FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Statement.

SUMMARY: The FDIC has adopted a statement of policy which sets forth when the FDIC will assert the federal common-law doctrine enunciated by the Supreme Court in *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447 (1942) and when the FDIC will assert the statutory protections set forth in 12 U.S.C. 1821(d)(9)(A) and 1823(e).

EFFECTIVE DATE: February 4, 1997.

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Introduction

The protection of the FDIC against unrecorded agreements or arrangements between a federally-insured depository institution (institution) and third parties is among the most important, long-standing, and powerful protections afforded the FDIC acting in either its corporate liquidator capacity (FDIC/Corporate) or in its capacity as a receiver for a failed institution (FDIC/Receiver). This statement of policy is intended to inform persons doing business with an institution of the circumstances in which: (1) The statutory provisions (12 U.S.C. 1821(d)(9)(A), 1823(e)); and (2) the rule enunciated by the Supreme Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), will be asserted by the FDIC to bar certain agreements or arrangements entered into with the institution prior to receivership. Published as an addendum are ''Guidelines For Use of *D'Oench* and Statutory Provisions'' (Guidelines), which are discretionary and evolving by nature but nevertheless will serve to moderate the circumstances in which the FDIC will exercise these protections.

Background

More than fifty years ago, the Supreme Court in *D'Oench* first recognized a federal policy of protecting FDIC/Corporate from unrecorded schemes or arrangements that would tend to mislead banking authorities. The Court articulated a rule of law prohibiting a party who had lent himself or herself to such a scheme or arrangement from asserting against the FDIC an unrecorded agreement. This rule of law, as it subsequently has been applied by the courts, is referred to as the ''*D'Oench* doctrine''.

In 1950, Congress enacted section 13(e), codified at 12 U.S.C. 1823(e) (section 1823(e)), as part of the Federal Deposit Insurance Act of 1950, ch. 967, Section 2[13](e), 64 Stat. 889 (81st Cong., 2d Sess. 1950). The strict approval and recording requirements of section 1823(e) supplemented the protection afforded by the *D'Oench* doctrine. In 1982, this section was reenacted by Congress as part of the Garn-St. Germain Depository Institution Act of 1982, Pub. L. 97–320, Section 113(m), 96 Stat. 1474. Both before and after 1982 the federal courts of appeals and federal district courts consistently construed section 1823(e) and the *D'Oench* doctrine in tandem.

In August 1989, as part of the Financial Institution Reform, Recovery and Enforcement Act (FIRREA), Public Law 101–73, 103 Stat. 183, Congress expanded section 1823(e) to cover defenses raised against the FDIC in its receivership capacity, the newly created Resolution Trust Corporation (in its corporate and receivership capacities) and bridge banks. In relevant part, section 1823(e) now provides:

No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

(A) Is in writing,

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

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

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

12 U.S.C. 1823(e)

In addition, FIRREA added a new provision, section 11(d)(9)(A) (codified at 12 U.S.C. 1821(d)(9)(A) (section 1821(d)(9)(A)), which states, in relevant part, that ''any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC in its corporate capacity].''

In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, subject to the Guidelines,[1] these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

More specifically, the statutory definition of the scope of agreements to which section 1823(e) applies—*i.e.*, those agreements ''which tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it'' (section 1823(e))—is *not* a ''requirement'' that section 1823(e) imposes on those agreements, which if not ''met'' renders section 1821(d)(9) inapplicable. There is no reason to suppose that Congress intended the scope of section 1821(d)(9)(A) to be coextensive with that of section 1823(e).

Section 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC because the function of that section is to bar certain defenses to the FDIC's collection on such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC. It does so in order to affect primary conduct by providing an incentive for parties contracting with institutions to document their transactions thoroughly. That in turn: (1) Allows federal and state bank examiners to rely on an institution's records in evaluating its worth; and (2) ensures mature consideration of unusual banking transactions by senior bank or thrift officials and prevents the fraudulent insertion of new terms when an institution appears headed for failure. *Cf. Langley* v. *FDIC,* 484 U.S. 86, 91–92 (1987).

