Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE FANNIE MAE/FREDDIE MAC SENIOR PREFERRED STOCK PURCHASE AGREEMENT CLASS ACTION

On Appeal from the United States District Court
For the District of Columbia, No. 13-mc-01288
(Royce C. Lamberth, District Judge)

SUPPLEMENTAL BRIEF FOR CLASS PLAINTIFFS

Hamish P.M. Hume
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., NW, Suite 800
Washington, DC 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

Interim Co-Lead Class Counsel for Appellants American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao

[*Additional Appearances on Inside Cover*]

BERNSTEIN LITOWITZ BERGER& GROSSMAN LLP
David L. Wales
1251 Avenue of the Americas
New York, NY 10020
Tel: (212) 554-1409
Fax: (212) 554-1444
dwales@blbglaw.com

Blair A. Nicholas
David R. Kaplan
Lucas E. Gilmore
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323
blairn@blbglaw.com
davidk@blbglaw.com

KESSLER TOPAZ MELTZER & CHECK, LLP
Eric L. Zagar
Matthew A. Goldstein
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056

Interim Co-Lead Class Counsel for Appellants American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao

GRANT & EISENHOFER P.A.
Michael J. Barry
David Haendler
123 Justison Street
Wilmington, DE 19801
Tel: (302) 622-7000
Fax: (302) 622-7100
gjarvis@gelaw.com
mbarry@gelaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES*

Cases **Page(s)**

* Authorities upon which Appellants chiefly rely are marked with asterisks.

Statutes

GLOSSARY

Term	Abbreviation
Ex.__	Exhibits to Class Plaintiffs' Supplemental Brief
American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao	Class Plaintiffs
Federal National Mortgage Association ("Fannie Mae) and Federal Home Loan Mortgage Corporation ("Freddie Mac")	The Companies
Appellees Fannie Mae, Freddie Mac, Treasury, and FHFA	Defendants
United States District Court for the District of Columbia (Lamberth, J.)	District Court
Federal Housing and Finance Agency	FHFA
The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989)	FIRREA
The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654 (2008)	HERA
United States Department of Treasury	Treasury

PRELIMINARY STATEMENT

Section 4623(d) does not bar any of plaintiffs' claims in this case. That is why FHFA never raised § 4623(d) before the District Court or in its briefing before this Court. Moreover, no matter how this Court interprets § 4623(d) with respect to equitable relief, the statute cannot be read to bar plaintiffs' claims for damages.

The plain text of § 4623(d) bars jurisdiction for claims that would "affect" certain actions taken by "the Director." The statute is unambiguous that the actions protected by § 4623(d) are only actions taken "by the Director" under Subchapter II of Chapter 46 of Title 12. Subchapter II unambiguously provides that the actions of "the Director" are actions to regulate the Companies, and are different from the actions taken by "the Agency acting as conservator or receiver." 12 U.S.C. § 4617(a). Subchapter II consistently and unambiguously treats actions by "the Director" as different from actions taken by "the Agency," which is referred to only its capacity as "conservator or receiver."

Class Plaintiffs advance common law claims for breach of contract against Fannie Mae, Freddie Mac, and FHFA in its role as conservator for both Companies. Class Plaintiffs also advance breach of fiduciary duty claims against these same defendants (and Treasury). The principal remedy Class Plaintiffs seek for these claims is the payment of *damages* directly to the Class. Since § 4623(d) says nothing about claims for damages against the Companies or against FHFA

acting as conservator, it does not bar the relief sought by Class Plaintiffs.

ARGUMENT

I. SECTION 4623(D) APPLIES TO REGULATORY ACTIONS TAKEN BY THE "DIRECTOR," NOT ACTIONS TAKEN BY "THE AGENCY" AS CONSERVATOR.

The plain text of § 4623(d) reads as follows:

> "Except as provided in this section, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subchapter (other than appointment of a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) or to review, modify, suspend, terminate, or set aside such classification or action." 12 U.S.C. § 4623(d).

By its plain terms, the jurisdictional bar set forth in § 4623(d) is limited to certain kinds of judicial relief that would affect "**the issuance or effectiveness of any classification or action of the Director under this subchapter**." *Id.* The relevant "subchapter" is Subchapter II of Chapter 46 of Title 12 of the United States Code. Subchapter II is entitled "Required Capital Levels For Regulated Entities, Special Enforcement Powers, And Reviews Of Assets And Liabilities." *See* Title 12 U.S. Code, page 4; 12 U.S.C. §§ 4611-24. There are currently eleven statutes in Subchapter II. 12 U.S.C. §§ 4611-24 (§§ 4619-21 have been repealed). Those eleven statutes all refer to the powers of "**the Director**" to take various actions to regulate the regulated entities. By contrast, only one of those statutes, 12 U.S.C. § 4617, refers to the power of "**the Agency**" to act as a conservator. The other ten statutes in Subchapter II do not even contain the word "Agency." The

only statute in Subchapter II that contains the word "Agency" is § 4617, which refers to "the Agency acting as conservator or receiver." 12 U.S.C. § 4617. No statute in the Subchapter ever refers to "the Director" acting as "conservator." Instead, it is always "the Agency" that acts "as conservator or receiver."[1]

Thus, since § 4623(d) refers only to actions taken by "the Director" and not to actions taken by "the Agency as conservator," its jurisdictional bar unambiguously applies only to judicial review of the regulatory actions taken by "**the Director**" under Subchapter II, and does *not* apply to actions taken by "**the Agency**" as "**conservator**." When Congress uses different words or phrases in the same statute (such as "Director" and "Agency as conservator"), Congress is presumed to have intended to be referring to different things.[2] As the Supreme Court has explained: "A familiar principle of statutory construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). Here, Congress excluded any reference to actions taken by the "Agency as conservator" in the jurisdictional bar

[1] The only time the word "conservator" ever appears outside of § 4617 is when the Director's power to appoint the Agency as a conservator is referenced briefly in § 4618 and § 4623. In both places, the reference reinforces the unambiguous distinction throughout the Subchapter that "the Director" has the power to regulate and to appoint "the Agency" as conservator or receiver, but it is "the Agency," not "the Director," that acts "as conservator or receiver."

