Loss Sharing Rules for Bank Holding Companies: An Assessment of the Federal Reserve's Source-of-Strength Policy and the FDIC's Cross Guarantee Authority

By Christine M. Bradley and Kenneth D. Jones

In this article, we critically examine two policies designed to protect the deposit insurance funds—the Federal Reserve Board's source-of-strength policy and the FDIC's cross-guarantee authority. We discuss why each of the policies was adopted and how effective each has been in practice since its implementation. We then evaluate the future application and usefulness of the two policies in light of the structural changes that have resulted from industry consolidation and the financial modernization of the 1990s.

I. INTRODUCTION

During the savings and loan and banking crises of the 1980s and early 1990s, the costs of resolving the nearly 3,000 thrift and commercial bank failures exceeded the financial resources that were readily available to the federal deposit insurance system. Eventually the costs of resolving failed institutions would lead to the collapse of the Federal Savings and Loan Insurance Corporation (FSLIC) and the near insolvency of the bank insurance fund.[1] In the face of the crises and their associated costs, federal banking regulators and Congress began seeking ways to protect the deposit insurance system by forcing the industry to share the burden of failure-related losses. On the regulatory side, the Federal Reserve Board (FRB) extended its longstanding position that a bank holding company serve as a source-of-strength to its subsidiary banks beyond the application process. Under the expanded policy, the FRB required that a holding company stand ready to provide troubled subsidiaries with both financial and managerial assistance in times of stress. On the legislative side, Congress responded to the crises in 1989 by enacting the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which introduced a "cross-guarantee" provision that authorized the FDIC to hold commonly controlled depository institutions liable for any

[1] The cleanup of the savings and loan industry would eventually require a taxpayer contribution of nearly $130 billion (Curry and Shibut (2000)).

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losses the FDIC suffered as a result of the insolvency of an affiliated depository institution.[2]

The intent of these efforts was to curb moral-hazard behavior by assigning losses to bank shareholders who might otherwise be protected under traditional corporate law.[3] The source of strength and the cross-guarantee provision were intended to decrease the likelihood that holding companies would be able to consolidate losses in a failing insured institution at the same time that both the holding company and any other affiliates remained profitable.

Since those days of crisis, the banking industry has undergone an unprecedented structural transformation whereby the number of banking organizations has dropped by half and the bulk of the industry's assets are held by less than 20 extremely large institutions. Additionally, deregulatory efforts and initiatives to modernize the banking industry have freed the industry from many restrictive laws and regulations while expanding the list of permissible banking activities. Notwithstanding the historic transformation of the banking system, the instruments available to the bank regulatory agencies relating to failed-bank resolutions remains virtually unchanged since the passage of the Federal Deposit Insurance Corporation Improvement Act (FDICIA) in 1991. In light of the formal and functional changes in banking, the effectiveness of the source-of-strength policy and the cross-guarantee authority should be reevaluated.

In this article, we review each of the policies including the rationale for their adoption, the intended legal scope and framework, and an evaluation of the key applications of those policies. In particular, we review the extent to which each policy has withstood legal challenges. We then evaluate the future application and usefulness of the two policies in light of the two major changes in banking since the policies were adopted: the structural changes that have resulted from industry consolidation, and the financial modernization of the 1990s.

II. THE SOURCE-OF-STRENGTH POLICY IN THEORY AND IN PRACTICE

The FRB first began applying its source-of-strength policy in the 1960s on a case-by-case basis as bank holding companies sought FRB approval to acquire member banks.[4] In these cases, the FRB stated that it would not approve an application by a BHC to make an acquisition or participate in a merger if the BHC did not have sufficient financial and managerial resources to serve as a source of strength for

[2] Under the original definition, banking institutions were commonly controlled if they were controlled by the same company or one depository institution was controlled by another depository institution. 12 U.S.C. § 1815(e)(9)(A) (2001), *amended by* the Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109–351, § 703, 120 Stat. 1966, 1986 (2006).

[3] Because the laws applicable to savings associations and banks differ and because the FRB's source of strength policy only applies to *bank* holding companies, this paper speaks to the effect of the source of strength policy and the cross-guarantee provision on FDIC-insured banks unless otherwise stated.

[4] See, for example, Mid-Continent Bancorp., 52 Fed. Res. Bull. 198, 200 (1966).

the new bank. In 1978, the Supreme Court upheld the FRB's authority to deny a BHC's application on this basis.[5]

The FRB codified the source of strength policy in 1984[6] and, in a 1987 policy statement, extended it beyond the formal application process. In the policy statement, the FRB asserted that a BHC has an obligation to "use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity."[7] To meet this obligation, BHCs must maintain financial flexibility, including the capacity to raise capital and obtain additional resources as needed. In 1989, the FRB's then Vice Chairman, Manuel Johnson, provided clarification stating that a BHC should "serve as a source of strength to its banks even at the expense of holding company creditors and non-bank business. The holding company should have to do whatever it takes to keep its banks adequately capitalized."[8]

The SOS Policy's Application in Theory

Under the expanded source of strength policy, the FRB maintains that it has regulatory authority to require the holding company to use any or all of its capital, even that held in a nonbank subsidiary, to support a bank subsidiary should that subsidiary become undercapitalized.[9] Conceivably the holding company can even be required to raise additional capital or divest itself of one or more subsidiaries to restore the capital adequacy of a troubled bank subsidiary.

A simple example will illustrate the application of the expanded source-of-strength policy. Consider the structure of a hypothetical multibank holding company (MBHC) with full ownership of two banking subsidiaries and one nonbank financial subsidiary (see Tables 1A and 1B). At the consolidated level, the MBHC has $200 million of capital.

Suppose that the lead bank subsidiary (Bank A) experiences losses in its loan portfolio and has to write off $200 million of bad loans (see Tables 2A and 2B). On the balance sheet, Bank A's total assets will fall to $9,800 million, with a corresponding decline in total equity capital of $200 million (equity = assets minus liabilities)—leaving a regulatory capital shortfall in the lead bank of $100 million. At the holding company level, this chain of events causes a corresponding decline in bank equity capital of $200 million and reduces total capital at the holding company level to zero.

[5] *Board of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234 (1978) (*First Lincolnwood*).
[6] 12 C.F.R. § 225.4 (a)(1) (Reg. Y).
[7] 52 Fed. Reg. 15,707 (1987). The policy statement provides that failure of a BHC to serve as a source of strength to its subsidiary banks will be considered an unsafe and unsound banking practice or violation of Regulation Y, resulting in issuance of a cease-and-desist order or other enforcement action. *Id.*
[8] Reported in BNA (1989).
[9] Current regulatory capital categories are defined and discussed in detail in Appendix A.

Table 1A: A Hypothetical Multibank Holding Company

MBHC – Parent Company Only Balance Sheet	
	Millions of Dollars
ASSETS	
Cash and Securities	100
Equity Investments in Bank A Subsidiary	900
Equity Investments in Bank B Subsidiary	100
Equity Investments in Nonbank Subsidiary	100
Total Assets	1,200
LIABILITIES	
Subordinated Debt	1,000
Total Liabilities	1,000
MBHC Capital	200

Table 1B: A Hypothetical Multibank Holding Company

	Balance Sheet of Subsidiaries		
	Bank A	Bank B	Nonbank Subsidiary
	Millions of Dollars		
Total Assets	10,000	1,000	500
Total Liabilities	9,100	900	400
Total Equity Capital	900	100	100
Regulatory Capital Requirement	800	80	0
Excess Regulatory Capital	+100	+20	+100

Under its source-of-strength policy, the FRB can require the BHC to recapitalize its lead bank subsidiary. In this example, there are a number of ways in which recapitalization can be accomplished. The BHC may, for example, liquidate its investments and downstream $100 million in return for an increased equity position in Bank A. Doing this will restore the bank's capital level to the regulatory minimum. Alternatively, the holding company may shift capital from its healthy banking and nonbank subsidiaries to the undercapitalized lead bank to make up the shortfall. One way to accomplish this would be to have the healthy subsidiaries declare a dividend payable to the BHC, which then downstreams the money to Bank A and books an increased equity interest. If the BHC is unable to find the necessary capital within the holding company structure, the FRB can even require the holding company to raise additional capital by selling equity or debt to recapitalize the lead bank.

