

July 2015

The Ohio Deposit Guarantee Fund - The Ohio Alternative to FSLIC

Ronald Alexander

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <https://ideaexchange.uakron.edu/akronlawreview>



Part of the [Law Commons](#)

Recommended Citation

Alexander, Ronald (1982) "The Ohio Deposit Guarantee Fund - The Ohio Alternative to FSLIC," *Akron Law Review*: Vol. 15 : Iss. 3 , Article 2.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol15/iss3/2>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

THE OHIO DEPOSIT GUARANTEE FUND — THE OHIO ALTERNATIVE TO FSLIC*

PROFESSOR RONALD ALEXANDER**

IN 1955 the Ohio General Assembly passed enabling legislation permitting the creation of "deposit guarantee associations."¹ Only one such association has been formed in this state. That association is the Ohio Deposit Guarantee Fund. This article will briefly review the substance of that enabling legislation, will examine the single progeny which emerged from that scheme, and will conclude with an analysis of the Ohio Superintendent of Building and Loan Associations' jurisdiction over the Ohio Deposit Guarantee Fund.

One important question must be addressed before proceeding further. Is the Ohio Deposit Guarantee Fund an agency of state government? The answer is emphatically no. Ohio's enabling legislation makes clear that deposit guarantee associations are privately owned corporations incorporated under the general corporation laws of this state². Even though that statutory answer is clear, the public may perceive the Ohio Deposit Guarantee Fund (hereinafter ODGF) as an agency of state government. Indeed, it is my personal experience that members of the savings and loan industry of this state and even employees of ODGF member associations are sometimes uncertain whether ODGF is an agency of state government. The source of this uncertainty is obvious.³ Use of the word "Ohio" in the corporation's name suggests some nexus between the fund and state government, just as the word "federal" in the title of FSLIC suggests that that entity is an agency of the federal government. Probably many depositors place their funds in FSLIC insured associations in the belief that such deposits are safe because insured by an agency of the federal government. Indeed, much of the advertising by FSLIC insured associations is designed to stress that very point to depositors and potential depositors. Quite probably, many depositors in ODGF member associations likewise assume that their funds are insured by an agency of the Ohio government. It is ironic that such a mistaken perception may be fostered in large part by the impressions created by FSLIC advertisements. Only the use of the word "Ohio" in the name of ODGF could engender such an erroneous perception. ODGF and

*Copyright 1982 by Ronald E. Alexander. All rights reserved.

**B.A., 1968; J.D., 1971, Ohio State University; L.L.M., 1978, University of Pennsylvania; Associate Professor of Law, University of Akron; Of Counsel, Buckingham, Doolittle & Burroughs, Akron, Ohio; former Ohio Superintendent of Building & Loan Associations.

¹ 1955-56 Ohio Laws 94.

² OHIO REV. CODE ANN. § 1151.81 (Page 1967).

³ For a full discussion of this issue, see Student Project, part IV, § (b) (1), at pp.....
infra.

its members strictly avoid any representations which might create the impression that deposits are insured by the state of Ohio.

What did the Ohio General Assembly intend to authorize, if not an agency of state government? The enabling legislation provided a simple answer: "a mutual . . . association without capital stock."⁴ The stockholders of this mutual corporation were to consist solely of Ohio chartered building and loan associations.⁵ The statute further required that there be at least twenty-five such stockholders.

The primary functions of a deposit guarantee association were two-fold. The first was to "assure the liquidity of member building and loan associations,"⁶ the second, to "guaranty moneys on deposit."⁷ Such deposits could be "evidenced by passbook or certificates of deposit, withdrawable shares, stock deposit accounts, or running stock of member building and loan associations."⁸ Although a guarantee association could thus guarantee shareholders' accounts in a mutual savings and loan association, the legislation expressly prohibited the guarantee of "permanent stock" of a stock savings and loan association.⁹ In addition to these two primary functions, the enabling legislation granted powers to deposit guarantee associations in the areas of lending, investment, and borrowing.¹⁰ The remainder of the legislation addressed three additional matters: supervision of such associations by the Ohio Superintendent of Building and Loan Associations, reporting requirements of any such association to the Superintendent, and incorporation procedures.

