Corporation, with the approval of the Board of Directors of the [FDIC], shall assess against each Savings Association Insurance Fund member an assessment (in the same manner as assessments are assessed against such members by the [FDIC] under section 7 of the FDI Act * * *

12 U.S.C. 1441(f)(2) (emphasis added).

Section 21(k)(1) of the FHLB Act defines the term "Savings Association Insurance Fund member" as "a savings association which is a Savings Association Insurance Fund member as defined by section 7(l) of the FDI Act." 12 U.S.C. 1441(k)(1).

Thus, with the approval of the FDIC Board of Directors, FICO has the statutory authority to levy assessments against each "savings association which is a (SAIF) member." Read together, these statutory provisions limit FICO's assessment authority to an institution which is both a savings association and a SAIF member as defined in section 7(l) of the FDI Act.

II. An Oakar Bank Is Neither a Savings Association Nor a SAIF Member and Thus Is Not Subject to FICO Draws

A. An Oakar Bank Is Not a "Savings Association"

The term "savings association" is defined in the FHLB Act by reference to section 3 of the FDI Act. 12 U.S.C. 1422(9). In turn, section 3(b) of the FDI Act provides:

- (b) Definition of Savings Associations and Related Terms.
- (1) Savings Association.—The term "savings association" means—
 - (A) any Federal savings association;
- (B) any State savings association; and
- (C) any corporation (other than a bank) that the [FDIC] Board of Directors and the Director of the Office of Thrift Supervision jointly determine to be operating in substantially the same manner as a savings association.
- (2) Federal Savings Association.—The term "Federal savings association" means any Federal savings association or Federal savings bank which is chartered under section 5 of the Home Owners' Loan Act.
- (3) State Savings Association.—The term "State savings association" means—
- (A) any building and loan association, savings and loan association, or homestead association; or
- (B) any cooperative bank (other than a cooperative bank which is a State bank as defined in subsection (a)(2)),

which is organized and operating according to the laws of the State * * * in which it is chartered or organized.

12 U.S.C. 1813(b).

Pursuant to section 3 of the FDI Act, the term "bank" means any national bank, State bank, District bank, and any Federal branch and insured branch.

Although the FDI Act does not further define the term "bank," the FDIC,

throughout its history, has required that a State-chartered financial institution be chartered by its State of incorporation as a bank if that institution is to be regarded as a bank by the FDIC. In determining a financial institution's status as a bank rather than a savings association, the FDIC will generally look to the characterization of the institution by the laws under which the institution is created. An Oakar bank is an institution that pre-existed the merger or assumption in which it gained Oakarbank status and, prior to that merger or assumption, it was a "bank" in every way.

Whether or not the limitations contained in the moratorium provision (12 U.S.C. 1815(d)(2)) or the Oakar provision apply in any given situation depends solely on the fund membership of the participating institutions; neither provision specifically refers to the charter of a covered institution. Thus, the statutory language of the moratorium and the Oakar provisions does not provide any basis for concluding that a bank participating in an Oakar transaction thereby forfeits its bank charter and somehow becomes a savings association. In this regard, we note that the sponsor of the Oakar Amendment emphasized that the Amendment had been drafted with great care and further emphasized that the Amendment would benefit the SAIF. Rep. Oakar commented:

I am exceedingly proud of this language as it is and always was intended to utilize private capital from the bank holding companies to bolster the SAIF fund * * * [A]s we briefed staffs of the Senate Banking and House Banking Committees and they in turn, briefed their members, support for the amendment grew. This was due to the benefit to taxpayer[s] and to the SAIF fund. But also to [the] care with which the amendment had been drafted.

135 Cong. Rec. H4970 (daily ed. Aug. 3, 1989) (statement of Rep. Oakar).

The Oakar provision was added to the pending legislation, for the first time, at the Committee of Conference level.

Both the Oakar provision and the provision governing FICO's assessment authority were before the Committee of Conference, and the Committee had available to it alternative language that would have extended FICO's authority to the assessments paid to SAIF by BIFmember Oakar banks. The Committee chose to adopt language that limits FICO's assessment authority to savings associations that are SAIF members.

Since FICO was granted the authority to assess savings associations but not banks, and a bank that acquires SAIF deposits pursuant to section 5(d)(3) of the FDI Act does not thereby relinquish or modify its bank charter to become a "savings association," we conclude that SAIF assessments paid by Oakar banks should remain in the SAIF and are not subject to draws by FICO.

B. An Oakar Bank Is Not a SAIF Member

1. Definition of the Term "SAIF Member." As noted above, FICO has the statutory authority to levy assessments against each savings association which is a "Savings Association Insurance Fund member as defined by section 7(1)." The term "Savings Association Insurance Fund member" means "any depository institution the deposits of which are insured by the Savings Association Insurance Fund." 12 U.S.C. 1817(1)(5). The term "Bank Insurance Fund member" means "any depository institution the deposits of which are insured by the Bank Insurance Fund.' 12 U.S.C. 1817(*l*)(4).

With regard to fund membership, section 7(*l*) of the FDI Act provides as follows:

Designation of fund membership for newly insured depository institutions; definitions. For purposes of this section:

- (1) Bank insurance fund. Any institution which—
- (A) becomes an insured depository institution; and
- (B) does not become a Savings Association Insurance Fund member pursuant to paragraph (2),
- shall be a Bank Insurance Fund member.
- (2) Savings association insurance fund. Any savings association, other than any

Conference provided that FICO had assessment authority over each "Savings Association Insurance Fund member." H.R. 1278, 101st Cong., 1st Sess. § 503 at p. 400 (passed by the House June 1, 1989); S. 774, 101st Cong., 1st Sess., § 503, 135 Cong. Rec. S4350 (April 19, 1989). While these earlier versions defined the term "savings association," neither version contained a definition for "SAIF member." If either provision had been enacted as drafted at that time, FICO's assessment authority would have extended to all SAIF members, regardless of charter. In fact, the definition of the term "SAIF member elsewhere in the Senate bill included "any other financial institution that is required to pay assessments into the [SAIF]." Id. 135 Cong. Rec. at S4311. The House version defined SAIF member to mean "any financial institution the deposits of which are insured by the [SAIF]." H.R. 1278, 101st Cong., 1st Sess. § 207 at p. 71 (passed by the House June 1, 1989). Had the Senate definition of SAIF member been adopted, FICO would have had the authority to draw on assessments paid to SAIF by BIF-member Oakar banks. The Committee of Conference did not adhere to either version, however. Instead, the Committee chose to add the current SAIF-member definition to the FICO provision, thereby limiting FICO's authority to savings associations which are SAIF members. H.R. Conf. Rep. No. 1278, 101st Cong., 1st Sess. § 512 at p. 240 and § 206 at p. 19-21 (1989).

¹ Earlier drafts of the legislation governing FICO's assessment authority did not restrict FICO's assessment authority to a "savings association" which is a SAIF member. Specifically, the House and Senate versions sent to the Committee of