The public-policy interest inherent in requiring BHCs to support their subsidiary banks is based on the argument that a BHC derives benefits from the ownership

Table 2A: Hypothetical Scenario: Bank A of MBHC Writes Off $200 Million in Bad Loans

	Balance Sheet for MBHC Subsidiaries		
	Bank A	Bank B	Nonbank Subsidiary
	Millions of Dollars		
Total Assets	9,800	1,000	500
Total Liabilities	9,100	900	400
Total Equity Capital	700	100	100
Regulatory Capital Requirement	800	80	0
Excess Regulatory Capital	−100	+20	+100

Table 2B: Hypothetical Scenario: After Write-Off of $200 Million in Bank Equity

MBHC – Parent Company Only Balance Sheet	
	Millions of Dollars
ASSETS	
Cash and Securities	100
Equity Investment in Bank A Subsidiary	700
Equity Investment in Bank B Subsidiary	100
Equity in Nonbank Subsidiary	100
Total Assets	1,000
LIABILITIES	
Subordinated Debt	1,000
Total Liabilities	1,000
MBHC Capital	0

of an institution that holds federally insured deposits. The FRB maintains that the protections afforded insured institutions reflect important governmental concerns regarding the critical fiduciary responsibilities of depository institutions— as custodians of depositors' funds—as well as their strategic role within the U.S. economy (as operators of the payment system and impartial providers of credit).[10]

Although the FRB views its source-of-strength policy as necessary for maintaining the safety of the financial system, the policy is controversial. Some critics argue that the policy—by impairing managerial flexibility—prevents holding company management from acting in the best interests of shareholders and possibly even requires management to violate its fiduciary duty to shareholders of

[10] 52 Fed. Reg. 15,707 (1987).

the corporation.[11] Critics also argue that the policy imposes unlimited liability on parent holding companies in contradiction of the protections traditionally provided under U.S. corporate law.[12] Finally, others contend that the policy poses a substantial disincentive to the integration of banking and commerce in the United States[13] and impairs a bank or bank holding company's ability to attract capital.[14]

The SOS Policy in Practice: Legal Challenges and Legislative Action

To date, the limited evidence available suggests that the source of strength policy has been effective within the application process. Ashcraft (2004) finds that distressed banks within a MBHC are more likely to receive capital injections from their parents and recover from distress more quickly than either independent banks or a bank that is part of a one-bank holding company. This finding was even more pronounced for banks that were members of an expanding MBHC—one that had acquired a banking institution within the last year.[15]

Although the evidence suggests that the source of strength policy is effective at the application stage, expansion of the policy beyond the application process has been hamstrung by a series of legal challenges. The first major court case dealing with the legality of the FRB's expanded policy occurred in October 1988, when the FRB ordered MCorp, a multibillion-dollar BHC in Texas, to "implement . . . an acceptable capital plan that would ensure that all of MCorp's available assets are used to recapitalize the Subsidiary Banks that are suffering capital deficiencies."[16] MCorp failed to comply. In March 1989, the Comptroller of the Currency (OCC)

[11] Deal, Thompson, and Ross (1995) at 269. Former FDIC Chairman L. William Seidman wrote that a clear conflict of interest existed in the American banking system of the 1980s because the system allowed directors of a bank holding company to also serve as directors for some or all of the BHC's subsidiary banks. Bank directors are required by law to maintain the safety and soundness of the bank. Yet, if they served also as directors of the holding company, then they could be sued by shareholders and creditors of the holding company for transferring money into a failing bank subsidiary when it was not in the best interest of the holding company. Failure to support an ailing subsidiary bank, however, made them liable to federal banking regulators under the source of strength policy. Seidman (1993) at 55–57; Bierman and Fraser (1993) at 307.

[12] Broome (1993) at 941. Although limited liability is often considered in the context of protecting individual shareholders, the law also applies to legal entities such as bank holding companies.

[13] Bierman and Fraser (1993) at 269; L. William Seidman, then Chairman of the FDIC, testified that "legislatively mandating that holding companies act as a 'source of strength' to their affiliated organizations could undermine the goals of limited corporate liability envisioned by having separate bank affiliates. If such ownership burdens are mandated by Congress, they would make investment in bank equities unattractive" (cited in Deal, Thompson, and Ross [1995] at note 61).

[14] Bierman and Fraser (1993) at 300–304.

[15] Focusing on the period 1986–1998, Ashcraft (2004) finds that distressed banks that are controlled by a MBHC are about 8% more likely to receive an infusion of equity than other distressed banks. Expanding holding companies, on the other hand, are more than 10 percentage points more likely to inject capital into a subsidiary, conditional on holding company size and strength. In this study, distressed banks are defined as having a CAMEL rating of 3, 4, or 5. CAMEL ratings are a confidential supervisory measure of bank financial condition. Ratings are on a scale of 1–5, with a rating of 1 being the best.

[16] *MCorp Financial, Inc. v. Board of Governors of the Federal Reserve System,* 900 F.2d 852, 853 (5th Cir. 1990).

declared 20 of MCorp's 25 subsidiary banks insolvent and ordered them closed.[17] Subsequently, MCorp filed for bankruptcy and asked the court to enjoin the FRB from taking any administrative action to enforce its source of strength policy while the bankruptcy case proceeded.[18] The district court ruled in favor of the holding company.[19] The FRB appealed the ruling to the U.S. Court of Appeals for the Fifth Circuit.

In May 1990, the Fifth Circuit ruled that although the Bank Holding Company Act (BHCA) grants the FRB the power to exercise control over the formation, structure, and operation of BHCs and their nonbank subsidiaries during the *application process*, it "does not grant the [FRB] authority to consider the financial and managerial soundness of the subsidiary banks after it approves the application."[20] Further, the court ruled that requiring the BHC to transfer assets to its failing subsidiary could "hardly be considered consistent with generally accepted standards of prudent operation" and would amount to "a wasting of the holding company's assets in violation of its duty to its shareholders"; requiring such a transfer of funds would cause MCorp to disregard its own corporate status.[21]

The FRB appealed the Fifth Circuit's ruling to the U.S. Supreme Court, but the Supreme Court sidestepped the question of whether the expanded scope of the source-of-strength policy was enforceable. Instead, the Court found that the lower courts lacked jurisdiction.[22] As a result of the Supreme Court's action, the Fifth Circuit's rejection of the FRB's policy is not controlling on future courts. Shortly after the Supreme Court's ruling, the FRB dropped its case against MCorp, stating that the holding company had downstreamed $17 million in capital to its subsidiary banks as called for by the Board of Governors' source-of-strength policy. As a consequence of the MCorp case, the legal enforceability of the FRB's expanded source-of-strength policy was left unsettled.

With the passage of FDICIA in 1991, however, Congress acknowledged that a holding company has at least a limited continuing responsibility for its banking subsidiaries. Under the Prompt Corrective Action (PCA) provisions of FDICIA, Congress requires any undercapitalized insured depository institution to submit a capital restoration plan to its federal banking regulator. The law further prescribes that "each company having control of the institution" must guarantee the

[17] For additional detail about the MCorp case, see FDIC (1998).

[18] The FRB also brought an administrative action against MCorp for violations of § 23A of the Federal Reserve Act by causing two of the closed banks to provide unsecured extensions of credit to bank holding company management. The details of this proceeding are not germane to the present discussion.

[19] In re *MCorp,* 101 B.R. 483 (S.D. Tex. 1989).

[20] *MCorp Financial, Inc. v. Board of Governors of the Fed. Reserve System,* 900 F. 2d 852, 861 (5th Cir. 1990). The Fifth Circuit distinguished the holding in *First Lincolnwood* (see discussion at footnote 2) because in *First Lincolnwood* the Supreme Court was only reviewing the FRB's authority to approve an application to form a BHC, not its authority to regulate the day-to-day financial soundness of the subsidiary banks.

[21] *MCorp* at 863.

[22] *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.,* 502 U.S. 32 (1991), *remanded to* 958 F.2d 615 (5th Cir. 1992).

compliance of the undercapitalized institution.[23] In contrast to a holding company's potentially unlimited liability under the FRB's source-of-strength policy, Congress limited a BHC's responsibility under FDICIA to the lesser amount of 5% of the depository institution's assets at the time the institution became undercapitalized or the amount needed by the insured depository institution to bring it into compliance with applicable capital standards.[24] In the example of the hypothetical holding company discussed above (see Tables 2A and 2B), the holding company's liability would be limited to $100 million—the amount needed to bring Bank A into compliance—since this amount is less than 5% of the bank's $9.8 billion of assets.

Although some observers have viewed the PCA provisions of FDICIA as weakening the FRB's source-of-strength policy both by outlining when a holding company is required to support its banking subsidiaries and by limiting the amount of its responsibilities,[25] in August 1992 the FRB made clear that it did not view PCA as constraining its use of the source-of-strength policy. The FRB stated that a holding company has a "responsibility to act as a source of financial strength" to its banking subsidiary and is required "to use its assets, including its cash and other short-term, liquid, investment grade assets, to provide whatever additional capital support" may be required by the Board.[26] The FRB continues to hold this position.[27]

III. THE CROSS-GUARANTEE AUTHORITY IN THEORY AND IN PRACTICE

In August 1989, Congress included in FIRREA a provision (known as the cross-guarantee provision) that authorizes the FDIC to unilaterally assess an insured depository institution within a bank holding company—but only an insured depository institution—for losses that the FDIC has incurred (or expects to incur) in connection with the failure of an affiliated institution that is commonly controlled.[28] In other words, the FDIC is allowed to draw upon the resources of a

[23] Failure of any company having control of a bank to fulfill a guarantee of the capital restoration plan subjects the bank to civil money penalties or other judicial or administrative enforcement actions. 12 C.F.R. §308.204(b)(2)-(c) (2006).

[24] 12 U.S.C. § 1831*o*(e)(E)(i) (2001). See Appendix A for details on PCA and its capital standards.

[25] See, for example, Bierman and Fraser (1993).

[26] *Written Agreement By and Among Baltimore Bancorp, Federal Reserve Bank of Richmond and Bank Commissioner State of Maryland,* Board of Governors of the Federal Reserve System, No. 92–051-WA/RB-HC (Aug. 5, 1992).

[27] See, for example, Bies (2006) ("the Federal Reserve follows the general principle that bank holding companies should be a source of strength for their subsidiary banks"); Olson (2005) ("the Board has discouraged BHCs from using debt to finance the acquisition of banks or nonbank companies because high levels of debt at a parent BHC can impair the parent's ability to serve as a source of strength to its subsidiary banks"); and Written Agreement dated February 24, 2004, between Cowboy State Bancorp, Inc. and the Board of Governors of the Federal Reserve System.

[28] Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), sec. 206(e)(1) (codified at 12 U.S.C. § 1815(e)(2001), amended by Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109–351, § 703, 120 Stat. 1966, 1986 (2006).

corporate family of banks (but not those of nonbanks within the corporate family) in order to fund the resolution of one of the family's banking affiliates—in essence, the FDIC is allowed to treat the banks within a multibank holding company as if they were a single institution. Commonly controlled insured depository institutions can also be assessed liability for losses that the FDIC "reasonably anticipates" incurring in connection with any assistance provided to any affiliated insured institutions that are "in danger of default."