The first and only corporation ever to take advantage of this enabling legislation did so almost immediately after the legislation became effective. On November 22, 1955, incorporators of ODGF filed articles of incorporation with the Secretary of State. In accordance with the enabling legislation, the Secretary of State proceeded to "transmit a copy of them to the superintendent of building and loan associations."¹¹ The Secretary of State may not record articles of incorporation for a deposit guarantee association unless first authorized to do so by the Superintendent.¹²

The enabling legislation next required that the Superintendent, after

⁴ OHIO REV. CODE ANN. § 1151.81 (Page 1967).

⁵ The term "building and loan association" is defined in OHIO REV. CODE ANN. § 1151.80 (A) (Page 1967) as "a corporation organized for the purpose of raising money to be loaned to its members or to others; and includes 'savings association.'"

⁶ OHIO REV. CODE ANN. § 1151.87(A) (Page 1967).

⁷ *Id.* § 1151.87(B).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* §§ 1151.87 (C)-(H).

¹¹ *Id.* § 1151.81.

¹² *Id.*

receipt of the articles from the Secretary of State, should "at once examine into all the facts connected with the formation of such proposed corporation."¹³ The purpose of this examination is threefold. First, the Superintendent must determine whether "the proposed corporation is to be formed for any business other than assuring the liquidity of member building and loan associations and guarantying deposits therein."¹⁴ Secondly, the Superintendent must ascertain "that the character and general fitness of the incorporators are . . . such as to command the confidence of the general public."¹⁵ Finally, he must determine that "the best interests of the public will . . . be promoted by its establishment."¹⁶ This latter criterion was the apparent basis for the Superintendent's refusal to certify the proposed articles of incorporation for the Ohio Deposit Guarantee Fund. After what has been described as "lengthy hearings,"¹⁷ the Superintendent announced his decision on April 4, 1956. The detailed nature of the Superintendent's articulated basis for his refusal suggests an almost vehement opposition to the creation of this fund. Indeed, the Superintendent had gone so far as to request an earlier opinion by the Ohio Attorney General concerning the proposed Ohio Deposit Guarantee Fund. The initial enabling legislation had permitted a deposit guarantee association to "guaranty the deposits in member building and loan associations."¹⁸ The Superintendent asked the Ohio Attorney General to determine which of the following accounts the association could guarantee:

- (1) withdrawable share accounts;
- (2) stock deposits or running stock accounts;
- (3) passbook deposits;
- (4) certificates of deposits; or
- (5) permanent stock.

The Ohio Attorney General concluded that the Ohio Deposit Guarantee Fund could guarantee all such accounts, with the exception of permanent stock.¹⁹

Having failed in what was apparently an attempt to thwart incorporation of the Ohio Deposit Guarantee Fund through a restrictive Ohio Attorney General's opinion,²⁰ the Superintendent proceeded to articulate eight separately stated reasons for refusal to certify the articles of incorporation to the Secretary of State. He was no more successful with this approach. Appeal of that refusal to the Hamilton County Court of Common Pleas produced a decision in favor of the incorporators of the Ohio Deposit

¹³ *Id.* § 1151.82.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *ODGF v. Dziamba*, 60 Ohio Op. 426, 427, 137 N.E.2d 905, 906 (C.P. 1956).

¹⁸ Amended Sen. Bill No. 144, 1955-56 Ohio Laws 96 § 1151.87(B).

¹⁹ [1956] Op. Ohio Att'y Gen. No. 6299.

²⁰ This opinion is reflected today in present § 1151.87(B).

