

Selected Provisions of Section 8 of the FDIA with RECOUP Act

SEC. 8 TERMINATION OF STATUS AS INSURED DEPOSITORY INSTITUTION.--

(b) CEASE-AND-DESIST PROCEEDINGS.--

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request by the depository institution or institution-affiliated party or any written agreement entered into with the agency, the appropriate Federal banking agency for the depository institution may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the depository institution or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is

stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection, and subsections (c) through (s) and subsection (u) of this section, and section 50 of this Act shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956, any savings and loan holding company and any subsidiary (other than a depository institution) of a savings and loan holding company (as such terms are defined in section 10 of Home Owners' Loan Act)), any noninsured State member bank, and to any organization organized and operated under section 25(a) of the Federal Reserve Act or operating under section 25 of the Federal Reserve Act, in the same manner as they apply to a State member insured bank. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank) or against a savings and loan holding company or any subsidiary thereof (other than a depository institution or a subsidiary of such depository institution).

(4) This subsection, and subsections (c) through (s) and subsection (u) of this section, and section 50 of the Act shall apply to any foreign bank or company to which subsection (a) of section 8 of the International Banking Act of 1978 applies and to any subsidiary (other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under paragraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned to it in section 2 of the Bank Holding Company Act of 1956.

(5) This section shall apply, in the same manner as it applies to any insured depository institution for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(6) **AFFIRMATIVE ACTION TO CORRECT CONDITIONS RESULTING FROM VIOLATIONS OR PRACTICES.**--The authority to issue an order under this subsection and subsection (c) which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to--

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if--

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

(7) **AUTHORITY TO LIMIT ACTIVITIES.**--The authority to issue an order under this subsection or subsection (c) includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

(8) **UNSATISFACTORY ASSET QUALITY, MANAGEMENT, EARNINGS, OR LIQUIDITY AS UNSAFE OR UNSOUND PRACTICE.**--If an insured depository institution receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the appropriate Federal banking agency may (if the deficiency is not corrected) deem the institution to be engaging in an unsafe or unsound practice for purposes of this subsection.

(9) RECOVERY OF COMPENSATION. – If the Corporation is appointed receiver or conservator of an insured depository institution with total consolidated assets of more than \$10,000,000,000, the Corporation may recover for the receivership or conservatorship incentive-based compensation, equity-based compensation, severance pay, golden parachute benefits, or compensation that is granted or vested based wholly or in part upon the attainment of any financial reporting measure or other performance metric, and any profits realized from the purchase or sale of securities of the depository institution or depository institution holding company during the 24-month period preceding the failure of the insured depository institution from any senior executive, as defined in subsection (e)(2)(C), who is responsible for the failed condition of the depository institution or depository institution holding company.

(9) [Repealed]

(10) STANDARD FOR CERTAIN ORDERS.--No authority under this subsection or subsection (c) to prohibit any institution-affiliated party from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property may be exercised unless the appropriate Federal banking agency meets the standards of Rule 65 of the Federal Rules of Civil Procedure, without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

...

(e) REMOVAL AND PROHIBITION AUTHORITY.--

(1) AUTHORITY TO ISSUE ORDER.--Whenever the appropriate Federal banking agency determines that--

(A) any institution-affiliated party has, directly or indirectly--

(i) violated--

(I) any law or regulation;

(II) any cease-and-desist order which has become final;

(III) any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or request by such depository institution or institution-affiliated party; or

(IV) any written agreement between such depository institution and such agency;

(i) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution;~~or~~

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty; or

(iv) in the case of a senior executive, as defined in paragraph (2)(C), failed to carry out the responsibilities of the senior executive for governance, operations, or risk or financial management of an insured depository institution or business institution;

(B) by reason of the violation, practice, failure, or breach described in any clause of subparagraph (A)--

(i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, failure, or breach--

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates =

(I) willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution; or

(II) in the case of a senior executive, as defined in paragraph (2)(C), gross negligence by such senior executive in the performance of the duties of the senior executive to the insured depository institution or business institution,

the appropriate Federal banking agency for the depository institution may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

(2) SPECIFIC VIOLATIONS.--

(A) IN GENERAL.--Whenever the appropriate Federal banking agency determines that--

(i) an institution-affiliated party has committed a violation of any provision of subchapter II of chapter 53 of title 31, United States Code, and such violation was not inadvertent or unintentional;

(ii) an officer or director of an insured depository institution has knowledge that an institution-affiliated party of the insured depository institution has violated any such provision or any provision of law referred to in subsection (g)(1)(A)(ii);