But, the purpose of FIRREA's cross-guarantee provision was not solely to reduce the costs incurred by the FDIC in resolving failed institutions. The provision was also intended to provide an incentive for holding company management to monitor bank risk taking, and as a means of preventing a holding company from consolidating losses in a single institution and allowing it to fail so that its losses accrue to the deposit insurance fund and not the holding company or the remaining bank subsidiaries.

The Cross-Guarantee Authority in Theory

The theoretical differences between the cross-guarantee provision and the source-of-strength policy can be illustrated by reference to our hypothetical bank holding company example. Under the expanded source-of-strength policy, the FRB can potentially require the holding company to use all of its capital ($200 million at the holding company level) to support any ailing subsidiary bank before the failure of the bank. The holding company may even be required to raise additional capital from outside investors. In contrast, the FDIC's cross-guarantee authority cannot be invoked until a subsidiary bank fails. If a failure occurs, the FDIC can then assess a liability against the surviving bank affiliates—but only against the affiliated banks and not against the holding company or other nonbank affiliates.

Suppose, for example, that the lead bank (Bank A) in our hypothetical bank holding company example fails. The FDIC can assess the surviving bank affiliate (Bank B) for the losses expected to accrue from Bank A's failure. Assuming the FDIC expects losses from the failure to be near the historical average (about 5% of assets for banks of this size), the assessment would be about $500 million.

This amount exceeds the total equity capital in the affiliated bank subsidiary (Bank B) by a sizable margin, so such an assessment will lead to the failure of Bank B. With the failure of Bank B, the parent holding company will lose all its bank equity capital (originally $1 billion), and the FDIC will assume control and ownership of all the remaining assets of the two bank subsidiaries. With the loss of its two bank subsidiaries, the bank holding company's liabilities will exceed its assets by $800 million, and the probability of bankruptcy will be high. If bankruptcy should occur, the shareholders and creditors of the holding company would be at risk of losing much of their investments.

With regard to the FDIC, if we assume that the lead bank (Bank A) is closed when its capital level reaches 2% (as required under PCA rules), approximately $200 million of equity capital will remain in the bank. Combining this with

the capital in the healthy Bank B ($100 million), the FDIC might expect to recover about $300 million—a sizable amount but not sufficient to offset the $500 million in expected losses from the failure of Bank A. Nevertheless, by using its cross-guarantee authority, the FDIC will be able to recover $100 million in this hypothetical example, or about 20% of its expected losses, from the healthy affiliate. But if the smaller bank subsidiary fails instead of the larger, assessing a cross-guarantee liability against the lead bank subsidiary will allow the FDIC (theoretically, at least) to fully recover any losses it might incur.

In its capacity as a bank supervisor, deposit insurer, and receiver of failed depository institutions, the FDIC pursues a number of objectives. Historically, the FDIC's primary objective has been to maintain public confidence in, and the stability of, the banking system. However, the FDIC is also concerned with maintaining market discipline to prevent excessive risk taking by banks; pursuing the least-costly failure-resolution method; choosing resolution methods that are consistent and equitable; minimizing disruption to the communities where failures occur; and minimizing the government's role in owning, financing, and managing financial institutions and financial assets.[29] The challenge faced by the FDIC is deciding how to balance these objectives with the inherent trade-offs in any given situation.

Suppose the FDIC is faced with a bank failure in which it may invoke its cross-guarantee power. The FDIC can choose to impose a full assessment against the affiliates of the failed bank. This decision is fully consistent with the maintenance of market discipline. If, however, the assessment triggers the failure of affiliated banks, the FDIC may conclude that the costs of additional bank failures, including the possible economic disruption to the local community and the costs to the FDIC in managing the resolution of the failed banks' assets outweigh any funds that would be received as a result issuing the cross-guarantee assessment.[30] Recognizing these competing objectives, the FDIC has not always chosen to issue a cross-guarantee assessment.

The Cross-Guarantee Authority in Practice

In March 1988, before FIRREA was passed, the FDIC loaned the two lead banks of First RepublicBank Corporation (First Republic) $1 billion in open-bank assistance conditioned on the banks procuring loan guarantees from their affiliates

[29] Bovenzi and Muldoon (1990). Before the passage of FDICIA in 1991, the FDIC was bound by a cost test that required only that the resolution method chosen for a particular bank be less costly than a deposit payoff and liquidation of the bank. There was no requirement that the FDIC use the "least costly" resolution method. That pre-FDICIA standard allowed the FDIC to consider non-cost objectives more fully when resolving failed banks. After the full implementation of FDICIA in 1992, the FDIC was required to resolve all failed institutions with the "least costly" method, although an exemption was allowed for cases found to pose unacceptable systemic risks. 12 U.S.C. § 1823(c)(4)(2001).

[30] A recent study in a leading economic journal documents that bank failures (including the failure of healthy banks precipitated by the use of the cross-guarantee authority) are followed by permanent declines in real economic activity (Ashcraft [2005]).

(in all there were 40 affiliated banks in the holding company). In July 1988, First Republic's lead bank was declared insolvent and the FDIC called the loan guarantees—with the result that all the remaining bank affiliates failed.[31]

After witnessing the fate of the First Republic banks, other holding companies refused the FDIC's proposals for recapitalization assistance agreements using similar interbank loan guarantees (MCorp being prominent among them). Soon it was apparent to the FDIC that its attempts to assign losses to shareholders of failing bank affiliates would not be effective without explicit legal powers that enable it to force cross-guarantee loss assessments.

Congress granted the FDIC its cross-guarantee authority as part of FIRREA, which became effective in August 1989. In the same month that its cross-guarantee authority became effective, the FDIC issued a notice of assessment for $5.3 million to the First National Bank of Canton in Canton, Texas. The assessment was to cover estimated losses accruing to the FDIC from the failure of the First State Bank in Pflugerville, Texas—an affiliated institution that was commonly controlled by the bank holding company, TransTexas Bancshares, Inc. The assessment exceeded the capital of the FNB of Canton, but rather than close the bank, the FDIC waived the liability in order to preserve the value of a promissory note previously issued by TransTexas Bancshares. In an ironic twist, the FDIC found itself (through a previous but unrelated failure resolution) holding a 51% interest in the proceeds from a pending sale of that promissory note. On the basis of staff's analysis, the FDIC concluded that the proceeds from the note sale (even at a steeply discounted price) were greater than the potential recovery from the sale or liquidation of an insolvent FNB of Canton. Hence, it granted a waiver releasing FNB of Canton from its cross-guarantee liability.[32]

Other failures that met the criteria for application of the cross-guarantee provision quickly followed. Indeed, since the enactment of FIRREA in August 1989, the FDIC Board of Directors considered more than 40 cases involving cross-guarantee liabilities. The bulk of these cases occurred prior to 1994 (coinciding with the end of the U.S. banking crisis) and involved applications for waivers or exemptions from actual or potential cross-guarantee liabilities. In only 11 cases did the FDIC formally assess a cross-guarantee liability against the surviving affiliate(s) of a failed bank. These 11 cases are shown in Appendix Table B.1. The table includes

[31] For additional detail on the First Republic case, see FDIC (1998).

[32] FDIC Board of Directors Meeting, August 24, 1989 and October 12, 1989. The FDIC Board of Directors has sole discretion to waive liability in the case of an affiliated or unaffiliated party of an institution in default or in danger of default. To communicate how it will use this discretion, the FDIC has issued the following guidelines for waiver consideration: a conditional waiver will be considered (1) when the exemption would facilitate an alternative that would be in the best interests of the FDIC; (2) if an affiliated institution is otherwise solvent, well-managed, and viable; and (3) in cases when an insured institution is sold to an acquirer that had no financial interest in the institution before the acquisition (FDIC Statement of Policy Regarding Liability of Commonly Controlled Depository Institutions, 63 Fed. Reg. 44765 [August 20, 1998]). When FIRREA and its cross-guarantee provision were enacted, Congressman Henry B. Gonzalez stated, "[O]ne of the purposes of the waiver authority... is to give the FDIC sufficient flexibility to facilitate the acquisition of a financially distressed bank by a bank holding company" (135 Cong. Reg. H5301 [daily ed. August 4, 1989]).

the name of the parent holding company, the name of the bank whose failure caused a cross-guarantee to be applicable, the subsidiary banks involved, the date of the initial failure, the original loss estimate for each failure, the amount of the cross-guarantee assessment, the amount of any payment made to satisfy that assessment, and the final loss to the bank insurance fund.

Among the cases listed in the Appendix-Table B.1, the total estimated loss to the FDIC from the failures that triggered cross-guarantee assessments was approximately $2.0 billion.[33] This amount also represents the total potential liability of the insured institutions that were deemed subject to the cross-guarantee provision. But total actual assessments levied in these cases amounted to only about $1.7 billion. Actual assessments often differed from the initial loss estimates because once the FDIC was appointed receiver, it was better able to assess a failing institution's financial condition and potential losses under different resolution scenarios. Eventually the FDIC received about $652.6 million in cross-guarantee payments from the institutions (or their receiverships) against which it had assessed a liability. This amount represents about a third (31.9%) of the total potential liability and slightly more than a third (38.8%) of the actual assessments levied. The full amount of the cross-guarantee assessment has been paid (or recovered) in only three cases: Premier Bancshares of Texas ($1.3 million), Southeast Banking Corporation ($143 million), and First City Corporation ($470 million). In the end, the ultimate cost to the FDIC attributable to these 11 cases was still about $2.8 billion. It should be noted, however, that this final loss number encompassed all costs, including the FDIC's administrative, legal, and overhead costs (and during the banking crisis, all of these were substantial).