Guarantee Fund.²¹ The articles were thus ultimately forwarded to the Secretary of State and the Ohio Deposit Guarantee Fund came into being in 1956. Today the Ohio Deposit Guarantee Fund has over eighty members.²² On June 30, 1981, those member associations had total assets in excess of \$2,400,000,000 and a net worth-to-savings ratio of 6.23%.²³

²¹ ODGF v. Dziamba, 60 Ohio Op. at 426, 137 N.E.2d at 905. The Superintendent argued that: (1) no standards for membership had been provided; (2) the trustees had too great discretion to expel members; (3) the fund would guarantee all withdrawal monies without limitation; (4) the trustees had too great authority over member companies to control removal of directors or amendment of their constitutions and by-laws; (5) the Superintendent would be denied supervisory powers over the guarantee corporation; (6) only two of the original incorporators survived; (7) the proposed constitution had no provision for a vote of shareholders of a proposed member; (8) the proposed guarantee association had the potential for becoming a holding company. Professing to be somewhat bemused by the last of these objections (since, by its very nature, any statutory guarantee corporation would "hold" assets of its members), the court rejected all of the Superintendent's arguments. It found ample regulatory authority in the statutory scheme to allow supervision of the guarantee corporation and to prevent abuses. To refuse certification on these speculative grounds would be to "defeat the very purpose of the legislative enactment."

²² Ohio Deposit Guarantee Fund, Statement of Condition (June 30, 1981) (available at the offices of the AKRON LAW REVIEW).

²³ *Id.* The following financial information on member associations is contained in the Statement of Conditions:

OHIO DEPOSIT GUARANTEE FUND
Consolidated Financial Statement of Membership
Adjusted to Reflect Current Membership Growth

ASSETS

	June 30, 1981	June 30, 1980	Increase or (Decrease)
Cash	\$ 31,090,169	\$ 27,503,399	\$ 3,586,770
U.S. Government Obligations	493,288,654	228,311,426	264,977,228
Other Investments	11,631,578	236,317,705	(224,686,127)
Ohio Deposit Guarantee Fund	37,993,800	31,556,000	6,437,800
Federal Home Loan Bank Stock	5,785,100	5,747,900	37,200
First Mortgage Loans	1,743,110,148	1,584,554,409	158,555,739
Other Loans	50,586,270	46,546,368	4,039,902
Real Estate Owned	4,685,415	2,513,475	2,171,940
Office Building, Leasehold Improvements and Equipment	29,253,314	24,536,546	4,716,768
Other Assets	25,728,909	21,093,496	4,635,413
TOTAL ASSETS	\$2,433,153,357	\$2,208,680,496	\$224,472,861

LIABILITIES AND NET WORTH

Withdrawable Savings*	\$1,984,529,887	\$1,752,774,733	\$231,755,154
Borrowed Money	269,234,140	277,201,198	(7,967,058)
Loans in Process	24,351,590	21,715,688	2,635,902
Other Liabilities	23,455,143	23,697,051	(241,908)
Deferred Credits	7,847,998	8,202,433	(354,435)
Permanent Stock	7,524,919	7,149,067	375,852
General Reserves	67,451,998	60,275,059	7,176,939
Undivided Profits	48,757,682	57,665,267	(8,907,585)
TOTAL LIABILITIES & NET WORTH	\$2,433,153,357	\$2,208,680,496	\$224,472,861

*Includes \$8,880,210
in 1981 and \$28,705,721
in 1980 insured by FSLIC.