In interpreting the meaning of ''agreement'' in section 1823(e) prior to its amendment in 1989, the Supreme Court in *Langley* held that it would disserve the policies recognized in *D'Oench* to interpret section 1823(e) in a more restricted manner than *D'Oench* itself: ''We can safely assume that Congress did not mean 'agreement' in section 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the

[1] The Guidelines have been in effect since late 1994.

principle of the leading case applying that term to FDIC-acquired notes.'' *Langley,* 484 U.S. at 92–93. In the same way, it would disserve the policies recognized in *D'Oench* and *Langley* to interpret section 1821(d)(9)(A) more narrowly than *D'Oench* has been applied in so-called no-asset cases.[2]

Nevertheless, as reflected in the Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of section 1823(e). To that end, the FDIC will continue to assert the protections of the *D'Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1823(e)) only in accordance with the Guidelines.

The FDIC has also determined, after careful consideration, that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) cannot be applied retroactively to alleged agreements or arrangements entered into before the enactment of FIRREA on August 9, 1989. Following the Supreme Court's decision in *Landgraf* v. *USI Film Products,* 511 U.S. 244, 114 S. Ct. 1483 (1994), the courts of appeals that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the transactions at issue occurred before FIRREA's enactment.[3]

No provision within FIRREA addresses the temporal reach of section 1821(d)(9) or section 1823(e)(as amended by FIRREA). If the courts were to apply those provisions to agreements made before the statute was enacted, that would alter the rights possessed by the parties to such agreements.[4] Under the principles articulated by the Supreme Court in *Landgraf,* Congress must therefore be presumed to have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA.[5] Thus, because the statutory provisions establish ''a categorical recording scheme'' (see *Langley,* 484 U.S. at 95) and *D'Oench* is an equitable doctrine (*id.* 93–95), sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) cannot be applied retroactively.

Accordingly, the statement of policy announces that the FDIC will assert the *D'Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D'Oench* doctrine. For claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). In either case, these protections will be asserted only in keeping with the Guidelines.

FDIC Statement of Policy

1. Because sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) do not apply to agreements entered into before the effective date of FIRREA (August 9, 1989), such agreements are governed by pre-FIRREA law, including section 1823(e) and the *D'Oench* doctrine.

2. Agreements made after the enactment of FIRREA are governed by sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA).

3. This statement of policy does not supersede the FDIC's Statement of Policy Regarding Treatment of Security Interests After Appointment of the FDIC as Conservator or Receiver of March 23, 1993 (58 FR 16833).

By order of the FDIC Board of Directors.

Dated at Washington, DC, this 4th day of February, 1997.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

Addendum—FDIC Guidelines for Use of D'Oench and Statutory Provisions

1. *Purpose.* To set forth guidelines for the use of the *D'Oench* doctrine and in 12 U.S.C. 1821(d)(9)(A), 1823(e) (statutory provisions).

2. *Scope.* This directive applies to all Service Centers and Consolidated Offices, to all future Servicers and, to the extent feasible, to all current Servicers.

3. *Responsibility.* It is the responsibility of the FDIC Regional Directors of the Division of Resolutions and Receiverships (DRR) and Regional Counsel of the Legal Division (Legal) to ensure compliance with applicable directives by all personnel in their respective service centers.

4. *Background*

a. *D'Oench* Doctrine

In an effort to protect the federal deposit insurance funds and the innocent depositors and creditors of insured financial institutions (institution(s)), the Supreme Court in the case of *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447 (1942) adopted what is commonly known as the *D'Oench* doctrine. This legal doctrine provides that a party who lends himself or herself to a scheme or arrangement that would tend to mislead the banking authorities cannot assert defenses and/or claims based on that scheme or arrangement.

b. Sections 1821(d)(9)(A) and 1823(e)

In 1950, Congress supplemented the *D'Oench* doctrine with 12 U.S.C. 1823(e) which bars any agreement which ''tends to diminish or defeat the interest of the [FDIC] in any asset'' unless the agreement satisfies all four of the following requirements: (1) It is in writing; (2) it was executed by the depository institution and any person claiming an adverse interest under the agreement contemporaneously with the acquisition of the asset; (3) it was approved by the board of directors of the institution or its loan committee as reflected in the minutes of the board or committee; and (4) it has been continuously an official record of the institution.