The fact that, in these cases, the FDIC was able to recover only about a third of its losses through cross-guarantee assessments is not surprising. Many bank holding companies at the time were facing severe financial challenges. In fact, in some cases all the affiliated banks within a holding company were found to be in such poor condition that the FDIC determined that little, if anything, would be gained by issuing a cross-guarantee assessment against the surviving affiliates. Several such cases are described in the Appendix Table B.2, which includes all cases where a failure triggered the cross-guarantee provision but the FDIC chose not to make a formal assessment (the table also includes, for illustrative purposes, several cases from Table B.1). For example, in the cases of Northway, Schreiner, and United Bancshares, the FDIC found the remaining subsidiary banks in the holding companies to be in extremely poor health, with little or no recovery value. Either the banks failed before the FDIC could take action, or the FDIC determined that if the banks were left to fail of their own accord, the deposit insurance fund would incur no additional losses. In other cases (for example, BancTexas Group and the National Bancshares of Texas), the FDIC used its discretionary authority under the law to grant an institution a waiver from cross-guarantee liability in

[33] Loss estimates are made at the time of the first failure of an affiliated institution within the multibank holding company.

order to facilitate a sale or recapitalization (or both) of the institution. Indeed, this latter strategy proved to be particularly important in the FDIC's efforts to minimize losses to the bank insurance fund.

Appendix-Table B.3 presents all cases in which the FDIC Board granted a depository institution or a holding company a waiver or an exemption from a pending or potential cross-guarantee liability. In exchange for the waiver, the FDIC was able to facilitate the sale or recapitalization of the institution or holding company. For example, in the four cases involving MBanks (surviving bank subsidiaries of MCorp's failure in March 1989), the FDIC was able to use the existence of outstanding cross-guarantee liability to leverage capital contributions from the banks or bank holding companies that wished to acquire one of the MBank franchises. Using this strategy, the FDIC obtained capital injections totaling $34.8 million in the four MBank cases. In the 24 cases listed in Appendix-Table B.3, the FDIC was able to use the waiver-granting process to secure capital commitments of more than $700 million. By facilitating the sale of troubled institutions, the FDIC avoided millions of dollars in additional losses to the insurance fund.

The Cross-Guarantee Authority in Practice: Legal Challenges

Before the enactment of FIRREA's cross-guarantee provision, common ownership of depository institutions would not have resulted in one bank's being held liable for the debts of an affiliated bank. U.S. corporate law traditionally recognizes that a corporate structure establishes a separate identity (and limited liability) for each subsidiary—a "corporate veil" through which a corporation's liability is limited to its investment in the subsidiary. Hence, before FIRREA there was no legal basis for fear on the part of affiliates of a multibank holding company that the corporate veil could be pierced and that each affiliate could be held responsible for the debts of another, or that the debts of a sister bank might result in the closure of both.

Given this history, it is not surprising that the FDIC's use of its cross-guarantee authority has been challenged in court. Between 1991 and 1994, four cases were filed in federal district courts challenging either the constitutionality of the cross-guarantee provision or its application to a specific case. These suits arose from the failures of the Bank of New England and the Southeast Bank in 1991, the second failure of the First City Corporation in 1992, and the failure of Central Bank of Meriden in 1994.[34]

In 1991 the FDIC used its cross-guarantee authority to recoup losses resulting from the failure of the Bank of New England (BNE). When BNE failed, the FDIC estimated that the cost to the deposit insurance fund would be more than $1 billion. The FDIC then assessed an affiliate of BNE, the Maine National Bank (MNB), the full amount of the estimated loss. Immediately before the assessment,

[34] For a more detailed discussion of these cases, see FDIC (1998), Part 2: Case Studies. Settlements were reached in the cases of Southeast Bank and First City Bancorporation. As part of the settlements, the plaintiffs agreed to drop all challenges relating to the constitutionality of the FDIC's cross-guarantee authority. Additional details of the settlements can be found in the aforementioned cite.

MNB had been a healthy bank with an estimated net worth of approximately $65 million. But because the FDIC's assessment far exceeded MNB's assets, the bank was closed by the Comptroller of the Currency and the FDIC was appointed as its receiver.[35] MNB challenged the FDIC in court, asserting that the cross-guarantee provision amounted to an "uncompensated taking" in violation of the Fifth Amendment of the U.S. Constitution—claiming, that is, that enforcing the cross-guarantee provision amounted to a taking of private property for public use without just compensation. After five years of litigation, the courts eventually validated the FDIC's authority to exercise its rights under the cross-guarantee provision, soundly rejecting the per se takings analysis and its conclusion that the cross-guarantee authority was a radical departure from the common-law principle of limited corporate liability.[36]

The FDIC's cross-guarantee authority was also challenged in a case involving the Meriden Trust and Safe Deposit Company in Meriden, Connecticut—an affiliated bank in Cenvest, a two-bank holding company. Following the July 1994 failure of Central Bank, the lead bank in Cenvest, the FDIC assessed its liabilities (estimated at $152 million) against Meriden Trust. Meriden Trust appealed the FDIC's action, arguing that the cross-guarantee provisions of FIRREA constituted an uncompensated taking. On August 2, 1995, the U.S. Court of Appeals for the Second Circuit issued a decision that affirmed the constitutionality of the cross-guarantee provision and the legal right of the FDIC to assess Meriden Trust for its losses. After the court decision, the FDIC placed Meriden Trust in receivership and recovered $7.8 million on the sale of the bridge bank.

The net result of these legal challenges is that the constitutionality of the cross-guarantee provision is now firmly established in case law. Going forward, the FDIC is not likely to have its authority challenged again on constitutional grounds.

IV. THE EFFECTS OF FINANCIAL MODERNIZATION ON SOURCE OF STRENGTH AND CROSS-GUARANTEE

Beginning in the mid-1990s, the banking industry began to recover from the crises. The number of failures dropped dramatically while the industry as a whole returned to profitability. The improved financial environment allowed for a change of priorities in Congress and a renewed push for the modernization and liberalization of the nation's banking laws.

As part of these efforts, Congress passed the Riegle-Neal Interstate Banking and Branching Efficiency Act (Riegle-Neal) in 1994 and the Gramm-Leach-Bliley Financial Modernization Act (GLBA) in 1999. Riegle-Neal permits banks and

[35] Another BNE affiliate, the Connecticut Bank and Trust, failed simultaneously with BNE because of losses on federal funds it had lent to the lead bank. As a formal matter, Connecticut Bank and Trust also received a notice of assessment, but the notice was only intended to preserve the FDIC's claims in the resolution.

[36] *Branch v. FDIC*, 69 F.3d 1571 (D.C. Cir.), *reh'g en banc denied* (Feb. 7, 1996), *cert. denied,* 519 U.S. (1996).

bank holding companies to purchase banks or establish subsidiaries across state lines. In effect, it allows banks to operate across state lines without the need for a holding company structure. The enactment of Riegle-Neal did much to further the consolidation and improve the efficiency of the banking industry. Following Riegle-Neal, GLBA repealed the Depression-era laws that had restricted affiliations among banks, securities firms, insurance companies, and other financial service providers.

More specifically, GLBA had a goal of "enhanc[ing] competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers. . .."[37] Under GLBA, the mixing of banking and other financial services must be contained within a new corporate structure—a financial holding company (FHC). An FHC can own a bank in addition to a company that engages in securities underwriting or dealing, insurance agency and underwriting, merchant banking or venture capital activities, the distribution of mutual funds, or securities lending (or any activity that the FRB determines to be financial in nature or incidental to a financial activity).[38] Simply put, GLBA permits bankers, insurers, and brokers to affiliate and house their diversified businesses in an FHC. On March 13, 2000, the first business day after the FHC provisions of GLBA became effective, the FRB approved the applications of 117 BHCs to become FHCs.[39] By September 30, 2005, 485 reporting BHCs had been approved as FHCs. In total, these FHCs held 86.1% of all BHC assets. (Table 3 gives the number and assets of reporting BHCs and FHCs from year-end 2000 through year-end 2005.)

Financial Modernization and the Source-of- Strength Policy

Although GLBA established the Federal Reserve Board as the umbrella supervisor of FHCs, it also imposed certain limits on the FRB's powers, including limits on the application of the source-of-strength policy.[40] Under GLBA, the FRB cannot require a bank holding company with a functionally regulated subsidiary that is a licensed insurance company, registered broker-dealer, registered investment company, or registered adviser to fund or provide capital to an affiliated depository institution if the Securities and Exchange Commission (SEC), the Commodity

[37] Pub. L. No. 106–102, 113 Stat. 1338 (Nov. 12, 1999).

[38] Congress directs the FRB to consult with the Secretary of the Treasury when considering whether any new activities may be performed within an FHC. (12 U.S.C. § 1843(k)(2) (2001)).

[39] FRB (2003), 6.

[40] As an umbrella supervisor, the FRB oversees the operation of a financial holding company on a comprehensive basis, while regulation of each subsidiary is left to its functional regulator. The functional regulator is the appropriate government entity based on the type of business. For example, in our hypothetical bank holding company (Table 1A and Table 1B), the FRB is the umbrella supervisor of the entire organization. If Bank A and Bank B are national banks, the Office of the Comptroller of the Currency is their functional regulator. The functional regulator of the nonbank subsidiary is dependent on its type of business—if it is a securities subsidiary then the Securities and Exchange Commission is the functional regulator, while an insurance subsidiary is regulated by the appropriate state insurance agency.

