations or assistance transactions.

[11/] S. Rep. No. 93-902, 93rd Cong., 2d Sess. 11, reprinted in [1974] U.S. Code Cong. & Ad. News 6129. (Emphasis added).

In Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Supreme Court considered the proper role of the executive branch over congressionally established independent governmental entities. That case held that a commissioner of an independent agency cannot be removed because of his policy viewpoints. Commissioner Humphrey of the Federal Trade Commission was asked to resign by President Franklin D. Roosevelt. The Supreme Court, in ruling the removal of the commissioner unconstitutional, stated that:

> the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service -- a body of experts which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. ... Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.

295 U.S. at 625-626. See also Wiener v. United States, 357 U.S. 349 (1958).

Conclusion

There is no sound legal basis to apply the Antideficiency Act apportionment provisions to the FDIC and inject the executive branch into the budget decisions of the FDIC.

APPENDIX

Partial Chronology of Prior Consideration of Increasing Executive Budget Oversight Over the FDIC

1945 In enacting the comprehensive Government Corporation Control Act, Congress designated the FDIC as "mixed-ownership" and did not include a requirement that FDIC participate in the appropriations process. See Government Corporation Control Act: Hearing on S.469 Before the Subcommittee of the Senate Committee on Banking and Currency, 79th Cong., 1st Sess. (1945) (statement of Leo T. Crowley, Chairman, FDIC).

1947 Budget Control Act - The Senate rejected provision to subject the FDIC to the appropriations process by vote of 83 to 1. H.R. 3756, 80th Cong., 1st Sess. (1947). See Bank Supervision, Bank Directors and Conflicts of Interest: Hearings on S.71 Before the Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 30 (1978) (statement of George LeMaistre, FDIC Director).

1949 The House of Representatives rejected a proposal to subject the FDIC to the appropriations process. H.R. 4177, 81st Cong., 1st Sess (1949). See Bank Supervision, Bank Directors and Conflicts of Interest: Hearings on S.71 Before the Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 31 (1978) (statement of George LeMaistre, FDIC Director).

1950 A House of Representatives Report expressly excluded the FDIC from the appropriations bill because the FDIC's funds, i.e., assessments on insured banks, were not Government moneys and were used only for deposit insurance. H.R. Rep. No. 303 81sc Cong. 2d Sess. (1950). See Bank Supervision, Bank Directors and Conflicts of Interest: Hearings on S.71 Before the Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 32 (1978) (statement of George LeMaistre, FDIC Director).

1958 Hearings were held on proposal to subject the FDIC to the appropriations process. No action taken. Amending the Government Corporation Co. Act: Hearings on H.R. 8332 Before a Subcommittee of the Committee on Government Operations, 85th Cong., 2d Sess. (1958) (statement of Rep. Patman).

1960 Hearings were held on proposal to subject the FDIC to the appropriations process. No action taken. Making the Federal Deposit Insurance Corporation Subject to Annual Budget Review: Hearings on H.R. 12092 Before a Subcommittee of the Committee on Government Operations, 86th Cong., 2d Sess. (1960).

1960 A proposal to subject the FDIC to the appropriations process was never reported out of committee. H.R. 12092, 86th Cong., 2d Sess. (1960). See Bank Supervision, Bank Directors and Conflicts of Interest: Hearings on S.71 Before the Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 32 (1978) (statement of George LeMaistre, FDIC Director).

1961 A proposal to subject the FDIC to the appropriations process was never reported out of committee. H.R. 6810, 87th Cong., 1st Sess. (1961). See Bank Supervision, Bank Directors and Conflicts of Interest: Hearings on S.71 Before the Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 32 (1978) (statement of George LeMaistre, FDIC Director).

1965 A proposal to subject the FDIC to the appropriations process was never reported out of committee. H.R. 10507, 89th Cong., 2d Sess. (1965). See Bank Supervision, Bank Directors and Conflicts of Interest: Hearings on S.71 Before the Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 32 (1978) (statement of George LeMaistre, FDIC Director).

1967 Report of the President's Commission on Budget Concepts advocated reforms including subjecting the FDIC to appropriations process. See, The Report of the President's Commission on Budget Concepts, 30 (1967).

1977 A proposal to subject the FDIC to the appropriations process was the subject of hearings but no action was taken. Bank Supervision, Bank Directors and Conflicts of Interest: Hearings on S.71 Before the Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. (1978).

1983 Study suggests comprehensive reform of laws governing government corporations including subjecting them to greater budget supervision. No action taken. Comptroller General, Report to Congress: Congress Should Consider Revising Basic Corporate Control Laws (1983).