[2] *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *Russello v. United States*, 464 U.S. 16, 23 (1983).

of § 4623(d), with full knowledge that § 4617 (in the same Subchapter) contains numerous references to actions taken by the "Agency as conservator." It therefore follows that Congress did not intend § 4623(d) to apply to actions taken by the "Agency as conservator."

We attach to this brief the entirety of Subchapter II to reinforce the point. *See* Ex. A. The eleven statutes comprising Subchapter II refer repeatedly to "the Director," while referring to the "Agency" only in § 4617. Section 4617 refers to "the Agency" as a distinct concept and person from "the Director," and it is the Agency, not the Director, whom the statute repeatedly designates as the "conservator or receiver."[3] Section 4623(d) unambiguously applies only to the actions of "the Director" under Subchapter II; it does *not* apply to the actions of "the Agency acting as conservator or receiver." Since Class Plaintiffs' claims in this case seek damages based on the actions of the Agency as conservator, they are not barred by § 4623(d).

In addition, if § 4623(d) applied to claims challenging actions taken by the Agency as conservator, that would render superfluous the jurisdictional bar of § 4617(f), violating the cardinal rule against construing any portion of a statute to be

[3] The statute unambiguously treats "the Director" as a different person from the "Agency acting as conservator or receiver." *See e.g.* § 4617 12 U.S.C. § 4617(a)(1) ("the Director may appoint the Agency as conservator or receiver…."); *id.* ("All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver."); *see also* 12 U.S.C. §§ 4611-16, 4619-24 (referring only to "the Director" and never to "the Agency").

"inoperative or superfluous, void or insignificant."[4] Also, reading "action of the Director" to include "actions by the Agency as conservator" would violate not only the plain text, but also the principle that statutes must be construed in light of their entire structure and context.[5]

The legislative history confirms this. Both HERA and its predecessor statutes distinguish between the powers of the *regulator* of the Companies and the powers of the *conservator* of the Companies.[6] And the origin of § 4623(d) is 12 U.S.C. §1818(i)(1), which bars review of claims relating to "the issuance or enforcement of any notice or order" issued by bank regulators. This confirms the original intent of § 4623(d) was to curb review of regulatory action, not action by a conservator. At oral argument, FHFA's counsel admitted that § 4623(d) addresses "when the Agency is regulator," Ex. B at 69; he also admitted § 4623(d) stems from case law that caused Congress to enact § 1818(i), and that the Congressional intent was to preclude judicial review of "capital directives" issued by financial regulators—which obviously has nothing to do with barring review of actions taken by conservators. *Id.* at 70-71.

---

[4] *Corley v. United States*, 556 U.S. 303, 314 (2009).

[5] *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943).

[6] *Compare* Housing & Community Development Act of 1992, Pub. L. 102-550, §§ 1361-1366, 1369C, 106 Stat. 3672, 3972-3986 (1992) ("1992 Act") (codified at 12 U.S.C. §§ 4611-4616, 4622) (powers of regulator) *with* 1992 Act at §§ 1367, 1369-1369B (originally codified at 12 U.S.C. §§ 4617 and 4619-4621, and then re-codified by HERA under § 4617) (powers of conservator).

The case law also confirms that § 4623(d) does not bar plaintiffs' claims. No case has ever held that § 4623(d) bars claims made against FHFA as conservator or receiver. Likewise, no court has interpreted the statute on which § 4623(d) was based (12 U.S.C. §1818(i)(1)) as barring claims against an agency acting as conservator or receiver.[7] At least one court has held that § 4623(d) merely bars actions relating to actions taken under § 4616(b)(4)—i.e., claims relating to "supervisory actions that the FHFA Director may take with respect to 'significantly undercapitalized' regulated entities." *California ex rel. Harris v. FHFA*, 2012 U.S. Dist. LEXIS 112442, at **37-39 (N.D. Cal. 2012).[8]

II. SECTION 4623(D) CANNOT BE READ TO BAR ANY DAMAGE CLAIMS AGAINST FANNIE, FREDDIE, OR FHFA.

Whatever this Court may conclude about the injunctive relief barred by § 4623(d), the statute does not bar damage claims, and is therefore irrelevant to the common law damage claims advanced by the Class.[9]

---

[7] *E.g.*, *Ridder v. OTS*, 146 F.3d 1035, 1039 (D.C. Cir. 1996) (§ 1818(i) limits review of "ongoing administrative proceedings brought by banking agencies").

[8] FHFA's briefing in that case admitted that § 4623(d) applies only to "FHFA['s actions] ***in its regulatory capacity***." Defs.' Mot. to Dismiss at 26 [ECF 49], in *Cal. ex rel. Harris v. FHFA*, No. 10-3084 (N.D. Cal. Oct. 14, 2010) (emphasis added).

[9] Counsel for FHFA argued that they previously failed to raise § 4623(d) because they were "focusing on the conservatorship allegations in the complaints." Ex. B at 69:16-17. They now claim the Net Worth Sweep is also a *regulatory* action that imposes a "new capital paradigm," and hence is protected by § 4623(d). *Id.* at 70:18. This 11th hour assertion is not credible. It is also inconsistent with the Government's insistence in the Court of Federal Claims that FHFA was acting as

First, the plain language of the statute does not refer to barring any claim for damages. No court has ever read this statute to bar damage claims. To the contrary, courts have held that the language which § 4623(d) mimics, found in § 1818(i)(1), does *not* bar damages claims.[10]

Second, the language used by § 4623(d) to describe the scope of claims that are barred as against the Director is similar to the language Congress used in § 4617(f) to describe the scope of claims barred as against the conservator. *Compare* 12 U.S.C. 4623(d) *with* 12 U.S.C. § § 4617(f). Courts have interpreted that language (or the language in the identical FIRREA provision) as *not* barring claims for damages. *See Hindes*, 137 F.3d at 161 ("Courts uniformly have held that the preclusion of section 1821(j) [on which 4617(f) is based] does not affect a damages claim.") (citing cases). The District Court cited to this case law in explaining why § 4617(f) does not bar the plaintiffs' damages claims. JA 347-8.

Third, any interpretation of § 4623(d) as barring damages claims against

---

an independent conservator, and *not* as the Government, when it agreed to the Net Worth Sweep. In any event, no matter what window-dressing is put on it, the Net Worth Sweep breached the contractual rights of the private shareholders, who are entitled to claim damages for that breach.