Table 3: Number and Assets of BHCs and FHCs[a] (Millions of dollars, not seasonally adjusted)

	Year[b]					
	2000	2001	2002	2003	2004	2005
Number of BHCs	1,727	1,842	1,979	2,134	2,254	2,288
Total Assets of BHCs	$6,745,836	$7,486,952	$7,991,161	$8,880,661	$10,339,839	$11,237,913
Number of FHCs	309	399	446	464	488	485
Total Assets of FHCs	$5,000,287	$6,062,284	$6,537,747	$7,320,870	$8,838,955	$9,681,256
FHC total assets as a percentage of BHC assets	74.1%	80.9%	87.3%	82.4%	85.5%	86.1%

[a]BHCs that obtain FHC status are essentially a subset of total BHCs. Hence, the total numbers and assets for BHCs include the totals for FHCs.
[b]As of December 31.
Source: FRB (2006).

Futures Trading Commission (CFTC), or a state insurance authority advises the FRB that such funding would materially and adversely affect the company. In other words, the FRB cannot enforce its source-of-strength policy against functionally regulated subsidiaries without the approval of the functional regulator (the SEC, the CFTC, or the state insurance authority).[41] As former FRB Chairman Greenspan recognized, with the passage of GLBA "Congress has placed real and effective limits on the Federal Reserve's authority to supervise and regulate functionally regulated entities."[42]

Finally, as noted above in the section on legal challenges and legislative action regarding the source-of-strength policy, the Prompt Corrective Action (PCA) provision of FDICIA limited the liability of a parent company (when guaranteeing the capital restoration plan of an insured institution) to whichever was less: 5% of the depository institution's total assets at the time the institution becomes undercapitalized, or the amount necessary to bring the institution into compliance with capital standards. Although that PCA provision has never been tested in practice, it appears that unlimited liability has effectively been ended under the source-of-strength policy. When one considers the GLBA limitation in combination with the legal obstacles discussed earlier, it can be argued that the force and effectiveness of the FRB's policy outside the application process has been eroded. Financial modernization legislation over the last decade has placed limits both on the extent of a holding company's liability and, in the case of a financial holding company, on the FRB's unilateral authority to require support. However, an alternative interpretation might be that the PCA provisions of FDICIA actually strengthened the source-of-strength policy by codifying at least a weak version of it into law.

Financial Modernization and Cross-Guarantees

With regard to cross-guarantees, GLBA did not reduce the FDIC's authority to impose a cross-guarantee assessment. Neither, however, did it expand the FDIC's authority. For example, House Banking Committee Chairman Henry B. Gonzalez introduced legislation in 1991 that would have expanded the cross-guarantee provisions to make the nonbanking subsidiaries of bank holding companies equally liable for the losses incurred by the FDIC in the event of the insolvency of an affiliated bank.[43] This legislation was never passed and the FDIC's cross-guarantee authority remained limited to cases involving banking affiliates of a multibank holding company.

With the passage of the Financial Services Regulatory Relief Act in 2006, Congress expanded the cross-guarantee authority to include insured financial

[41] The section of GLBA that restricts the use of the source-of-strength doctrine does not use the term "financial holding company" when defining the limits of the FRB's power but, rather, places limits on the FRB's use of the doctrine as far as "bank holding companies" are concerned (12 U.S.C. § 1844(g) (2001)).

[42] Greenspan (1999).

[43] H.R. 6, 102d Cong., 1st sess. (1991).

institutions that are members of nonbanking holding companies.[44] As a consequence, the FDIC's cross-guarantee authority is now applicable to affiliated insured financial institutions that are members of nonbank holding companies as well (for example, credit card banks, trust companies or industrial loan companies). Despite the expansion of the cross-guarantee authority, an assessment of the likely future effectiveness of the cross-guarantee begins with the current status of MBHCs.

MBHCs were originally formed to circumvent the prohibitions against bank branching that existed until 1994, when Congress passed the Riegle-Neal Interstate Banking and Branching Efficiency Act. Because Riegle-Neal preempted state banking regulations and created a nationwide standard for interstate expansion by both national and state banks, it was expected to lead to a decline in the importance of MBHCs.[45] As of year-end 2005, there were 522 MBHCs, compared with 973 in 1988 (Table 4), but in contrast to the falling numbers, the assets held by MBHCs have been steadily increasing in both nominal and real dollars (Figure 1). In 2005, MBHCs held over $6 trillion (or 65%) of all assets held by insured institutions.

MBHCs have also experienced an internal realignment of activities within the multibank holding company structure, which may have implications for the FDIC's cross-guarantee authority going forward. As Figure 2 indicates, the percentage of holding company assets that are held by the lead bank in an MBHC has grown significantly since 1994. Indeed, at year-end 2005, lead banks held nearly 84% of MBHC assets, compared with 65% in 1986. In 1986, the average MBHC had about $3.1 billion in assets (constant 2000 dollars) and five banking subsidiaries. Twenty years later, there are far fewer MBHCs but they are bigger in terms of assets. In 2006, the "average" MBHC held approximately $11.6 billion in assets (constant 2000 dollars) and three subsidiaries. Finally, because financial modernization has expanded the scope of activities permissible to banking companies, the percentage of assets devoted to nonbanking activities (such as insurance and brokerage) has risen steadily over the past decade (Figure 3). To the extent that these activities are conducted in separate nonbank subsidiaries, they are beyond the reach of FDIC's cross-guarantee authority.

The net effect of these structural changes and financial modernization on the utility of cross-guarantees is hard to determine. Because of the beneficial effects of scale, scope, and geographic diversification, the average MBHC in 2006 is likely

[44] Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109–351 § 703, 120 Stat. 1966, 1986 (2006). Nonbank holding companies are holding companies that do not qualify as bank holding companies under the Bank Holding Company Act of 1956 because the institutions they control do not meet the statutory definition of "bank."

[45] Riegle-Neal was enacted in 1994, but nationwide interstate banking through the holding company structure was prohibited until June 1995 and interstate branch banking was allowed after September 30, 1997. Notwithstanding Riegle-Neal, prior to 1995, several states permitted multibank ownership in limited circumstances—a situation that sometimes resulted in bank ownership being allowed across regional groups of states.

Table 4: Number and Assets of FDIC-Insured Banking Organizations

	Thrifts and Independent Banks		One-Bank Holding Companies		Multibank Holding Companies		
Date	Number	Assets ($Billions)	Number	Assets ($Billions)	Number	Assets ($Billions)	TOTAL ($Billions)
Dec. 1988	7,399	$1,803	4,916	$512	973	$2,422	$4,737
Dec. 1989	6,793	1,641	4,919	562	953	2,524	4,727
Dec. 1990	6,287	1,404	4,872	619	962	2,626	4,649
Dec. 1991	5,853	1,266	4,872	648	921	2,630	4,544
Dec. 1992	5,484	1,182	4,804	669	878	2,685	4,536
Dec. 1993	5,093	1,131	4,656	696	850	2,881	4,708
Dec. 1994	4,687	1,120	4,524	692	838	3,209	5,021
Dec. 1995	4,282	1,115	4,483	670	820	3,556	5,341
Dec. 1996	3,955	1,097	4,428	778	822	3,737	5,611
Dec. 1997	3,635	1,075	4,464	902	792	4,068	6,045
Dec. 1998	3,379	1,090	4,399	932	745	4,509	6,531
Dec. 1999	3,253	1,172	4,369	1,069	733	4,643	6,884
Dec. 2000	3,152	1,329	4,396	1,294	699	4,840	7,463
Dec. 2001	3,004	1,433	4,444	1,373	654	5,064	7,869
Dec. 2002	2,856	1,456	4,503	1,614	606	5,367	8,436
Dec. 2003	2,716	1,508	4,549	1,694	577	5,874	9,075
Dec. 2004	2,584	1,642	4,566	1,861	555	6,602	10,106
Dec. 2005	2,522	1,770	4,597	2,056	522	7,051	10,877

to be less risky than its 1986 counterpart.[46] In effect, MBHCs are likely to be more resilient than they were 20 years ago. Offsetting these diversification benefits is the increase in concentration risk with a MBHC. The average MBHC in 2006 has a larger lead bank (larger relative to both the BHC and its affiliated banks) and fewer bank affiliates. To some extent, this disparity between the size of the lead bank and the number of bank affiliates changes the nature of the cross-guarantee—from mutual support to more of a one-way guarantee. That is, the losses incurred from the failure of a non-lead bank subsidiary can be guaranteed by a healthy lead bank affiliate, but not vice versa. In sum, the effects of diversification make it less likely that the cross-guarantee authority will be needed, but if it becomes applicable in the case of a lead bank failure, there is a good chance that the guarantee will cover a smaller percentage of the deposit insurance fund's losses.

Although changes in the concentration and nature of MBHCs have evolved in a way that has negative implications for the use of the FDIC's cross-guarantee authority, there is little doubt that the authority does exert some measure of discipline on bank holding company management. Indeed, backed by the force of

[46] This assumes of course that banks choose not to increase their risk levels in response to these risk-reducing benefits.