(iii) an officer or director of an insured depository institution has committed any violation of the Depository Institution Management Interlocks Act; ~~or~~

(iv) a senior executive of an insured depository institution has -

(I) breached any fiduciary duty owed to the institution, if the breach is determined to require grossly negligent, reckless, or willful conduct;

(II) failed to appropriately implement financial, risk, or supervisory reporting or information system or controls; or

(III) having implemented a system or controls described in subclause (II), has failed to oversee its operations; or

~~(iv)~~ (v) an institution-affiliated party of a subsidiary (other than a bank) of a bank holding company or of a subsidiary (other than a savings association) of a savings and loan holding company has been convicted of any criminal offense involving dishonesty or a breach of trust or a criminal offense under section 1956, 1957, or 1960 of title 18, United States Code, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense,

the agency may serve upon such party, officer, or director a written notice of the agency's intention to remove such party from office.

(B) FACTORS TO BE CONSIDERED.--In determining whether an officer or director should be removed as a result of the application of subparagraph (A)(ii), the agency shall consider whether the officer or director took appropriate action to stop, or to prevent the recurrence of, a violation described in such subparagraph.

(C) DEFINITION. --In this paragraph, the term 'senior executive' means an individual who has oversight authority for managing the overall governance, operations, risk, or finances of a depository institution or depository institution holding company, including the president, the chief executive officer, the chief operating officer, the chief financial officer, the chief risk officer, the chief legal officer, the chairman of the board, an inside director of the board of directors, and an individual who occupies an equivalent position, as determined by the depository institution holding company, as applicable.

...

(4) A notice of intention to remove an institution-affiliated party from office or to prohibit such party from participating in the conduct of the affairs of an insured depository institution, shall contain a statement of the facts constituting grounds therefor, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or a later date is set by the agency at the request of (A) such party, and for good cause shown, or (B) the Attorney General of the United States. Unless such party shall appear at the hearing in person or by a duly authorized representative, such party shall be deemed to have consented to the issuance of an order of such removal or prohibition. In the event of such consent, or if upon the record made at any such hearing the agency shall find that any of the grounds specified in such notice have been established, the agency may issue such orders of suspension or removal from office, or prohibition from participation in the conduct of the affairs of the depository institution, as it may deem appropriate. Any such order shall become effective at the expiration of thirty days after service upon such depository institution and such party

concerned (except in the case of an order issued upon consent, which shall become effective at the time specified therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(5) For the purpose of enforcing any law, rule, regulation, or cease-and-desist order in connection with an interlocking relationship, the term "officer" within the term "institution-affiliated party" as used in this subsection means an employee or officer with management functions, and the term "director" within the term "institution-affiliated party" as used in this subsection includes an advisory or honorary director, a trustee of a depository institution under the control of trustees, or any person who has a representative or nominee serving in any such capacity.

(6) PROHIBITION OF CERTAIN SPECIFIC ACTIVITIES.--Any person subject to an order issued under this subsection shall not--

(A) participate in any manner in the conduct of the affairs of any institution or agency specified in paragraph (7)(A);

(B) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subparagraph (A);

(C) violate any voting agreement previously approved by the appropriate Federal banking agency; or

(D) vote for a director, or serve or act as an institution-affiliated party.

(7) INDUSTRYWIDE PROHIBITION.--

(A) IN GENERAL.--Except as provided in subparagraph (B), any person who, pursuant to an order issued under this subsection or subsection (g), has been removed or suspended from office in an insured depository institution or prohibited from participating in the conduct of the affairs of an insured depository institution may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of--

(i) any insured depository institution;

(ii) any institution treated as an insured bank under subsection (b)(3) or (b)(4), or as a savings association under subsection (b)(9);

(iii) any insured credit union under the Federal Credit Union Act;

(iv) any institution chartered under the Farm Credit Act of 1971;

(v) any appropriate Federal depository institution regulatory agency; and

(vi) the Federal Housing Finance Agency and any Federal home loan bank.

(B) EXCEPTION IF AGENCY PROVIDES WRITTEN CONSENT.--If, on or after the date an order is issued under this subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of--

(i) the agency that issued such order; and

(ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party,

subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent. Any agency that grants such a written consent shall report such action to the Corporation and publicly disclose such consent.

(C) VIOLATION OF PARAGRAPH TREATED AS VIOLATION OF ORDER.--Any violation of subparagraph (A) by any person who is subject to an order described in such subparagraph shall be treated as a violation of the order.