[10] *See Hindes v. FDIC*, 137 F.3d 148 (3rd Cir. 1998), 165 ("We see no reason why…a plaintiff could not institute…an action for damages based upon the FDIC's allegedly wrongful conduct without offending section 1818(i)") ("section 1818(i)(1) precludes the declaratory and injunctive relief, but on its face would not affect an appropriate constitutional claim for damages"); *see also In re JPMorgan Chase Mortg. Modification Litig.*, 880 F. Supp. 2d 220, 231-32 (D. Mass. 2012); *Rex v. Chase Home Finance LLC*, 905 F. Supp. 2d 1111 (C.D. Cal. 2012).

FHFA and the Companies would directly contradict a number of other provisions. For example, § 4617(d)(3) provides for "C**laims for damages**" based on the repudiation of contracts of the regulated entities by "the conservator or receiver." Section 4617(b)(18) also addresses "any final and unappealable **judgment for monetary damages entered against the conservator or receiver** for the breach of an agreement." Section 4617(b)(6) provides for the "judicial determination of claims" against Fannie and Freddie in receivership, and provides that "**The claimant may file suit on a claim**…." 12 U.S.C. § 4617(b)(6)(A). Similarly, § 4617(b)(9) provides for the receiver to make "payment of claims" which are "**determined by the final judgment of any court of competent jurisdiction**." 12 U.S.C. §4617(b)(9). These provisions would all be in irreconcilable conflict with § 4623(d) if the latter were read to bar damages claims against the Companies.

Fourth, interpreting § 4623(d) to bar claims for money damages would conflict with § 4617(j)(4)—and with the litigation positions taken by FHFA with respect to § 4617(j)(4). Section 4617(j)(4) provides that "The Agency shall not be liable for any amounts in the nature of penalties or fines…" The necessary implication of this provision is that there is nothing precluding the award of damages that do *not* constitute "penalties or fines." In litigating cases involving § 4617(j)(4), FHFA has effectively admitted this implication. *See e.g. Higgins v. BAC Home Loans Servicing, LP*, 2014 WL 1332825, *1 (E.D. Ky. 2014) (Fannie

and FHFA "argue that the claims against them must be dismissed because a federal statute [§4617(j)] prohibits the imposition of penalties or fines on either of them and the plaintiffs have failed to plead any actual damages.").[11] Even when a court ruled against FHFA by finding statutory awards to be "actual damages" rather than "penalties or fines," *id.* at *6-7, FHFA's appeal from that ruling did not invoke § 4623(d); instead, it merely argued that § 4617(j)(4) bars "penalties or fines," and the monetary awards in that case were properly characterized as "penalties or fines," and *not* as "compensation for actual injury" or "liquidated-damages." Ex. C at 11-39. FHFA did not even mention § 4623(d) in its briefing in that case. It would have made no sense for FHFA to have battled so mightily in *Higgins* and elsewhere over the gray area between "penalties or fines" (barred) and "compensatory damages" (not barred) if § 4623(d) created an absolute bar against all damage claims against the Companies and FHFA.[12]

Fifth, if Congress wanted to bar damage claims against FHFA and the Companies, it would not have limited § 4623(d) to claims against "the Director," which by their nature are equitable or declaratory (the Director having no ability to pay meaningful damages). Indeed, the Class did not even sue "the Director"; we sued only the Companies and FHFA. JA226-29. Congress knows how to bar

[11] *Reversed on other grounds*, 793 F.3d 688 (6th Cir. 2015).

[12] *See also Raddatz v. Fed. Nat'l Mort. Assoc.*, 2016 WL 1129211, *6 (Ohio 2016).

damage claims, and did not do so here.

Sixth, reading § 4623(d) to bar damage claims would raise a constitutional issue, including whether the statute is a Taking requiring just compensation. The Court should endeavor to avoid such interpretations. *See e.g. NLRB v. Catholic Bishops*, 440 U.S. 490, 501 (1979); *Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 699 (D.C. Cir. 1997); *Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014).[13]

In the District Court, Defendants did not argue that any statute barred the *direct* claims brought by Class Plaintiffs for *damages*. Thus, the District Court addressed those claims on the merits. JA347-8. This Court should do so too.[14]

CONCLUSION

Section 4623(d) does not bar any of the Class Plaintiffs' claims in this case.

Dated: April 22, 2016

Respectfully submitted,

/s/ *Hamish P.M. Hume*

[13] At oral argument, Class Plaintiffs' counsel was unable to answer the Court's question whether we raised the constitutional avoidance doctrine in our opening brief. We did raise it in our opening brief. Doc.1602879 at 28-29. It was raised with respect to Defendants' argument that our derivative claims are barred. It was not raised with respect to FHFA's argument that § 4617 bars *direct* claims because *FHFA did not make that argument in the District Court*, which is why the District Court never addressed it, instead addressing plaintiffs' direct claims on the merits. JA347-56. After FHFA made that new argument, we rebutted it in reply, including with reference to the constitutional avoidance doctrine. Doc.1602880 at 5.

[14] At argument, Defendants' counsel made no effort to defend the District Court's reasoning in dismissing our direct breach of contract claims, and never responded to our arguments showing the flaws in that decision and the merits of our claims.

Hamish P.M. Hume
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., NW, Suite 800
Washington, DC 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and this Court's oral Order during the April 15, 2016 oral argument, I hereby certify that this brief complies with the page limitation because the text of the brief is not in excess of 10 pages, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: April 22, 2016

/s/ *Hamish P.M. Hume*

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25, that on February 2, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

DATED: April 22, 2016

/s/ *Hamish P.M. Hume*
Hamish P.M. Hume

INDEX OF EXHIBITS TO CLASS PLAINTIFFS' SUPPLEMENTAL BRIEF ON SECTION 4623(d)

Exhibit A	Subchapter II of Chapter 46 of Title 12 of the United States Code (highlighting added for ease of reference)
Exhibit B	Excerpts from Transcript of April 15, 2016 Oral Argument in *Perry Capital et al v. Jack lew, et al*, Case Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.) (highlighting added for ease of reference)
Exhibit C	Corrected Joint Opening Brief of Appellants FHFA and Fannie Mae in *Higgins v. BAC Home loans Servg., LP,* and *FHFA et al,* Case No. 5:12-cv-183 (Document 33 in Dkt. No. 14-6167, U.S. Court of Appeals for the Sixth Circuit) (highlighting added for ease of reference)

Exhibit A

CHAPTER 46—GOVERNMENT SPONSORED ENTERPRISES

SUBCHAPTER III—ENFORCEMENT PROVISIONS

GUIDE TO EXHIBIT A PAGE NUMBERS FOR EACH STATUTE IN SUBCHAPTER II

SUBCHAPTER II—REQUIRED CAPITAL LEVELS FOR REGULATED ENTITIES, SPECIAL ENFORCEMENT POWERS, AND REVIEWS OF ASSETS AND LIABILITIES

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4611

§ 4611. Risk-based capital levels for regulated entities

Effective: July 30, 2008

Currentness

(a) In general

(1) Enterprises

The Director shall, by regulation, establish risk-based capital requirements for the enterprises to ensure that the enterprises operate in a safe and sound manner, maintaining sufficient capital and reserves to support the risks that arise in the operations and management of the enterprises.