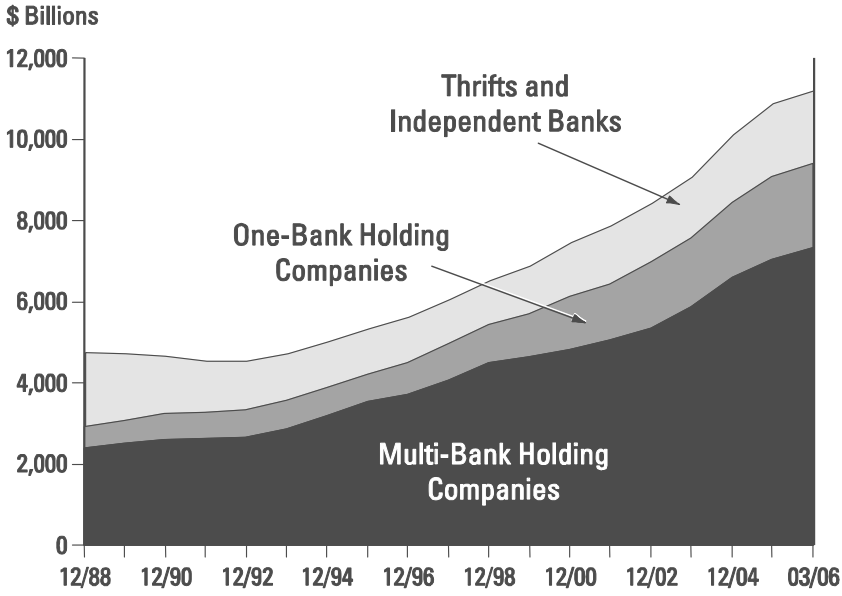

Figure 1: Assets of FDIC-Insured Banking Organization, 1980–2005.

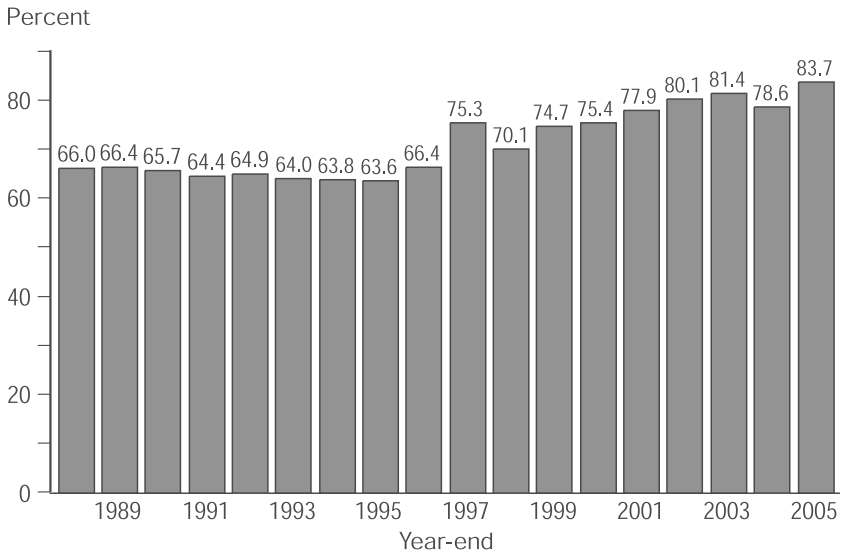

Figure 2: Lead Bank Assets as a Percentage of Total Assets in Multibank Holding Companies.

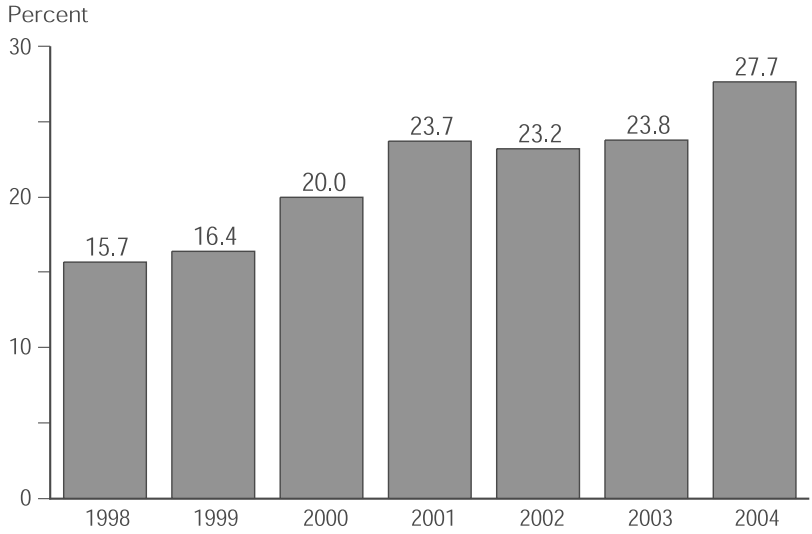

Figure 3: Combined Nonbank Assets as a Percentage of Total Bank Holding Company Asstes.

law, the cross-guarantee authority gives the FDIC (and the other bank regulators as well) a credible mechanism with which it can encourage a holding company to fix problem subsidiaries before they fail. Moreover, the authority has certainly eliminated the loophole that allowed a BHC to pass its losses onto the deposit insurance fund while remaining independent. Hence, in practice the FDIC can (and does) use its cross-guarantee authority much as the FRB envisioned using its expanded source-of-strength policy.

V. CONCLUSION

In the 1980s and early 1990s, the failure of thousands of federally-insured depository institutions threatened the solvency of the deposit insurance system. Both Congress and federal banking regulators reacted to the banking crises by attempting to expand liability for the costs of banking failures beyond the deposit insurance fund to the shareholders of entities that were affiliated with the failed institution. In the 1980s, the Federal Reserve Board attempted unilaterally to broaden the scope of its source-of-strength policy by requiring bank holding companies to use all their available resources to assist their troubled or failing bank subsidiaries. And in 1989, Congress provided the FDIC with the authority to impose a cross-guarantee liability on multibank holding companies for the costs of a failed subsidiary bank. While there have been no recent failures upon which

application of the FRB's source-of-strength policy or the FDIC's cross-guarantee authority might be judged, changes in the banking environment as a result of industry consolidation and financial modernization may have affected the strength and effectiveness of the policies going forward.

The FRB's authority to exercise its source-of-strength policy outside the application process has been constrained by legal challenges. Moreover, FDICIA's prompt corrective action provisions, while acknowledging a BHC's responsibility to its banking subsidiaries, explicitly identify the circumstances in which a holding company is required to support its banking subsidiaries and set a limit on the amount of the BHC's responsibilities.

In contrast, the FDIC's cross-guarantee authority has survived legal challenges to its use and has emerged with its legal standing firmly established. And, in practice, the authority has proven to be an important regulatory tool for preventing and/or reducing losses to the deposit insurance fund. The FDIC has issued cross-guarantee assessments in nearly a dozen cases resulting in recovery of about a third of its estimated losses in those cases. The FDIC has also used its cross-guarantee authority to facilitate the sale or recapitalization (or both) of dozens of troubled banks. In at least two dozen cases, the FDIC was able to use its discretionary authority to grant conditional waivers from cross-guarantee liabilities in exchange for over $700 million in capital commitments to troubled bank subsidiaries. Finally, anecdotal evidence suggests that the cross-guarantee authority has given the FDIC (and other bank regulators as well) a credible means with which to persuade the management of MBHCs (and their stockholders) to dispose of a problem bank subsidiary before it fails. In this respect, the cross-guarantee authority has evolved into an effective supervisory tool as well as an important mechanism for reducing losses to the deposit insurance fund during the failed-bank resolution process. Nevertheless, the declining numbers of multibank holding companies and structural changes within MBHC themselves, suggest that in certain respects, the loss-sharing benefits of the cross-guarantee may be less significant than they have been in the past.

VI. APPENDICES

Appendix A: FDI Act: Section 38, Prompt Corrective Action
Appendix B: Cross-Guarantee Cases

APPENDIX A

FDI Act: Section 38, Prompt Corrective Action (codified 12 USC 1831o)

The prompt corrective action (PCA) provisions of the Federal Deposit Insurance Corporation Improvement Act (FDICIA) were intended to minimize losses to the deposit insurance funds by requiring federal banking regulators to promptly

and forcefully respond to an insured depository institution's deteriorating financial condition and possible failure. Section 38 provisions require federal regulators to institute actions whenever an institution fails to meet minimum capital levels.

More specifically, section 38(c) created a capital-based framework for bank and thrift supervision that places a depository institution into one of five capital categories. Table A.1 shows the minimum capital levels for each of the five categories defined by section 38(c). Institutions are considered *undercapitalized* if their ratios fall below 8 percent Total Risk-Based Capital or 4 percent Tier 1 Risk-Based Capital or 4 percent Leverage Capital. Institutions that do not meet these minimum capital requirements are subject to increasingly restrictive and prescriptive supervisory actions. For example, section 38(e) mandates that federal regulators require *undercapitalized* depository institutions to (1) submit capital restoration plans; (2) restrict growth of assets; and (3) obtain prior approval for additional acquisitions, branches, and new lines of business. Under section 38(f), depository institutions that are classified as *significantly undercapitalized* face additional restrictions on transactions with affiliates and interest rates paid on deposits. When an institution becomes *critically undercapitalized*, federal regulators must, within 90 days, either appoint the FDIC as receiver or take other action to minimize potential losses to the deposit insurance fund.

Definitions

Leverage Capital Ratio—Tier 1 risk-based capital divided by [average total assets less disallowed intangibles].

Risk-Weighted Assets—Assets adjusted for risk-based capital definitions that include on-balance-sheet items as well as off-balance-sheet items multiplied by risk weights that range from zero to 100 percent.

Tangible Equity—Tier 1 capital plus outstanding cumulative perpetual preferred stock less all intangible assets except mortgage-servicing assets.

Tier 1 Risk-Based Capital Ratio—Tier 1 capital divided by total risk-weighted assets.