In FIRREA, Congress added 12 U.S.C. 1821(d)(9)(A) which protects the FDIC against all claims which do not meet the enumerated requirements of section 1823(e).

c. Policy Considerations

The *D'Oench* doctrine and the statutory provisions embody a public policy designed to protect diligent creditors and innocent depositors from bearing the losses that would result if claims and defenses based on undocumented agreements could be enforced against a failed institution. The requirement that any arrangement or agreement with a failed institution must

[2] Two courts of appeals have applied section 1821(d)(9)(A) in a more constricted manner. See *John* v. *RTC,* 39 F.3d 773, 776 (7th Cir. 1994); and *Thigpen* v. *Sparks,* 983 F.2d 644 (5th Cir. 1993). Both of these cases involved pre-FIRREA facts and, consequently, as discussed *infra,* sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) were inapplicable. Moreover, in any future case involving similar post-FIRREA facts, any decision to raise the statutory protections would have to be authorized pursuant to the Guidelines, which were not in use at the time these cases were litigated.

[3] *See Oklahoma Radio Assocs.* v. *FDIC,* 987 F.2d 685, 695–96, *motion to vacate denied,* 3 F.3d 1436 (10th Cir. 1993); *Murphy* v. *FDIC,* 38 F.3d 1490, 1501 (9th Cir. 1994) (*en banc*) (noting FDIC's concession in that regard).

[4] Before FIRREA, a borrower could assert an affirmative claim against the FDIC or FSLIC, or a defense against FDIC/Receiver or the FSLIC, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench,* 315 U.S. at 460.

[5] The retroactivity of FIRREA, however, is not determined on an all-or-nothing basis. There is no ''reason to think that all the diverse provisions of the [statute] must be treated uniformly for'' purposes of the retroactivity analysis. *Landgraf* v. *USI Film Prods.,* 511 U.S. at 280, 114 S. Ct. at 1505. Moreover, ''[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.'' *Landgraf,* 511 U.S. at 270, 114 S. Ct. at 1499.

be in writing allows banking regulators to conduct effective evaluations of open institutions and the FDIC to accurately and quickly complete resolution transactions for failed institutions. This requirement also places the burden of any losses from an undocumented or ''secret'' arrangement or agreement on the parties to the transaction, who are in the best position to prevent any loss.

Although the *D'Oench* doctrine and the statutory provisions generally promote essential public policy goals, overly aggressive application of the specific requirement of these legal doctrines could lead to inequitable and inconsistent results in particular cases. In order to ameliorate this possibility, the FDIC has undertaken development of these guidelines and procedures to promote the exercise of sound discretion in the application of *D'Oench* or the statutory provisions.

5. *Guidelines*

These guidelines are intended to aid in the review of matters where the assertion of *D'Oench* or the statutory provisions is being considered. The examples given are intended to give clear direction as to when particular issues must be referred. In particular, if the use of *D'Oench* or the statutory provisions is proposed in a DRR—Operations matter within the categories set forth below, the matter and recommendation must be referred to the Associate Director—Operations for approval through the procedures contained in section 6.

In the great majority of cases, however, it is anticipated that no resort to Washington should be necessary. It is only in the categories of cases highlighted in the guidelines that Washington approval must be obtained.

a. Pre-Closing Vendors

D'Oench or the statutory provisions shall not be used as a defense against claims by vendors who have supplied goods and/or services to failed institution pre-closing when there is clear evidence that the goods/services were received. In such case, *D'Oench* or the statutory provisions shall not be asserted whether or not there are written records in the institution's files confirming a contract for the goods and/or services.

This does not mean that *D'Oench* or the statutory provisions may never be asserted against a vendor, but only that each claim must be examined carefully on its facts. When there is no evidence that goods or services were received by the failed institution or in other appropriate circumstances, the defenses may be asserted after approval by Washington.

Examples Requiring Washington Approval:

1. Landscaping service filed claim for planting trees around the institution's parking lot. There is no contract for planting trees in the books and records of the institution, but there are trees around the parking lot and no record of any payment. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. A contingency fee attorney is unable to produce any contingency fee agreement, but there is evidence in the files that this attorney has been paid for his collection work for the past 20 years and his name appears on the court records for collection matters for which he has not been paid. In this example also, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. Contractor has construction contract with institution to renovate any property owned by the institution. At the time the institution fails, the contractor has completed 90% of the contract and is owed about 50% of the contract price. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

b. Diligent Party

D'Oench or the statutory provisions may not be asserted without Washington approval where the borrower or claimant took all reasonable steps to document and record the agreement or understanding with the institution and there is no evidence that the borrower or claimant participated in some activity that could likely result in deception of banking regulators, examiners, or the FDIC regarding the assets or liabilities of the institution. In particular, Washington approval is required before *D'Oench* or the statutory provisions may be asserted where the agreement is not contained in the institution's records, but where the borrower or claimant can establish by clear and convincing evidence that the agreement was properly executed by the depository institution through an officer authorized by the board of directors to execute such agreements, as reflected in the minutes of the board. Cases involving ''insiders'' of the depository institution require particularly careful review because of the greater opportunities of such parties to manipulate the inclusion of ''agreements'' within the institution's records.