(2) Federal Home Loan Banks

The Director shall establish risk-based capital standards under section 1426 of this title for the Federal Home Loan Banks.

(b) No limitation

Nothing in this section shall limit the authority of the Director to require other reports or undertakings, or take other action, in furtherance of the responsibilities of the Director under this Act.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1361, Oct. 28, 1992, 106 Stat. 3972; Pub.L. 110-289, Div. A, Title I, § 1110(a), July 30, 2008, 122 Stat. 2675.)

12 U.S.C.A. § 4611, 12 USCA § 4611
Current through P.L. 114-115 approved 12-28-2015

Ex. A1

End of Document

Ex. A2

12 U.S.C.A. § 4612

§ 4612. Minimum capital levels

Effective: July 30, 2008

Currentness

(a) Enterprises

For purposes of this subchapter, the minimum capital level for each enterprise shall be the sum of--

(1) 2.50 percent of the aggregate on-balance sheet assets of the enterprise, as determined in accordance with generally accepted accounting principles;

(2) 0.45 percent of the unpaid principal balance of outstanding mortgage-backed securities and substantially equivalent instruments issued or guaranteed by the enterprise that are not included in paragraph (1); and

(3) 0.45 percent of other off-balance sheet obligations of the enterprise not included in paragraph (2) (excluding commitments in excess of 50 percent of the average dollar amount of the commitments outstanding each quarter over the preceding 4 quarters), except that the Director shall adjust such percentage to reflect differences in the credit risk of such obligations in relation to the instruments included in paragraph (2).

(b) Federal Home Loan Banks

For purposes of this subchapter, the minimum capital level for each Federal Home Loan Bank shall be the minimum capital required to be maintained to comply with the leverage requirement for the bank established under section 1426(a)(2) of this title.

Ex. A3

(c) Establishment of revised minimum capital levels

Notwithstanding subsections (a) and (b) and notwithstanding the capital classifications of the regulated entities, the Director may, by regulations issued under section 4526 of this title, establish a minimum capital level for the enterprises, for the Federal Home Loan Banks, or for both the enterprises and the banks, that is higher than the level specified in subsection (a) for the enterprises or the level specified in subsection (b) for the Federal Home Loan Banks, to the extent needed to ensure that the regulated entities operate in a safe and sound manner.

(d) Authority to require temporary increase

(1) In general

Notwithstanding subsections (a) and (b) and any minimum capital level established pursuant to subsection (c), the Director may, by order, increase the minimum capital level for a regulated entity on a temporary basis, when the Director determines that such an increase is necessary and consistent with the prudential regulation and the safe and sound operations of a regulated entity.

(2) Rescission

The Director shall rescind any temporary minimum capital level established under paragraph (1) when the Director determines that the circumstances or facts no longer justify the temporary minimum capital level.

(3) Regulations required

The Director shall issue regulations establishing--

(A) standards for the imposition of a temporary increase in minimum capital under paragraph (1);

(B) the standards and procedures that the Director will use to make the determination referred to in paragraph (2); and

(C) a reasonable time frame for periodic review of any temporary increase in minimum capital for the purpose of making the determination referred to in paragraph (2).

(e) Authority to establish additional capital and reserve requirements for particular purposes

Ex. A4

The Director may, at any time by order or regulation, establish such capital or reserve requirements with respect to any product or activity of a regulated entity, as the Director considers appropriate to ensure that the regulated entity operates in a safe and sound manner, with sufficient capital and reserves to support the risks that arise in the operations and management of the regulated entity.

(f) Periodic review

The Director shall periodically review the amount of core capital maintained by the enterprises, the amount of capital retained by the Federal Home Loan Banks, and the minimum capital levels established for such regulated entities pursuant to this section.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1362, Oct. 28, 1992, 106 Stat. 3975; Pub.L. 110-289, Div. A, Title I, § 1111, July 30, 2008, 122 Stat. 2676.)

12 U.S.C.A. § 4612, 12 USCA § 4612
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A5

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4613

§ 4613. Critical capital levels

Effective: July 30, 2008

Currentness

(a) Enterprises

For purposes of this subchapter, the critical capital level for each enterprise shall be the sum of--

(1) 1.25 percent of the aggregate on-balance sheet assets of the enterprise, as determined in accordance with generally accepted accounting principles;

(2) 0.25 percent of the unpaid principal balance of outstanding mortgage-backed securities and substantially equivalent instruments issued or guaranteed by the enterprise that are not included in paragraph (1); and

(3) 0.25 percent of other off-balance sheet obligations of the enterprise not included in paragraph (2) (excluding commitments in excess of 50 percent of the average dollar amount of the commitments outstanding each quarter over the preceding 4 quarters), except that the Director shall adjust such percentage to reflect differences in the credit risk of such obligations in relation to the instruments included in paragraph (2).

(b) Federal Home Loan Banks

(1) In general

For purposes of this subchapter, the critical capital level for each Federal Home Loan Bank shall be such amount of capital as the Director shall, by regulation, require.

Ex. A6

(2) Consideration of other critical capital levels

In establishing the critical capital level under paragraph (1) for the Federal Home Loan Banks, the Director shall take due consideration of the critical capital level established under subsection (a) for the enterprises, with such modifications as the Director determines to be appropriate to reflect the difference in operations between the banks and the enterprises.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1363, Oct. 28, 1992, 106 Stat. 3976; Pub.L. 110-289, Div. A, Title I, § 1141(a), July 30, 2008, 122 Stat. 2730.)