Tier 1 Capital—Also known as core capital; the sum of common stockholders' equity (common stock and related surplus, undivided profits, disclosed capital reserves, foreign currency translation adjustments, less net unrealized losses on available-for-sale securities with readily determinable market values), noncumulative perpetual preferred stock, and minority interest in consolidated subsidiaries, minus intangible assets, identified losses, investments in securities subsidiaries subject to 337.4, and deferred tax assets in excess of the limit set forth in section 325.5(g) of the FDIC's rules and regulations.

Total Risk-Based Capital Ratio—Total reported risk-based capital divided by total risk-weighted assets.

Table A.1: Capital Categories and Ratios Defined for Prompt Corrective Action Provisions

Capital Category	Total Risk-Based Capital Ratio	Tier 1 Risk-Based Capital Ratio	Leverage Capital Ratio
Well capitalized	10 percent or more and	6 percent or more and	5 percent or more
Adequately capitalized	8 percent or more and	4 percent or more and	4 percent or more
Undercapitalized	Less than 8 percent or	Less than 4 percent or	Less than 4 percent
Significantly Undercapitalized	Less than 6 percent or	Less than 3 percent or	Less than 3 percent
Critically Undercapitalized	An institution is critically undercapitalized if its tangible equity is 2 percent or less regardless of its other capital ratios.		

Source: Section 38 of the FDI Act and 57 Federal Register 44866–01.

Table B.1: Cross-Guarantee-Related Failures, Assessments, and Recoveries

Name of Institution	Location	Date of Failure	Original Loss Estimate	Cross-Guarantee Assessment	Cross-Guarantee Recovery	Final Loss to the BIF
TransTexas Bancshares						
First State Bank (1)	Pflugerville, TX	8/24/1989	5,823,000	na	na	8,778,425
First National Bank of Canton	Canton, TX	na	na	5,823,000	waiver (4)	na
Greater Texas Bancorporation						
Greater Texas Bank Southwest (1)	Austin, TX	11/30/1989	7,658,000	na	na	4,032,499
First National Bank of San Marcos (2)	San Marcos, TX	1/4/1990	22,891,238	0	0	22,822,907
First National Bank of Georgetown (2)	Georgetown, TX	5/17/1990	19,050,513	7,658,000	0	40,534,986
Bank of New England Corp.						
Bank of New England (1)	Boston, MA	1/6/1991	1,015,900,000	na	na	573,422,751
Connecticut Bank and Trust (3)	Hartford, CT	1/6/1991	783,554,000	378,015,000	0	1,258,111,680
Maine National Bank (3)	Portland, ME	1/6/1991	112,550,000	98,985,000	29,685,602	66,394,517
The One Bancorp						
Maine Savings Bank (1)	Portland, ME	2/1/1991	143,855,000	na	na	10,146,518
Southstate Bank for Savings (2)	Brockton, MA	4/24/1992	15,800,000	0	0	10,457,323
The Bank of Hartford (2)	Hartford, CT	6/10/1994	0	285,873,000	0	295,688,750
Premier Bancshares of Texas						
Texas Premier Bank of Victoria	Victoria, TX	6/13/1991	1,750,000	na	na	1,245,218
Bank of Kerrville	Kerrville, TX	na	na	1,340,000	1,340,000	0
The First Coastal Corporation (5)						
Suffield Bank (1)	Suffield, CT	9/6/1991	88,419,000	na	na	83,633,087
Coastal Savings Bank	Portland, ME	na	na	89,804,637	settlement	na

(Continued)

Table B.1: *(Continued)*

Name of Institution	Location	Date of Failure	Original Loss Estimate	Cross-Guarantee Assessment	Cross-Guarantee Recovery	Final Loss to the BIF
Southeast Banking (5)						
Southeast Bank (1)	Miami, FL	9/19/1991	143,000,000	na	na	0
Southeast Bank of West Florida (3)	Pensacola, FL	9/19/1991	0	143,000,000	143,000,000	0
Cenvest						
Central Bank (1)	Meriden, CT	10/18/1991	151,852,000	na	na	242,063,008
Meriden Trust and Safe Deposit	Meriden, CT	7/7/1994	na	151,852,000	7,987,415	143,362,134
First City Corporation (5)						
First City - Dallas (1)	Dallas/Houston	10/30/1992	144,600,000	na	na	0
First City - Houston (1)	Dallas/Houston	10/30/1992	288,000,000	na	na	0
First City - Beaumont (3)	Beaumont, TX	10/30/1992	5,100,000	26,105,000	26,105,000	0
First City - Bryan (3)	Bryon, TX	10/30/1992	0	26,105,000	26,105,000	0
First City - Graham (3)	Graham, TX	10/30/1992	132,000	26,105,000	26,105,000	0
First City - Lufkin (3)	Lufkin, TX	10/30/1992	2,651,000	26,105,000	26,105,000	0
First City - Madisonville (3)	Madisonville, TX	10/30/1992	967,000	26,105,000	26,105,000	0
First City - Midland (3)	Midland, TX	10/30/1992	7,219,000	26,105,000	26,105,000	0
First City - Orange (3)	Orange, TX	10/30/1992	3,695,000	26,105,000	26,105,000	0
First City - San Angelo (3)	San Angelo, TX	10/30/1992	2,518,000	26,105,000	26,105,000	0
First City - Tyler (3)	Tyler, TX	10/30/1992	5,100,000	26,105,000	26,105,000	0
First City - Sour Lake (3)	Sour Lake, TX	10/30/1992	220,000	26,105,000	26,105,000	0
First City - Austin (3)	Austin, TX	10/30/1992	28,000,000	26,105,000	26,105,000	0

(Continued)

Table B.1: *(Continued)*

Name of Institution	Location	Date of Failure	Original Loss Estimate	Cross-Guarantee Assessment	Cross-Guarantee Recovery	Final Loss to the BIF
First City - Lake Jackson (3)	Lake Jackson, TX	10/30/1992	914,000	26,105,000	26,105,000	0
First City - El Paso (3)	El Paso, TX	10/30/1992	18,100,000	26,105,000	26,105,000	0
First City - Kountze (3)	Kountze, TX	10/30/1992	0	26,105,000	26,105,000	0
First City - Alice (3)	Alice, TX	10/30/1992	2,207,000	26,105,000	26,105,000	0
First City - Aransas Pass (3)	Aransas Pass, TX	10/30/1992	2,977,000	26,105,000	26,105,000	0
First City - Corpus Cristi (3)	Corpus Cristi, TX	10/30/1992	4,000,000	26,105,000	26,105,000	0
First City - San Antonio (3)	San Antonio, TX	10/30/1992	18,400,000	26,105,000	26,105,000	0
Eastland Financial Corporation						
Eastland Savings Bank (1)	Woonsocket, RI	12/11/1992	47,835,000	na	na	10,303,042
Eastland Bank (3)	Woonsocket, RI	12/11/1992	0	47,835,000	650,556	16,925
Ameritex Bancshares Corporation						
American Bank of Haltom City (1)	Haltom City, TX	2/5/1993	9,799,000	na	na	14,480,026
American Bank of Commerce	Grapevine, TX	na	na	0	waiver (4)	na
Riverbend Bank	Fort Worth, TX	na	na	3,607,000	waiver (4)	na
TOTAL			2,048,491,000	1,683,682,637	652,553,573	2,785,493,795

Notes:
1) Name of institution whose failure resulted in cross-guaranty being applicable.
2) Institution failed on its own accord, not related to cross-guaranty assessment.
3) Institution failed simultaneously because of cross-guaranty assessment.
4) Cross-guarantee assessment was waived; see Table B.2 for details.
5) The case was litigated and a settlement was reached.

Table B.2: The Disposition of Actual and Potential Cross-Guaranty Liability in Selected Cases

Holding Company	Failed Bank	Date of Failure	Affiliated Institution(s)	Potential or Actual Cross-Guaranty Assessment	Disposition of Potential Liability
TransTexas Bancshares Beaumont, TX	First State Bank Pflugerville, TX	8/24/89			First State Bank of Pflugerville was sold via a purchase and assumption transaction (P&A) for a premium of $26,000—reducing the estimated $5.85 million loss to the amount assessed against FNB of Canton.
			First National Bank of Canton Canton, TX	$5,823,000 (actual)	The First National Bank of Canton received a waiver of its cross-guaranty liability in order to preserve the value of a TransTexas promissory note held by the Special Asset Bank of NCNB, TX (the FDIC held 51percent of NCNB). The $7.6 million note was eventually sold for $871,000. The FDIC determined the sale value of the note was greater than the potential recovery from the sale or liquidation of an insolvent FNB of Canton.