(D) APPROPRIATE FEDERAL FINANCIAL INSTITUTIONS REGULATORY AGENCY DEFINED.--For purposes of this paragraph and subsection (j), the term "appropriate Federal financial institutions regulatory agency" means--

(i) the appropriate Federal banking agency, in the case of an insured depository institution;

(ii) the Farm Credit Administration, in the case of an institution chartered under the Farm Credit Act of 1971;

(iii) the National Credit Union Administration Board, in the case of an insured credit union (as defined in section 101(7) of the Federal Credit Union Act); and

(iv) the Secretary of the Treasury, in the case of the Federal Housing Finance Agency and any Federal home loan bank.

(E) CONSULTATION BETWEEN AGENCIES.--The agencies referred to in clauses (i) and (ii) of subparagraph (B) shall consult with each other before providing any written consent described in subparagraph (B).

(F) APPLICABILITY.--This paragraph shall only apply to a person who is an individual, unless the appropriate Federal banking agency specifically finds that it should apply to a corporation, firm, or other business enterprise.

(f) STAY OF SUSPENSION AND/OR PROHIBITION OF INSTITUTION-AFFILIATED PARTY.--Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section, such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.

...

(h) HEARINGS AND JUDICIAL REVIEW.--

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the depository institution is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h). Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the depository institution or the institution-affiliated party concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of title 28 of the United States Code. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be

had as provided in chapter 7 of title 5 of the United States Code. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

(i) JURISDICTION AND ENFORCEMENT; PENALTY.--

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 38 or 39, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 38 or 39 no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2) CIVIL MONEY PENALTY.--

(A) FIRST TIER.--Any insured depository institution which, and any institution-affiliated party who--

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) or any final order under section 38 or 39;

(iii) violates any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request by the depository institution or institution-affiliated party; or

(iv) violates any written agreement between such depository institution and such agency,

shall forfeit and pay a civil penalty of not more than \$5,000 for each day during which such violation continues.

(B) SECOND TIER.--Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who--

(i)(I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach--

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such depository institution; or

(III) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than \$25,000 for each day during which such violation, practice, or breach continues.

(C) THIRD TIER.--Notwithstanding subparagraphs (A) and (B), any insured depository institution which, and any institution-affiliated party who--

(i) knowingly or, in the case of a senior executive, as defined in subsection (e)(2)(c), recklessly--

(I) commits any violation described in any clause of subparagraph (A);

(II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or

(III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) MAXIMUM AMOUNTS OF PENALTIES FOR ANY VIOLATION DESCRIBED IN SUBPARAGRAPH (C).--The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is--

(i) in the case of any person other than an insured depository institution, an amount not to exceed \$~~1,000,000~~3,000,000; and

(ii) in the case of any insured depository institution, an amount not to exceed the lesser of--

(I) \$1,000,000; or

(II) 1 percent of the total assets of such institution.

(E) ASSESSMENT.--

(i) WRITTEN NOTICE.--Any penalty imposed under subparagraph (A), (B), or (C) may be assessed and collected by the appropriate Federal banking agency by written notice.

(ii) FINALITY OF ASSESSMENT.--If, with respect to any assessment under clause (i), a hearing is not requested pursuant to subparagraph (H) within the period of time allowed under such subparagraph, the assessment shall constitute a final and unappealable order.

(F) AUTHORITY TO MODIFY OR REMIT PENALTY.--Any appropriate Federal banking agency may compromise, modify, or remit any penalty which such agency may assess or had already assessed under subparagraph (A), (B), or (C).

(G) MITIGATING FACTORS.--In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to--

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

(H) HEARING.--The insured depository institution or other person against whom any penalty is assessed under this paragraph shall be afforded an agency hearing if such institution or person submits a request for such hearing within 20 days after the issuance of the notice of assessment.

(I) COLLECTION.--

(i) REFERRAL.--If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court.

(ii) APPROPRIATENESS OF PENALTY NOT REVIEWABLE.--In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review.

(J) DISBURSEMENT.--All penalties collected under authority of this paragraph shall be deposited into the Treasury.

(K) REGULATIONS.--Each appropriate Federal banking agency shall prescribe regulations establishing such procedures as may be necessary to carry out this paragraph.

(3) NOTICE UNDER THIS SECTION AFTER SEPARATION FROM SERVICE.--The resignation, termination of employment or participation, or separation of an institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice or order and proceed under this section against any such party, if such notice or order is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such depository institution (whether such date occurs before, on, or after [August 9, 1989], the date of the enactment of this paragraph).