12 U.S.C.A. § 4613, 12 USCA § 4613
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A7

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4614

§ 4614. Capital classifications

Effective: July 30, 2008

Currentness

(a) Enterprises

For purposes of this subchapter, the Director shall classify the enterprises according to the following capital classifications:

(1) Adequately capitalized

An enterprise shall be classified as adequately capitalized if the enterprise--

(A) maintains an amount of total capital that is equal to or exceeds the risk-based capital level established for the enterprise under section 4611 of this title; and

(B) maintains an amount of core capital that is equal to or exceeds the minimum capital level established for the enterprise under section 4612 of this title.

(2) Undercapitalized

An enterprise shall be classified as undercapitalized if--

(A) the enterprise--

(i) does not maintain an amount of total capital that is equal to or exceeds the risk-based capital level established for the enterprise; and

Ex. A8

(ii) maintains an amount of core capital that is equal to or exceeds the minimum capital level established for the enterprise; or

(B) the enterprise is otherwise classified as undercapitalized under subsection (b)(1) of this section.

(3) Significantly undercapitalized

An enterprise shall be classified as significantly undercapitalized if--

(A) the enterprise--

(i) does not maintain an amount of total capital that is equal to or exceeds the risk-based capital level established for the enterprise;

(ii) does not maintain an amount of core capital that is equal to or exceeds the minimum capital level established for the enterprise; and

(iii) maintains an amount of core capital that is equal to or exceeds the critical capital level established for the enterprise under section 4613 of this title; or

(B) the enterprise is otherwise classified as significantly undercapitalized under subsection (b)(2) of this section or section 4615(b) of this title.

(4) Critically undercapitalized

An enterprise shall be classified as critically undercapitalized if--

(A) the enterprise--

(i) does not maintain an amount of total capital that is equal to or exceeds the risk-based capital level established for the enterprise; and

Ex. A9

(ii) does not maintain an amount of core capital that is equal to or exceeds the critical capital level for the enterprise; or

(B) is otherwise classified as critically undercapitalized under subsection (b)(3) of this section or section 4616(b)(5) of this title.

(b) Federal Home Loan Banks

(1) Establishment and criteria

For purposes of this subchapter, the Director shall, by regulation--

(A) establish the capital classifications specified under paragraph (2) for the Federal Home Loan Banks;

(B) establish criteria for each such capital classification based on the amount and types of capital held by a bank and the risk-based, minimum, and critical capital levels for the banks and taking due consideration of the capital classifications established under subsection (a) for the enterprises, with such modifications as the Director determines to be appropriate to reflect the difference in operations between the banks and the enterprises; and

(C) shall classify the Federal Home Loan Banks according to such capital classifications.

(2) Classifications

The capital classifications specified under this paragraph are--

(A) adequately capitalized;

(B) undercapitalized;

(C) significantly undercapitalized; and

Ex. A10

(D) critically undercapitalized.

(c) Discretionary classification

(1) Grounds for reclassification

The Director may reclassify a regulated entity under paragraph (2) if--

(A) at any time, the Director determines in writing that the regulated entity is engaging in conduct that could result in a rapid depletion of core or total capital or the value of collateral pledged as security has decreased significantly or that the value of the property subject to mortgages held by the regulated entity (or securitized in the case of an enterprise) has decreased significantly;

(B) after notice and an opportunity for hearing, the Director determines that the regulated entity is in an unsafe or unsound condition; or

(C) pursuant to section 4631(b) of this title, the Director deems the regulated entity to be engaging in an unsafe or unsound practice.

(2) Reclassification

In addition to any other action authorized under this chapter, including the reclassification of a regulated entity for any reason not specified in this subsection, if the Director takes any action described in paragraph (1), the Director may classify a regulated entity--

(A) as undercapitalized, if the regulated entity is otherwise classified as adequately capitalized;

(B) as significantly undercapitalized, if the regulated entity is otherwise classified as undercapitalized; and

(C) as critically undercapitalized, if the regulated entity is otherwise classified as significantly undercapitalized.

Ex. A11

(d) Quarterly determination

The Director shall determine the capital classification of the regulated entities for purposes of this subchapter on not less than a quarterly basis (and as appropriate under subsection (c) of this section).

(e) Restriction on capital distributions

(1) In general

A regulated entity shall make no capital distribution if, after making the distribution, the regulated entity would be undercapitalized.

(2) Exception

Notwithstanding paragraph (1), the Director may permit a regulated entity, to the extent appropriate or applicable, to repurchase, redeem, retire, or otherwise acquire shares or ownership interests if the repurchase, redemption, retirement, or other acquisition--

(A) is made in connection with the issuance of additional shares or obligations of the regulated entity in at least an equivalent amount; and

(B) will reduce the financial obligations of the regulated entity or otherwise improve the financial condition of the entity.

(f) Implementation

Notwithstanding any other provision of this section, during the period beginning on October 28, 1992, and ending upon the effective date of section 4615 of this title (as provided in section 4615(c) of this title), an enterprise shall be classified as adequately capitalized if the enterprise maintains an amount of core capital that is equal to or exceeds the minimum capital level for the enterprise under section 4612 of this title.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1364, Oct. 28, 1992, 106 Stat. 3976; Pub.L. 110-289, Div. A, Title I, §§ 1142(a), 1161(a)(3), July 30, 2008, 122 Stat. 2730, 2779.)

Ex. A12

12 U.S.C.A. § 4614, 12 USCA § 4614
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A13

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4615

§ 4615. Supervisory actions applicable to undercapitalized regulated entities

Effective: July 30, 2008

Currentness

(a) Mandatory actions

(1) Required monitoring

The Director shall--

(A) closely monitor the condition of any undercapitalized regulated entity;

(B) closely monitor compliance with the capital restoration plan, restrictions, and requirements imposed on an undercapitalized regulated entity under this section; and

(C) periodically review the plan, restrictions, and requirements applicable to an undercapitalized regulated entity to determine whether the plan, restrictions, and requirements are achieving the purpose of this section.

(2) Capital restoration plan

A regulated entity that is classified as undercapitalized shall, within the time period provided in section 4622(b) and (d) of this title, submit to the Director a capital restoration plan that complies with section 4622 of this title and carry out the plan after approval.