Liquidity Ratio: 17.54% 14.63%
Net Worth to Savings Ratio: 6.23% 7.14%

Assets of ODGF on that date were slightly over \$53,500,000. The reserve fund consisted of \$15,290,633.²⁴

ODGF's principal office is located in Cincinnati, Ohio. The fund is incorporated as a non-profit corporation under the Ohio Corporation Code.²⁵ It qualifies also as a non-profit corporation under Internal Revenue Code section 501(c)(14), as a result of the following grandfather provision granting an exemption to the following entities: "Corporations or associations without capital stock organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for, an assurance of shares or deposits in (i) domestic building and loan associations."²⁶

Membership in ODGF is limited to Ohio chartered building and loan associations. To qualify, a member must "maintain a deposit with the corporation in such amount and under such terms and conditions as shall be determined by the Board of Trustees, not to exceed two percent (2%) of the deposit liability of such member."²⁷ These deposits are adjusted semi-annually to reflect any changes in a member association's deposit liability.²⁸ New members must also contribute an amount to the accumulated

²⁴ The Statement of Conditions presents the following financial statement for the Fund:

OHIO DEPOSIT GUARANTEE FUND

Statements of Financial Condition
June 30, 1981 and 1980

Assets	<u>1981</u>	<u>1980</u>
Cash	\$ 69,833	\$ 62,787
Time and overnight deposits	3,675,000	565,000
U.S. Government and agency obligations, approximate market \$40,339,300 in 1981 and \$37,525,000 in 1980	43,387,859	37,859,887
Accrued interest receivable	952,489	663,660
Notes receivable from members (note 3)	5,040,000	5,300,000
Equalization contributions due from new members (note 2)	190,000	295,000
Deferred charges and other assets	219,996	56,936
	<u>\$53,535,177</u>	<u>\$44,803,270</u>
 Liabilities, Deposits and Reserve Fund		
Accrued expenses and other liabilities	\$ 83,644	\$ 47,765
Deposits and reserve fund (note 2):		
Members' deposits	38,160,900	32,017,400
Reserve fund	15,290,633	12,737,105
Total deposits and reserve fund	<u>53,451,533</u>	<u>44,754,505</u>
	<u>\$53,535,177</u>	<u>\$44,803,270</u>

²⁵ OHIO REV. CODE ANN. §§ 1702.01-1702.99 (Page 1964).

²⁶ I.R.C. § 501(c)(14) (1954). The provision withstood a constitutional challenge and is discussed in some detail in *Maryland Savings-Share Ins. Corp. v. United States*, 308 F. Supp. 761 (D. Md. 1970).

²⁷ ODGF Const. art. V (available at the offices of the ACRON LAW REVIEW).

reserves of the corporation "equal to the accumulated reserves at the end of the calendar quarter immediately preceding such admission multiplied by the fraction whose numerator shall be the required deposit of each new member and the denominator shall be the aggregate of deposits of all members."²⁹

The stated purpose of the corporation is to "use the full extent of its powers, authority and resources to provide for the liquidity of its members and to guarantee the moneys on deposit in member associations, whether evidenced by passbook, or certificates of deposit, withdrawable shares, stock deposit accounts, or running stock of member building and loan associations and savings associations, but not the permanent stock, debentures or similar stock accounts."³⁰ Advertising literature of ODGF paraphrases this quotation from the fund's constitution in the following fashion: "The purpose of the Fund is to provide additional security assuring the liquidity in guarantying the deposits, WITHOUT LIMITATION AS TO AMOUNT, in the savings and loans which are members of the Fund."³¹ This ability to represent that deposits are guaranteed to their full amount has allowed ODGF member associations to offer a service not available at FSLIC insured associations, since FSLIC is permitted by statute to insure only the first \$100,000 of each deposit.³²

The management structure of ODGF is comprised of a board of trustees. Individual trustees are elected by the member associations and serve without compensation.³³ The board is at present composed of eleven trustees.³⁴ The officers of the corporation include a president, who may in turn appoint a five-member executive committee of the board. The executive vice-president of ODGF is the chief managing officer responsible for the day-to-day operation of the fund. In addition to the board of trustees, the constitution provides that the President may also appoint a seven-member advisory committee. Members of that committee must be officers or directors of member building and loan associations.³⁵ Chief among the responsibilities of the advisory committee is to review all applications for membership in ODGF and to make an initial recommendation to the board of trustees concerning such applications.³⁶

Both Ohio statute and the documents of governance adopted by ODGF make clear that one of its primary functions is to "guarantee" the deposits

²⁹ *Id.*

³⁰ *Id.* art. III.