Further, where it is clear that a borrower or claimant has been diligent in insisting on a written document in an apparently arms-length transaction, and had no control over the section 1823(e) requirement that the transaction be reflected in the Board of Directors' or Loan Committee minutes, assertion of the statutory provisions solely because the transaction is not reflected in those minutes may not be appropriate. In such cases, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

Examples Requiring Washington Approval:

1. Plaintiff sells a large parcel of land to the borrower of the failed institution and the property description in the failed institution's Deed of Trust mistakenly includes both the parcel intended to be sold and a parcel of property not included in the sale. Prior to the appointment of the receiver, the institution agrees orally to amend the Deed of Trust, and indeed sends a letter to the title company asking for the amendment. However, there is nothing in the books and records of the institution to indicate the mistake. The institution fails and the Deed of Trust has never been amended. The borrower defaults and the FDIC attempted to foreclose on both parcels. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. A limited partnership applies for refinancing. A commitment letter is issued by the institution to fund a non-recourse permanent loan which requires additional security of $1 million from a non-partner. The Board of Directors minutes reflects that approval is for a nonrecourse loan, however, the final loan documents, including the note, do not contain the nonrecourse provisions. The institution fails, the partnership defaults and it is determined that the collateral plus the additional collateral is approximately $3 million less than the balance of the loan. In a suit by the FDIC for the deficiency, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. A borrower completes payment on a loan, and he has cancelled checks evidencing that his loan has been paid off. The institution's records, however, do not document that the final payment has been tendered. The institution fails and the FDIC seeks to enforce the note. Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

However, if it is clear that the borrower or claimant participated in some fraudulent or other activity which could have resulted in deception of banking regulators or examiners, then *D'Oench* or the statutory provisions may be asserted without prior approval from Washington.

Examples Not Requiring Washington Approval:

1. Borrower signs a note with several blanks including the amount of the loan. An officer of the institution fills in the amount of the loan as $40,000. Bank fails, loan is in default, the FDIC sues to collect $40,000 and the borrower claims that he or she only borrowed $20,000. There is nothing in the institution's books and records to indicate the $20,000 amount, and, in fact, the institution's books and records evidence

disbursement of $40,000. *D'Oench* or the statutory provisions may be asserted.

2. Guarantor, an officer of the borrower corporation, signs a guaranty for the entire amount of a loan to the corporation. At the time of the institution's failure, the loan is in default and the corporation is in Chapter 7 bankruptcy. FDIC files suit against the guarantor for the entire amount of the loan. The guarantor claims that he has an agreement with the institution that he is only liable for the first $25,000. There is no record in the institution's files of such an agreement. Again, *D'Oench* or the statutory provisions may be asserted.

Where the specific facts of a case raise any question as to whether *D'Oench* or the statutory provisions should be asserted, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

c. Integral Document

If there are documents in the books and records of the institution which indicate an agreement under the terms asserted by the claimant or borrower, the use of *D'Oench* or the statutory provisions must be carefully evaluated. Particular care must be taken before challenging a claim or defense solely because it fails to comply with the 1823(e) requirement that the agreement be reflected in the minutes of the Board of Directors or Loan Committee. While any number of cases have held that the terms of the agreement must be ascertainable on the face of the document, in some circumstances it may be appropriate to consider all of the failed institution's books and records in determining the agreement, not just an individual document. Where the records of the institution provide satisfactory evidence of an agreement, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

Examples Requiring Washington Approval:

1. Note in failed institution's file is for one year term on its face. However, the loan application, which is in the loan file, is for five years renewable at one year intervals. The borrower also produces a letter from an officer of the institution confirming that the loan would be renewed on a sixty month basis with a series of one year notes. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. Debtor executes two notes with the proviso that there is no personal liability to the debtor beyond the collateral pledged. When the notes become due they are rolled over and consolidated into one note which recited that it is a renewal and extension of the original notes but does not contain the express disclaimer of personal liability. All three notes are contained together in one loan file. Here, all of the notes should be considered as part of the institution's records. In this example also, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

d. No Asset/Transactions Not Recorded in Ordinary Course of Business

The use of *D'Oench* or the statutory provisions should be limited in most circumstances to loan transactions and other similar ordinary banking transactions. If the ordinary banking transaction is not related to specific current or former assets, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in such cases. The application of *D'Oench* or the statutory provisions also should be carefully considered before it is asserted in opposition to a tort claim, such as negligence, misrepresentation or tortious interference with business relationships, where the claim is unrelated to a loan or ordinary banking transaction or to a transaction creating or designed to create an asset. Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in such cases.