(3) Restriction on capital distributions

A regulated entity that is classified as undercapitalized may not make any capital distribution that would result in the regulated entity being reclassified as significantly undercapitalized or critically undercapitalized.

Ex. A14

(4) Restriction of asset growth

An undercapitalized regulated entity shall not permit its average total assets during any calendar quarter to exceed its average total assets during the preceding calendar quarter, unless--

(A) the Director has accepted the capital restoration plan of the regulated entity;

(B) any increase in total assets is consistent with the capital restoration plan; and

(C) the ratio of tangible equity to assets of the regulated entity increases during the calendar quarter at a rate sufficient to enable the regulated entity to become adequately capitalized within a reasonable time.

(5) Prior approval of acquisitions and new activities

An undercapitalized regulated entity shall not, directly or indirectly, acquire any interest in any entity or engage in any new activity, unless--

(A) the Director has accepted the capital restoration plan of the regulated entity, the regulated entity is implementing the plan, and the Director determines that the proposed action is consistent with and will further the achievement of the plan; or

(B) the Director determines that the proposed action will further the purpose of this subchapter.

(b) Reclassification from undercapitalized to significantly undercapitalized

The Director shall reclassify as significantly undercapitalized a regulated entity that is classified as undercapitalized (and the regulated entity shall be subject to the provisions of section 4616 of this title) if--

(1) the regulated entity does not submit a capital restoration plan that is substantially in compliance with section 4622 of this title within the applicable period or the Director does not approve the capital restoration plan submitted by the regulated entity; or

(2) the Director determines that the regulated entity has failed to comply with the capital restoration plan and fulfill the schedule for the plan approved by the Director in any material respect.

Ex. A15

(c) Other discretionary safeguards

The Director may take, with respect to an undercapitalized regulated entity, any of the actions authorized to be taken under section 4616 of this title with respect to a significantly undercapitalized regulated entity, if the Director determines that such actions are necessary to carry out the purpose of this subchapter.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1365, Oct. 28, 1992, 106 Stat. 3978; Pub.L. 110-289, Div. A, Title I, § 1143, July 30, 2008, 122 Stat. 2732.)

12 U.S.C.A. § 4615, 12 USCA § 4615
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A16

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4616

§ 4616. Supervisory actions applicable to significantly undercapitalized regulated entities

Effective: July 30, 2008

Currentness

(a) Mandatory supervisory actions

(1) Capital restoration plan

A regulated entity that is classified as significantly undercapitalized shall, within the time period under section 4622(b) and (d) of this title, submit to the Director a capital restoration plan that complies with section 4622 of this title and carry out the plan after approval.

(2) Restrictions on capital distributions

(A) Prior approval

A regulated entity that is classified as significantly undercapitalized may not make any capital distribution that would result in the regulated entity being reclassified as critically undercapitalized. A regulated entity that is classified as significantly undercapitalized may not make any other capital distribution unless the Director approves the distribution.

(B) Standard for approval

The Director may approve a capital distribution by a regulated entity classified as significantly undercapitalized only if the Director determines that the distribution (i) will enhance the ability of the regulated entity to meet the risk-based capital level and the minimum capital level for the regulated entity promptly, (ii) will contribute to the long-term financial safety and soundness of the regulated entity, or (iii) is otherwise in the public interest.

Ex. A17

(b) Specific actions

In addition to any other actions taken by the Director (including actions under subsection (a) of this section), the Director shall carry out this section by taking, at any time, 1 or more of the following actions with respect to a regulated entity that is classified as significantly undercapitalized:

(1) Limitation on increase in obligations

Limit any increase in, or order the reduction of, any obligations of the regulated entity, including off-balance sheet obligations.

(2) Limitation on growth

Limit or prohibit the growth of the assets of the regulated entity or require contraction of the assets of the regulated entity.

(3) Acquisition of new capital

Require the regulated entity to acquire new capital in a form and amount determined by the Director.

(4) Restriction of activities

Require the regulated entity to terminate, reduce, or modify any activity that the Director determines creates excessive risk to the regulated entity.

(5) Improvement of management

Take 1 or more of the following actions:

(A) New election of board

Order a new election for the board of directors of the regulated entity.

(B) Dismissal of directors or executive officers

Ex. A18

Require the regulated entity to dismiss from office any director or executive officer who had held office for more than 180 days immediately before the date on which the regulated entity became undercapitalized. Dismissal under this subparagraph shall not be construed to be a removal pursuant to the enforcement powers of the Director under section 4636a of this title.

(C) Employ qualified executive officers

Require the regulated entity to employ qualified executive officers (who, if the Director so specifies, shall be subject to approval by the Director).

(6) Reclassification from significantly to critically undercapitalized

The Director may reclassify as critically undercapitalized a regulated entity that is classified as significantly undercapitalized (and the regulated entity shall be subject to the provisions of section 4617 of this title) if--

(A) the regulated entity does not submit a capital restoration plan that is substantially in compliance with section 4622 of this title within the applicable period or the Director does not approve the capital restoration plan submitted by the regulated entity; or

(B) the Director determines that the regulated entity has failed to make, in good faith, reasonable efforts necessary to comply with the capital restoration plan and fulfill the schedule for the plan approved by the Director.

(7) Other action

Require the regulated entity to take any other action that the Director determines will better carry out the purpose of this section than any of the other actions specified in this subsection.

(c) Restriction on compensation of executive officers

A regulated entity that is classified as significantly undercapitalized in accordance with section 4614 of this title may not, without prior written approval by the Director--

(1) pay any bonus to any executive officer; or

Ex. A19

(2) provide compensation to any executive officer at a rate exceeding the average rate of compensation of that officer (excluding bonuses, stock options, and profit sharing) during the 12 calendar months preceding the calendar month in which the regulated entity became significantly undercapitalized.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1366, Oct. 28, 1992, 106 Stat. 3978; Pub.L. 110-289, Div. A, Title I, § 1144, July 30, 2008, 122 Stat. 2733.)

12 U.S.C.A. § 4616, 12 USCA § 4616
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A20

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4617

§ 4617. Authority over critically undercapitalized regulated entities

Effective: July 30, 2008

Currentness

(a) Appointment of the Agency as conservator or receiver

(1) In general

Notwithstanding any other provision of Federal or State law, the Director may appoint the Agency as conservator or receiver for a regulated entity in the manner provided under paragraph (2) or (4). All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver.