³¹ ODGF advertising brochure (available at the offices of the AKRON LAW REVIEW).

³² Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified in scattered sections of 12, 15 U.S.C.).

³³ ODGF Const. art. VIII, § 2.

³⁴ ODGF Statement of Condition, *supra* note 22.

³⁵ ODGF Const. art. IX, § 2.

³⁶ ODGF By-Laws § IV(B) (available at the offices of the AKRON LAW REVIEW).

held by member associations. Although the term "insure" appears nowhere in either of those sources, the public perception is that the chief function of ODGF is to *insure* depositor accounts. The General Assembly did not deem to subject deposit guarantee associations to regulation by the Ohio Superintendent of Insurance, however. Instead, deposit guarantee associations, and thus ODGF, are subject to the exclusive jurisdiction of the Superintendent of Building and Loan Associations.

The extent of the Superintendent's supervisory responsibility over ODGF is described in ambiguous terms. While the Superintendent is required to conduct annual examinations of ODGF, the purpose of those examinations is simply not stated in the statute. Certainly, if the Superintendent may refuse to certify a proposed deposit guarantee association because it will conduct some business other than assuring the liquidity and guaranteeing the deposits of member associations, or because the public interest will not be promoted by such an association, then those same matters ought to be subject to continuing scrutiny during the examination process. This observation lends very little assistance, however, to an attempt to define the Superintendent's supervisory responsibilities. It ought to be fairly easy to ascertain that a deposit guarantee association is acting *ultra vires* its statutorily defined powers. What activities are not in the best interest of the public in the context of the operation of a deposit guarantee fund, however, are more difficult to identify. Difficult, but not impossible.

Perhaps the question foremost in the mind of any regulator of financial institutions is how to determine the proper response when a regulated institution is no longer able to fulfill its obligations to its depositors. The Ohio Deposit Guarantee Fund is certainly a financial institution and its members are depositors therein. Its primary responsibility to those members is to assure their liquidity and guarantee member associations' deposit accounts. If a cataclysmic economic event were to render ODGF incapable of fulfilling its responsibility to member associations, the question would become one of determining what responses are available to the Superintendent of Building and Loan Associations. Such an inability by ODGF to meet its responsibility to member associations would be analogous to the inability of any building and loan association to fulfill its obligations to its depositors. Chapter 1157 of the Ohio Revised Code provides a comprehensive scheme delimiting the Superintendent's response in the event that a building and loan association is unable to meet those obligations. Upon the occurrence of a defined triggering event,³⁷ the Superintendent is authorized to take possession of the building and loan association, in-

³⁷ OHIO REV. CODE ANN. § 1157.01 (Page Supp. 1981). The 1975 amendment removed the earlier statutory requirement that the Superintendent proceed "with the written approval of the director of commerce." See § 1157.01 (Page 1967).

ventory the assets, list liabilities and proceed with liquidation.³⁸ No similar authority is granted to the Superintendent with regard to deposit guarantee associations. The only supervisory authority clearly available to the Superintendent as to deposit guarantee associations is contained in section 1155.01 of the Ohio Revised Code.³⁹ That section provides that the Superintendent may cause to have arrested any person who violates laws "relating to . . . deposit guarantee associations." Further, section 1155.02⁴⁰ confers cease and desist authority upon the Superintendent in regard to "an association." If "association" is deemed to include not only building and loan associations but also deposit guarantee associations, then this section confers some additional supervisory power upon the Superintendent. Jurisdiction under the section is triggered whenever an association:

- (1) makes an unauthorized loan or investment; or
- (2) engages "in any practice likely to cause substantial dissipation of assets or earnings of the association."⁴¹