(4) PREJUDGMENT ATTACHMENT.--

(A) IN GENERAL.--In any action brought by an appropriate Federal banking agency (excluding the Corporation when acting in a manner described in section 11(d)(18)) pursuant to this section, or in actions brought in aid of, or to enforce an order in, any administrative or other civil action for money damages, restitution, or civil money penalties brought by such agency, the court may, upon application of the agency, issue a restraining order that--

(i) prohibits any person subject to the proceeding from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property; and

(ii) appoints a temporary receiver to administer the restraining order.

(B) STANDARD.--

(i) SHOWING.--Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under subparagraph (A) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(ii) STATE PROCEEDING.--If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to a party's right to due process as Rule 65 (as modified with respect to such proceeding by clause (i)), the relief sought under subparagraph (A) may be requested under the laws of such State.

Selected Provisions of Section 18(c) of FDIA with RECOUP Act

(c) MERGER TRANSACTIONS; CONSENT OF BANKING AGENCIES; EMERGENCY APPROVAL; NOTICE; UNIFORM STANDARDS; ANTITRUST ACTIONS; REVIEW DE NOVO; LIMITATIONS; REPORT TO CONGRESS; MONEY LAUNDERING; APPLICABILITY.--

(1)* Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured depository institution shall--

(A) merge or consolidate with any noninsured bank or institution;

(B) assume liability to pay any deposits (including liabilities which would be "deposits" except for the proviso in section 3(1)(5) of this Act) made in, or similar liabilities of, any noninsured bank or institution; or

(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured depository institution.

(2) No insured depository institution shall merge or consolidate with any other insured depository institution or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured depository institution except with the prior written approval of the responsible agency, which shall be--

(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a Federal savings association;

(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank; and

(C) the Corporation if the acquiring, assuming, or resulting bank is to be a State nonmember insured bank or a State savings association.

(D) [Repealed]

(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a "merger transaction") shall, unless the responsible agency finds that it must act immediately in order to prevent the probable default of one of the banks or savings associations involved, be published--

(A) prior to the granting of approval of such transaction,

(B) in a form approved by the responsible agency,

(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

(D) in a newspaper of general circulation in the community or communities where the main offices of the banks or savings associations involved are located, or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto.

...

(13)(A) Except as provided in subparagraph (B), the responsible agency may not approve an application for an interstate merger transaction if the resulting insured depository institution (including all insured depository institutions which are affiliates of the resulting insured depository institution), upon consummation of the transaction, would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States.

(B) Subparagraph (A) shall not apply to an interstate merger transaction that involves 1 or more insured depository institutions in default or in danger of default, or with respect to which the Corporation provides assistance under section 13, if-

(i) at the time the responsible agency proposes to approve the application, there is no application or proposed application (other than an application that also would be subject to the prohibition in subparagraph (A)) to acquire the 1 or more insured depository institutions in default or in danger of default pending before any appropriate Federal banking agency that would, according to the responsible agency for such application, meet all applicable standards for approval by the responsible agency;

(ii) the Corporation would provide assistance under section 13 with respect to the interstate merger transaction; and

(iii) the Corporation has determined that the interstate merger transaction that is the subject of the application to the responsible agency is the only proposed transaction to acquire, directly or indirectly, the 1 or more insured depository institutions in default or in danger of default pending before the Corporation (other than an interstate merger transaction that also would be subject to the prohibition in subparagraph (A)) that would permit the Corporation to—

(I) comply with the least-cost resolution requirements set forth in section 13(c)(4); or

(II) avoid the serious adverse effects on economic conditions or financial stability that would occur absent exercise of the authority in section 13(c)(4)(G), if a systemic risk determination has been made under such section with respect to the insured depository institution or institutions that are the subject of the application.

(C) In this paragraph--

(i) the term "interstate merger transaction" means a merger transaction involving 2 or more insured depository institutions that have different home States and that are not affiliates; and

(ii) the term "home State" means--

(I) with respect to a national bank, the State in which the main office of the bank is located;

(II) with respect to a State bank or State savings association, the State by which the State bank or State savings association is chartered; and

(III) ~~(III)~~ with respect to a Federal savings association, the State in which the home office (as defined by the regulations of the Director of the Office of Thrift Supervision, or, on and after the transfer date, the Comptroller of the Currency) of the Federal savings association is located.

At the end of the FDIA the following from the RECOUP Act is added –

SEC. 54. GOVERNANCE AND ACCOUNTABILITY STANDARDS.