Examples Requiring Washington Approval:

1. Three years before failure the institution sells one of its subsidiaries. The institution warrants that the subsidiary has been in ''continuous and uninterrupted status of good standing'' through the date of sale. The buyer in turn attempts to sell the subsidiary and discovers that the subsidiary's charter has been briefly forfeited. The prospective buyer refuses to go through with the sale and the original buyer sues the institution for breach of warranty. FDIC is appointed receiver. This transaction does not involve a lending or other banking financial relationship between the institution and the buyer. In addition, the subsidiary is not an asset on the books of the institution at the time of the receivership. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. In the case described above in the diligent party section, where the property description in the failed institution's Deed of Trust mistakenly includes a parcel not included in the sale, the parcel at issue is not an actual asset of the failed institution and the assertion of *D'Oench* or the statutory provisions is not be appropriate. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

However, if a claim arises out of an asset which was involved in a normal banking transaction, such as a loan, *D'Oench* or the statutory provisions would be properly asserted against such a claim despite the fact that the asset no longer exists. For example, collection on the asset does not preclude the use of *D'Oench* or the statutory provisions in response to claims by the former debtor related to the transaction creating the asset.

Example Not Requiring Washington Approval:

1. A borrower obtains a loan from an institution, secured by inventory and with an agreement that allows the institution to audit the business. The business fails, the institution sells the remaining inventory, and applies the proceeds of the sale to the business's debt. Borrower sues the institution for breach of oral agreements, breach of fiduciary duty, and negligence in performance of audits of the business. Borrower then pays off remaining amount of loan and continues the lawsuit. The institution subsequently fails. Despite borrower's argument that there is no asset involved since the debt has been paid, assertion of *D'Oench* or the statutory provisions would be appropriate.

e. Bilateral Obligations

The facts must be examined closely in matters where the agreement which the FDIC is attempting to enforce contains obligations on both the borrower or claimant and the failed institution and the borrower or claimant is asserting that the institution breached the agreement. If the failed institution's obligation is clear on the face of the agreement and there are documents supporting the claimed breach which are outside the books and records of the institution, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

f. Statutory Defenses

The appropriateness of using *D'Oench* or the statutory provisions to counter statutory defenses should be evaluated on a case by case basis. Although many such defenses may be based on an agreement that is not fully reflected in the books and records of the institution, a careful analysis should be made before asserting *D'Oench* or the statutory provisions. In such cases, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

The clearest examples of situations where assertion of *D'Oench* or the statutory provisions may be appropriate occur where the opposing party is relying on a statutory defense based upon some misrepresentation or omission by the failed institution. Examples of this type of statute are unfair trade practice statutes.

On the other hand, application of *D'Oench* or the statutory provisions may not be appropriate to oppose claims based on mechanics lien statutes or statutes granting other recorded property rights. The fact that all elements of those liens may not be reflected in the books and records of the institution should not control the application of *D'Oench* or the statutory provisions.

In analyzing the propriety of asserting the *D'Oench* or the statutory provisions, at least the following three general factors should be considered in preparation for seeking approval from Washington:

* To what extent is the purpose of the statute regulatory, rather than remedial? If the statute simply imposes regulatory or mandatory requirements for a transaction, such as a filing requirement or maximum fee for services, assertion of *D'Oench* or the statutory provisions is unlikely to be successful.
* To what extent is the application of the statute premised upon facts that are not reflected in the books and records of the institution? If the state statute requires the existence and/or maintenance of certain facts, but those facts are not recorded in the institution's records, then *D'Oench* or the statutory provisions may be applicable.
* To what extent do the facts involve circumstances where the opposing party failed to take reasonable steps to document some necessary requirement or participated in some scheme or arrangement that would tend to mislead the banking authorities.