(2) Discretionary appointment

The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.

(3) Grounds for discretionary appointment of conservator or receiver

The grounds for appointing conservator or receiver for any regulated entity under paragraph (2) are as follows:

(A) Assets insufficient for obligations

The assets of the regulated entity are less than the obligations of the regulated entity to its creditors and others.

Ex. A21

(B) Substantial dissipation

Substantial dissipation of assets or earnings due to--

(i) any violation of any provision of Federal or State law; or

(ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition

An unsafe or unsound condition to transact business.

(D) Cease and desist orders

Any willful violation of a cease and desist order that has become final.

(E) Concealment

Any concealment of the books, papers, records, or assets of the regulated entity, or any refusal to submit the books, papers, records, or affairs of the regulated entity, for inspection to any examiner or to any lawful agent of the Director.

(F) Inability to meet obligations

The regulated entity is likely to be unable to pay its obligations or meet the demands of its creditors in the normal course of business.

(G) Losses

The regulated entity has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the regulated entity to become adequately capitalized (as defined in section 4614(a)(1) of this title).

Ex. A22

(H) Violations of law

Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to--

(i) cause insolvency or substantial dissipation of assets or earnings; or

(ii) weaken the condition of the regulated entity.

(I) Consent

The regulated entity, by resolution of its board of Directors or its shareholders or members, consents to the appointment.

(J) Undercapitalization

The regulated entity is undercapitalized or significantly undercapitalized (as defined in section 4614(a)(3) of this title), and--

(i) has no reasonable prospect of becoming adequately capitalized;

(ii) fails to become adequately capitalized, as required by--

(I) section 4615(a)(1) of this title with respect to a regulated entity; or

(II) section 4616(a)(1) of this title with respect to a significantly undercapitalized regulated entity;

(iii) fails to submit a capital restoration plan acceptable to the Agency within the time prescribed under section 4622 of this title; or

(iv) materially fails to implement a capital restoration plan submitted and accepted under section 4622 of this title.

Ex. A23

(K) Critical undercapitalization

The regulated entity is critically undercapitalized, as defined in section 4614(a)(4) of this title.

(L) Money laundering

The Attorney General notifies the Director in writing that the regulated entity has been found guilty of a criminal offense under section 1956 or 1957 of Title 18 or section 5322 or 5324 of Title 31.

(4) Mandatory receivership

(A) In general

The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that--

(i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

(ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due.

(B) Periodic determination required for critically undercapitalized regulated entity

If a regulated entity is critically undercapitalized, the Director shall make a determination, in writing, as to whether the regulated entity meets the criteria specified in clause (i) or (ii) of subparagraph (A)--

(i) not later than 30 calendar days after the regulated entity initially becomes critically undercapitalized; and

(ii) at least once during each succeeding 30-calendar day period.

Ex. A24

(C) Determination not required if receivership already in place

Subparagraph (B) does not apply with respect to a regulated entity in any period during which the Agency serves as receiver for the regulated entity.

(D) Receivership terminates conservatorship

The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter.

(5) Judicial review

(A) In general

If the Agency is appointed conservator or receiver under this section, the regulated entity may, within 30 days of such appointment, bring an action in the United States district court for the judicial district in which the home office of such regulated entity is located, or in the United States District Court for the District of Columbia, for an order requiring the Agency to remove itself as conservator or receiver.

(B) Review

Upon the filing of an action under subparagraph (A), the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.

(6) Directors not liable for acquiescing in appointment of conservator or receiver

The members of the board of Directors of a regulated entity shall not be liable to the shareholders or creditors of the regulated entity for acquiescing in or consenting in good faith to the appointment of the Agency as conservator or receiver for that regulated entity.

(7) Agency not subject to any other Federal Agency

When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other Agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency.

Ex. A25

(b) Powers and duties of the Agency as conservator or receiver

(1) Rulemaking authority of the Agency

The Agency may prescribe such regulations as the Agency determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers

(A) Successor to regulated entity

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to--

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or Director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

(B) Operate the regulated entity

The Agency may, as conservator or receiver--

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the Directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(ii) collect all obligations and money due the regulated entity;

(iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;

(iv) preserve and conserve the assets and property of the regulated entity; and

Ex. A26

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

(C) Functions of officers, Directors, and shareholders of a regulated entity

The Agency may, by regulation or order, provide for the exercise of any function by any stockholder, Director, or officer of any regulated entity for which the Agency has been named conservator or receiver.

(D) Powers as conservator

The Agency may, as conservator, take such action as may be--

(i) necessary to put the regulated entity in a sound and solvent condition; and

(ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

(E) Additional powers as receiver

In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph.

(F) Organization of new enterprise

The Agency may, as receiver for an enterprise, organize a successor enterprise that will operate pursuant to subsection (i).

(G) Transfer or sale of assets and liabilities

The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale.

Ex. A27

(H) Payment of valid obligations

The Agency, as conservator or receiver, shall, to the extent of proceeds realized from the performance of contracts or sale of the assets of a regulated entity, pay all valid obligations of the regulated entity that are due and payable at the time of the appointment of the Agency as conservator or receiver, in accordance with the prescriptions and limitations of this section.

(I) Subpoena authority

(i) In general

(I) Agency authority

The Agency may, as conservator or receiver, and for purposes of carrying out any power, authority, or duty with respect to a regulated entity (including determining any claim against the regulated entity and determining and realizing upon any asset of any person in the course of collecting money due the regulated entity), exercise any power established under section 4588 of this title.

(II) Applicability of law

The provisions of section 4588 of this title shall apply with respect to the exercise of any power under this subparagraph, in the same manner as such provisions apply under that section.

(ii) Subpoena

A subpoena or subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Director, or the designee of the Director.

(iii) Rule of construction

This subsection shall not be construed to limit any rights that the Agency, in any capacity, might otherwise have under section 4517 or 4639 of this title.

Ex. A28

(J) Incidental powers

The Agency may, as conservator or receiver--

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.

(K) Other provisions

(i) Shareholders and creditors of failed regulated entity

Notwithstanding any other provision of law, the appointment of the Agency as receiver for a regulated entity pursuant to paragraph (2) or (4) of subsection (a) and its succession, by operation of law, to the rights, titles, powers, and privileges described in subsection (b)(2)(A) shall terminate all rights and claims that the stockholders and creditors of the regulated entity may have against the assets or charter of the regulated entity or the Agency arising as a result of their status as stockholders or creditors, except for their right to payment, resolution, or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e).