(Continued)

Table B.2: *(Continued)*

Holding Company	Failed Bank	Date of Failure	Affiliated Institution(s)	Potential or Actual Cross-Guaranty Assessment	Disposition of Potential Liability
BancTexas Group Dallas, TX	BancTexas -Dallas	1/26/90		$63,784,000	
			BancTexas – McKinney BancTexas – Houston		Conditional waiver issued; in exchange the two institutions received capital injections totaling $7,450,000 and the FDIC was granted warrants convertible into 51percent of BancTexas Group's common stock.
Northway Bancshares Dallas, TX	Northway National Bank Dallas, TX	2/15/90		$8,178,000	
			Richardson National Bank Richardson, TX		Bank failed of its own accord on 5/03/90.
			Great Western National Bank Lewisville, TX		Bank failed of it own accord on 9/27/90.
Schreiner Bancshares Kerrville, TX	Chas. Schreiner Bank Kerrville, TX	4/19/90		$53,636,000	

(Continued)

Table B.2: *(Continued)*

Holding Company	Failed Bank	Date of Failure	Affiliated Institution(s)	Potential or Actual Cross-Guaranty Assessment	Disposition of Potential Liability
			Southwest National Bank, Austin, TX		Bank failed of its own accord on 6/28/90.
			Ingram National Bank, Ingram, TX		Bank failed of its own accord on 9/24/90.
			First State Bank Bandera, TX		Conditional waiver issued; estimates indicated an additional loss of $4.4 million to the FDIC if First State Bank were to fail. The waiver allowed for sale of the bank with approximately $350,000 of the proceeds paid to the FDIC.
National Bancshares Corporation of TX Laredo, TX	9 subsidiaries	6/01/90		$617,084,000	
			3 affiliates—Eagle Pass, Laredo, Rockdale		Conditional waiver issued for all three institutions as part of a broader settlement in which the holding company agreed to inject $1.5 million in additional capital into the banks.
United Bankers, Inc. Waco, TX	United Bank of Waco Waco, TX	8/02/90		$45,698,000	

(Continued)

Table B.2: *(Continued)*

Holding Company	Failed Bank	Date of Failure	Affiliated Institution(s)	Potential or Actual Cross-Guaranty Assessment	Disposition of Potential Liability
			Farmers State Bank of Madisonville Madisonville, TX		Waiver denied (8/14/90). The FDIC considered recapitalization of the bank to be improbable and failure likely in the near term. No evidence that deposit insurance fund losses would be increased by denying waiver. Bank failed of its own accord on 11/20/90.
Washington Bancorporation Washington, D.C.	The National Bank of Washington Washington, D.C.	8/10/90		$528,973,000	
			The Washington National Bank Washington, D.C.		Bank failed of its own accord on 5/10/91; waiver request returned.
			The Washington Bank Fairfax, VA		Conditional waiver approved on 11/26/91 to facilitate the sale and recapitalization of the bank. The buyers injected $4 million in new capital and the FDIC received payments of $80,750 to offset losses from the failure of the other affiliates. The bank eventually failed of its own accord (9/18/92).

(Continued)

Table B.2: *(Continued)*

Holding Company	Failed Bank	Date of Failure	Affiliated Institution(s)	Potential or Actual Cross-Guaranty Assessment	Disposition of Potential Liability
The One Bancorp Brockton, MA	Maine Savings Bank Portland, ME	2/01/91		$143,855,000	
			SouthState Bank for Savings Brockton, MA		SouthState failed of its own accord on 4/24/92 with an additional estimated loss of $15,848,000 to the BIF.
			The Bank of Hartford Hartford, CT	$285,848,000 (actual)	Prolonged negotiations for settlement ceased when the bank failed of its own accord on 6/10/94.
First Coastal Corporation Portland, ME	Suffield Bank Suffield, CT	9/06/91	Coastal Savings Bank Portland, ME	$89,804,637 (actual)	Settlement agreement signed on 11/24/94 wherein the bank would receive an immediate capital contribution of $200,000 and the FDIC would receive non-voting perpetual preferred stock that would represent, on conversion, 95 percent of the common shares of the bank—stock sold later at par but the FDIC earned $1.3 million in dividends.

(Continued)

Table B.2: *(Continued)*

Holding Company	Failed Bank	Date of Failure	Affiliated Institution(s)	Potential or Actual Cross-Guaranty Assessment	Disposition of Potential Liability
Ameritex Bancshares Corporation Fort Worth, TX	American Bank of Haltom City Haltom City, TX	2/05/93		$9,799,000	American Bank of Haltom City was resolved through a P&A transaction that was deemed least costly to the deposit insurance funds. The sale was estimated to save $2.5 million in losses vs. a liquidation and deposit payoff.
			American Bank of Commerce Grapevine, TX		Conditional waiver granted to facilitate the sale of the bank. The FDIC received $1.7 million in compensation for its interests in the bank.
			Riverbend Bank, NA Fort Worth, TX	$3,607,000 (actual)	First waiver request denied. Conditional waiver subsequently granted to facilitate the change of control and recapitalization of the bank. Controlling interest in Riverbend was eventually sold for $200,000 and an additional capital contribution of $110,000.

Table B.3: Cross-Guarantee-Related Cases—Conditional Waivers and Exemptions

Institution	Bank Holding Company	Date	Capital Commitments ($ millions)	Waiver Condition(s)
MBank – Corpus Christi, TX	MCorp	09/18/90	2.5	Waiver approved to facilitate sale conditions on injecting $2.5 million in capital to MBank – Waco.
MBank –Brownsville, TX	MCorp	12/18/90	13.0	Waiver approved to facilitate sale conditions on injecting $5.3 million in capital to Mbank – Waco and $7.7 million to Mbank – El Paso.
MNC Financial, Baltimore, MD	MNC Financial	01/14/91	290.0	Waiver approved in exchange for pledge to downstream $290 million to subsidiary banks (Maryland National Bank and American Security Bank).
MBank – Waco, TX	Ford Bank Group	05/28/91	15.0	Waiver approved to facilitate sale conditional on injection $15 million in additional capital.
MBank – El Paso, TX	MCorp	08/06/91	12.3	Waiver approved to facilitate sale and recapitalization of MBank – El Paso with conditions to inject $12 million in additional capital to MBank – El Paso and $300,000 to MBank-New Braunfels.
Republic National Bank, Phoenix, AZ	Dakota Bankshares	03/13/91	1.0	Granted conditional waiver for sale of Republic National Bank to Dakota Bancshares in exchange for a capital injection of $1 million.
Independence Bank, Los Angeles, CA	Pharaon/BCCI	09/27/91	100.0	Waiver approved to secure $100 million in new capital for Independence Bank from the frozen assets of BCCI.
Southshore Bank of Chicago, Chicago, IL	na	10/09/91	2.0	Waiver approved to facilitate a $2 million recapitalization of Douglas Bank, KS; Douglas Bank is a minority-owned institution.
First State Bank, Overton, TX	Overton Financial	11/05/91	0.0	Waiver approved to facilitate purchase of Lindale State Bank, Lindale, TX.

(Continued)

Table B.3: *(Continued)*

Institution	Bank Holding Company	Date	Capital Commitments ($ millions)	Waiver Condition(s)
State Home State Savings Bank, FSB, Bowling Green, OH	U.S. Thrift Opportunity Partners	11/05/91	14.0	Waiver granted to facilitate the sale and recapitalization of State Home Savings Bank; purchase price of $14 million.
Palisade Savings Bank, Ridgefield Park, NJ	U.S. Thrift Opportunity Partners	11/05/91	12.0	Waiver granted to facilitate the purchase and recapitalization of Palisade Savings Bank; purchase price of $12 million.
Banco Santander Puerto Rico, San Juan, PR	Banco de Santander	12/19/91	200.0	Waiver granted to secure recapitalization of First Fidelity Bancorp, Newark, NJ.
Keystone Holdings, Ft. Worth, TX	Keystone Holdings	04/07/92	0.0	Waiver approved to facilitate purchase of 15 percent of the common stock of Family Savings Bank, FSB, Los Angeles, CA.
First Fidelity Bancorp, Lawrenceville, NJ	First Fidelity Bancorp	09/30/92	0.0	Waiver granted to facilitate purchase of Howard Savings Bank, Newark, NJ; this is a loss-sharing transaction that the FDIC determined to be necessary and least costly.
Peoples State Bank, Clyde, TX	na	10/06/92	0.0	Waiver approved to facilitate sale of Freedom Bank of Ranger, TX; a subsidiary of Freedom Bank Group, which is in default; first case of open bank assistance since FDICIA; FDIC contributes $360,970 in cash in exchange for 50 percent of the collections from all charged-off debts.
Moultrie National Bank, Moultrie, GA	na	12/15/92	0.0	Waiver approved in exchange for consulting, support services, and a purchase option.

(Continued)

Table B.3: *(Continued)*

Institution	Bank Holding Company	Date	Capital Commitments ($ millions)	Waiver Condition(s)
Pacific First Bank, FSB, Seattle, WA	Hees International Bancorp	12/22/92	30.0	Waiver approved to facilitate purchase of Pacific First Bank and to obtain a $30 million recapitalization of Lincoln Savings Bank, NY, NY.
First American Metro Corporation, McLean, VA	First Union Corporation	06/11/93	0.0	Waiver approved to facilitate sale to First Union Corporation.
Winters State Bank, The Winters, TX	Independence Bancshares	08/17/93	0.45	Waiver approved to facilitate sale in exchange for $450,000 in additional capital injection.
White County Bank, Cleveland, GA	White County Bancshares	07/26/94	2.85	Waiver approved to facilitate change in control and to obtain a $2.85 capital million injection.
Peoples Savings Bank, New Britain, CT	na	11/01/94	7.8	Waiver approved to facilitate the P&A of New Meriden Trust and Safe Deposit Company—a bridge bank. The purchase price included a premium of $7.8 million.
First State Bank of El Dorado, El Dorado, IL	El Dorado Bancshares	07/22/97	2.0	Waiver approved to facilitate sale wherein El Dorado Bancshares agrees to inject $2 million in capital to First National Bank of Dana, Dana, IN.
Western American National Bank, Bedford, TX	First Baird Bancshares	08/11/98	5.0	Waiver approved to facilitate sale wherein First Baird Bancshares injects $5 million in equity into Western American National Bank, Deford, TX.
American Bank Holding Corporation, Corpus Christi, TX	American Bank Holding Co.	01/13/04	0.0	Waiver issued to facilitate sale of First National Bank of Goliad, Goliad, TX.
TOTAL			709.90	

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VIII. NOTES ON CONTRIBUTORS/ACKNOWLEDGMENTS

Christine M. Bradley is Senior Policy Analyst at the Federal Deposit Insurance Corporation, Division of Insurance and Research.

Kenneth D. Jones is Senior Financial Economist, at the Federal Deposit Insurance Corporation, Division of Insurance and Research

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