In the event of a violation, the Superintendent may fashion any of three remedies. First, he may require the association to "establish a valuation reserve against an unauthorized loan or investment."⁴² Secondly, he may cause the association to "divest itself of such loan or investment within a reasonable time of not less than ninety days."⁴³ Finally, he may issue an order to the association to "cease and desist from any unauthorized lending or investment practice, or any practice likely to cause substantial dissipation of assets or earnings of the association."⁴⁴ While these supervisory powers may be of substantial aid in preventing practices which might substantially impair a deposit guarantee association's capacity to meet its obligations to its member associations, they accord the Superintendent no ability to fashion a response once the deposit guarantee association has become in fact unable to meet those obligations.

On balance, the Ohio General Assembly has granted the Superintendent little power to assist ODGF to accomplish its mission. When the Ohio General Assembly authorized formation of deposit guarantee associations in 1955, its objective was commendable. Formation of the Ohio Deposit Guarantee Fund has permitted a large number of Ohio savings and loan associations to escape interest rate control and thus better serve the depositor needs of member institutions' communities. ODGF has operated in a superb fashion over the years. Periods both of economic prosperity

³⁸ *Id.* § 1157.06 (Page 1967).

³⁹ *Id.* § 1155.01 (Page Supp. 1981).

⁴⁰ *Id.*

⁴¹ *Id.* § 1155.02(A).

⁴² *Id.* § 1155.02(B)(1).

⁴³ *Id.* § 1155.02(B)(2).

⁴⁴ *Id.* § 1155.02(B)(3).

and of economic recession have occurred during the quarter century following the creation of ODGF. Despite those economic fluctuations, however, ODGF steadily strengthened its financial integrity.

Today this nation's savings and loan industry is in trouble. Deregulation, economic recession, spiraling cost of money, low-yielding mortgage loan portfolios and stiff competition from other financial institutions are factors that have combined to challenge the continued viability of this most important financial intermediary. As noted in a recent Brookings Institute study, these factors threaten not only savings and loan associations but also those entities charged with the responsibility of insuring depositors' accounts.⁴⁵ Members of the Congress, spokesmen for the savings and loan industry's national trade associations and members of the Federal Home Loan Bank Board are now engaged in a dialogue intended to fashion legislative and regulatory programs to insure that FSLIC will continue to meet and fulfill its mission.⁴⁶

It is time for a similar dialogue to commence in Ohio.

The Ohio General Assembly, the state regulator, representatives of this state's savings and loan industry, and ODGF must work together to devise a program to insure that ODGF will continue to carry out its mission. Thousands of Ohio citizens are depositors of ODGF member savings and loan associations. Some form of state support of ODGF would serve to promote the welfare of those citizens. Such support must obviously be financial. Just as the FSLIC has the ability to draw upon funds of the federal government in times of emergency, so must ODGF be accorded an equal right in similar times.

The difficulties facing this state's savings and loan industry at present are a product of factors beyond the control of its individual member associations. When this industry was similarly challenged some five decades ago, the appropriate legislative bodies fashioned a positive response. No less is necessary today. This state's savings and loan industry plays a vital role in our state's economy. It is this industry which has financed the construction and purchase of housing for Ohio families. To insure the continued performance of that role, the leaders of state government and industry must work together to formulate and ultimately implement policies to insure the continued viability of ODGF and its member savings and loan associations.

⁴⁵ See *Bailout of Troubled Thrifts Would Meet Strong Reagan Opposition, Aide Asserts*, Wall St. J., Feb. 23, 1982, at 48, col. 2.

⁴⁶ See, e.g., 6 Sav. & Loan Rep., Feb. 26, 1982, at 1, where it was noted that: "At the Bank Board, Chairman Richard Pratt is going to try to get Congress to explicitly state that FSLIC insurance of accounts is a full faith and credit obligation of the U.S. Government. In the interim, he's going to try and get a statement, presumably by President Reagan, to the effect the government stands behind insurance of accounts."