- (a) DEFINITION.- In this section, the term ‘senior executive’ has the meaning given the term in section 8(e)(2)(C).
- (b) ADOPTION OF STANDARDS.- Except as provided in subsection (d), each depository institution and depository institution holding company shall adopt governance and accountability standards in the bylaws (or their equivalents) of the depository institution or depository institution holding company, as applicable, that promote safety and soundness, responsiveness to supervisory matters, and responsible management.
- (c) REQUIRED CONTENTS.-
 - (1) IN GENERAL.- The standards adopted under subsection (b) shall include-
 - (A) policies for senior executives and members of the board of directors of the depository institution or depository institution holding company relating to appropriate risk management and responsiveness to supervisory matters, including responding to the appropriate Federal banking agency and State banking supervisor, as applicable, on supervisory matters on a timely basis;
 - (B) Accountability and corporate governance mechanisms and controls such as-
 - (i) Directing such senior executives and board of directors to implement reporting or information systems or controls and oversee such systems appropriately and prudently;
 - (ii) directing that management does not deviate from sound governance, internal control, or risk management; and
 - (iii) directing that appropriate long-term risk management be tailored to long term economic conditions; and
 - (C) Except as provided in paragraph (2) and subsection (d), in the event of the failure of the depository institution or depository institution holding company, as applicable, clawback authority that permits the board of directors of the depository institution or depository institution holding company (or the equivalent), or, if the Corporation has been appointed receiver or conservator of the depository institution, the Corporation in its capacity as receiver or conservator, to recover from a senior executive of the depository institution or depository institution holding company who is

responsible for the failed condition of the depository institution or depository institution holding company –

(i) Any bonus, other incentive-based or equity-based compensation, severance pay, or golden parachute benefits received by that senior executive from the depository institution or depository institution holding company during the 24-month period preceding the failure of the depository institution or depository institution holding company; and

(ii) Any profits realized by the senior executive from the sale of securities of the entity during the 24-month period described in clause (i).

(2) EXCEPTION. – Paragraph (1)(C) shall not apply to any senior executive

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(A) who has been employed by the depository institution or depository institution holding company for not more than 18 months before the date of the failure of the depository institution or depository institution holding company; and

(B) whose conduct did not contribute to the failure of the depository institution or depository institution holding company, as applicable.

(d) EXCEPTION. – This section shall not apply to a depository institution or depository institution holding company with total consolidated assets of not more than \$10,000,000,000.

Selected Provisions of Section 3(d) of Bank Holding Company Act with RECOUP Act

(d) Interstate banking

(1) Approvals authorized

(A) Acquisition of banks

The Board may approve an application under this section by a bank holding company that is well capitalized and well managed to acquire control of, or acquire all or substantially all of the assets of, a bank located in a State other than the home State of such bank holding company, without regard to whether such transaction is prohibited under the law of any State.

...

(5) Exception for banks in default or in danger of default

~~The~~ (A) Except as provided in subparagraph (B), the Board may approve an application pursuant to paragraph (1)(A) which involves—

~~(A)~~ (i) an acquisition of 1 or more banks in default or in danger of default; or

~~(B)~~ (ii) an acquisition with respect to which assistance is provided under section 1823(c) of this title;

without regard to subparagraph (B) or (D) of paragraph (1) or paragraph (2) or (3).

(B) Notwithstanding subparagraph (A), the Board may approve an application that would otherwise be subject to the prohibition in subparagraph (A) or (B) of paragraph (2) if—

(i) at the time the Board proposes to approve the application, there is no application or proposed application (other than an application that also would be subject to the prohibitions in subparagraph (A) or (B) of paragraph (2)) to acquire, directly or indirectly, the 1 or more banks in default or in danger of default, or the acquisition with respect to which assistance is provided under section 13(c) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)), pending before the Board that would meet all applicable standards for approval under this section;

(ii) the Federal Deposit Insurance Corporation would provide assistance under section 13 of the Federal Deposit Insurance Act (12 U.S.C. 1823) with respect to the acquisition that is the subject of the application to the Board; and

(iii) the Federal Deposit Insurance Corporation has determined that the acquisition is the only proposed transaction to acquire, directly or indirectly, the 1

or more banks in default or in danger of default pending before the Corporation (other than an acquisition that also would be subject to the prohibition in subparagraph (A) or (B) of paragraph (2)) that would permit the Corporation to —

(I) comply with the least-cost resolution requirements set forth in section 13(c)(4) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)(4)); or

(II) avoid the serious adverse effects on economic conditions or financial stability that would occur absent exercise of the authority in section 13(c)(4)(G) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)(4)(G)), if a systemic risk determination has been made under such section with respect to the bank or banks that are the subject of the application.