Examples Requiring Washington Approval:

1. A priority dispute arises involving a mechanic's lien against property on which the FDIC is attempting to foreclose. An attempt to persuade a court that the mechanic's lien is a form of secret agreement under *D'Oench,* which, if given priority over the interests of the FDIC, will tend to diminish or defeat the value of the asset may not be appropriate. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. State law requires insurance companies doing business in the state to deposit funds with the Commissioner of Insurance. Further, the law provides that the deposit cannot be levied upon by creditors or claimants of the insurance company. An insurance company purchases a certificate of deposit from an institution and assigns it to the Commissioner. At the same time a document is executed entitled ''Requisition to the Bank'' which states that the institution would not release the CD funds without authorization of the Commissioner. Subsequently the insurance company borrows money from the institution. After the loan goes into default, the institution does not roll the CD over, but rather credits the proceeds to the loan account. The institution then fails and the Commissioner files a proof of claim with the FDIC seeking payment on the CD. The FDIC may not defend the suit by claiming that the assignment documents did not meet the requirements of section 1823(e). In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. The FDIC attempts to collect on a note which the failed institution acquired from a mortgage broker. The note is at a 15% interest rate and the mortgage broker charged six and one half points. State law provides that interest shall be no more than 13% and that no more than one point may be charged. The FDIC may not defend the borrower's counterclaim of a usurious loan by asserting *D'Oench* or the statutory provisions. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

g. Section 1823(e)'s Contemporaneous Requirement

This requirement of section 1823(e) may not be asserted to invalidate a good faith workout or loan modification agreement where the sole issue is whether the contemporaneous requirement of section 1823(e) is met. Where there is an agreement which otherwise satisfies the remaining requirements of the statute, but was not executed contemporaneously with the acquisition of the asset, in most circumstances the statutory provisions should not be asserted. This applies only to workouts or loan modifications done by the failed institution prior to receivership. The assertion of the section 1823(e) contemporaneous requirement should be considered principally where the facts demonstrate that the workout or restructure was entered into in bad faith and in anticipation of institution failure.

Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in these cases.

6. *Procedures To Obtain Washington Approval*

DRR Operations: When facts involving the possible assertion of *D'Oench* or the statutory provisions arise, Legal should be consulted. When the assertion of *D'Oench* or statutory provisions requires Washington approval, as outlined above, prior approval must be received from the Deputy Director—Operations or his designee in Washington in all such cases. Such approval must be obtained by preparation of a memorandum identifying the facts of the case forwarded through Legal Division procedures to the Deputy Director—Operations or his designee.

DRR Asset Management: When facts involving the possible assertion of *D'Oench* or the statutory provisions arise, Legal should be consulted. When the assertion of *D'Oench* or the statutory provisions requires Washington approval, as outlined above, Legal Division procedures should be followed for referral to Washington. Washington Legal will consult with Washington DRR where appropriate.

Legal: Each attorney must carefully review the facts of each instance where the assertion of *D'Oench* or the statutory provisions is being considered under revised Litigation Procedure 3 (LP 3). All cases requiring consultation or approval within these Guidelines and/or PS must be referred to Washington pursuant to LP3 procedures.

These Guidelines are intended only to improve the FDIC's review and management of utilization of *D'Oench* or the statutory provisions. The Guidelines do not create any right or benefit, substantive or procedural, that is enforceable at law, in equity, or otherwise by any party against the FDIC, its officers, employees, or agents, or any other person. The Guidelines shall not be construed to create any right to judicial review, settlement, or any other right involving compliance with its terms.

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FEDERAL MARITIME COMMISSION

[Docket No. 97–02]

McKenna Trucking Company, Inc. v. Maersk Incorporated; Notice of Filing of Complaint and Assignment

Notice is given that a complaint filed by McKenna Trucking Company, Inc. (''Complainant'') against Maersk Incorporated (''Respondent'') was served February 5, 1997. Complainant alleges that Respondent has violated sections 10(b)(1), (4), (6), (10), (11), and (12) of the Shipping Act of 1984, 46 U.S.C. app. sections 1709(1), (4), (6), (10), (11), and (12), by receiving rebates of intermodal trucking charges, thereby charging, demanding, collection and receiving greater compensation for the transportation of property than the rates shown in its service contracts, and subjecting complainant to an unreasonable refusal to deal, while continuing to charge shippers the higher, listed rate as a portion of the total through rate.

This proceeding has been assigned to the Office of Administrative Law Judges. Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61, and only after consideration has been given by the parties and the presiding officer to the use of alternative forms of dispute resolution. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on