(ii) Assets of regulated entity

Notwithstanding any other provision of law, for purposes of this section, the charter of a regulated entity shall not be considered an asset of the regulated entity.

(3) Authority of receiver to determine claims

(A) In general

The Agency may, as receiver, determine claims in accordance with the requirements of this subsection and any regulations prescribed under paragraph (4).

Ex. A29

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall--

(i) promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the date of publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the date of publication under clause (i).

(C) Mailing required

The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the books of the regulated entity--

(i) at the last address of the creditor appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the books of the regulated entity, within 30 days after the discovery of such name and address.

(4) Rulemaking authority relating to determination of claims

Subject to subsection (c), the Director may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(5) Procedures for determination of claims

(A) Determination period

(i) In general

Before the end of the 180-day period beginning on the date on which any claim against a regulated entity is filed with the Agency as receiver, the Agency shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

Ex. A30

(ii) Extension of time

The period described in clause (i) may be extended by a written agreement between the claimant and the Agency.

(iii) Mailing of notice sufficient

The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears--

(I) on the books of the regulated entity;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance

If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain--

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining Agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claim

The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

Ex. A31

(C) Disallowance of claims filed after filing period

Claims filed after the date specified in the notice published under paragraph (3)(B)(i), or the date specified under paragraph (3)(C), shall be disallowed and such disallowance shall be final.

(D) Authority to disallow claims

(i) In general

The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors

In the case of a claim of a creditor against a regulated entity which is secured by any property or other asset of such regulated entity, the receiver--

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the regulated entity; and

(II) may not make any payment with respect to such unsecured portion of the claim, other than in connection with the disposition of all claims of unsecured creditors of the regulated entity.

(iii) Exceptions

No provision of this paragraph shall apply with respect to--

(I) any extension of credit from any Federal Reserve Bank, Federal Home Loan Bank, or the United States Treasury; or

(II) any security interest in the assets of the regulated entity securing any such extension of credit.

Ex. A32

(E) No judicial review of determination pursuant to subparagraph (D)

No court may review the determination of the Agency under subparagraph (D) to disallow a claim.

(F) Legal effect of filing

(i) Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions

Subject to paragraph (10), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the date of the appointment of the receiver, subject to the determination of claims by the receiver.

(6) Provision for judicial determination of claims

(A) In general

The claimant may file suit on a claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the principal place of business of the regulated entity is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim), before the end of the 60-day period beginning on the earlier of--

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a regulated entity for which the Agency is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i).

(B) Statute of limitations

A claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver), and such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim, if the claimant fails, before the end of the 60-day period described under subparagraph (A), to file suit on such claim (or continue an action commenced before the appointment of the receiver).

Ex. A33

(7) Review of claims

(A) Other review procedures

(i) In general

The Agency shall establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria

In establishing alternative dispute resolution processes, the Agency shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures

The Agency may establish both binding and nonbinding processes under this subparagraph, which may be conducted by any government or private party. All parties, including the claimant and the Agency, must agree to the use of the process in a particular case.

(B) Consideration of incentives

The Agency shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims

(A) Establishment required

The Agency shall establish a procedure for expedited relief outside of the routine claims process established under paragraph (5) for claimants who--

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any regulated entity for which the Agency has been appointed receiver; and

Ex. A34

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period

Before the end of the 90-day period beginning on the date on which any claim is filed in accordance with the procedures established under subparagraph (A), the Director shall--

(i) determine--

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established under paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining Agency review or judicial determination.

(C) Period for filing or renewing suit

Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the date of appointment of the receiver, seeking a determination of the rights of the claimant with respect to such security interest after the earlier of--

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date on which the Agency denies the claim.

(D) Statute of limitations

If an action described under subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed under subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

Ex. A35

(E) Legal effect of filing

(i) Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions

Subject to paragraph (10), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action that was filed before the appointment of the receiver, subject to the determination of claims by the receiver.

(9) Payment of claims

(A) In general

The receiver may, in the discretion of the receiver, and to the extent that funds are available from the assets of the regulated entity, pay creditor claims, in such manner and amounts as are authorized under this section, which are--

(i) allowed by the receiver;

(ii) approved by the Agency pursuant to a final determination pursuant to paragraph (7) or (8); or

(iii) determined by the final judgment of any court of competent jurisdiction.

(B) Agreements against the interest of the Agency

No agreement that tends to diminish or defeat the interest of the Agency in any asset acquired by the Agency as receiver under this section shall be valid against the Agency unless such agreement is in writing and executed by an authorized officer or representative of the regulated entity.

Ex. A36

(C) Payment of dividends on claims

The receiver may, in the sole discretion of the receiver, pay from the assets of the regulated entity dividends on proved claims at any time, and no liability shall attach to the Agency by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(D) Rulemaking authority of the Director

The Director may prescribe such rules, including definitions of terms, as the Director deems appropriate to establish a single uniform interest rate for, or to make payments of post-insolvency interest to creditors holding proven claims against the receivership estates of the regulated entity, following satisfaction by the receiver of the principal amount of all creditor claims.

(10) Suspension of legal actions

(A) In general

After the appointment of a conservator or receiver for a regulated entity, the conservator or receiver may, in any judicial action or proceeding to which such regulated entity is or becomes a party, request a stay for a period not to exceed--

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver.

(B) Grant of stay by all courts required

Upon receipt of a request by the conservator or receiver under subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(11) Additional rights and duties

(A) Prior final adjudication

The Agency shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Agency as conservator or receiver.

Ex. A37

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Agency as conservator or receiver--

(i) shall have all of the rights and remedies available to the regulated entity (before the appointment of such conservator or receiver) and the Agency, including removal to Federal court and all appellate rights; and

(ii) shall not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver, or upon the charter, of a regulated entity for which the Agency has been appointed receiver.

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over--

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets or charter of any regulated entity for which the Agency has been appointed receiver; or

(ii) any claim relating to any act or omission of such regulated entity or the Agency as receiver.

(E) Disposition of assets

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of a regulated entity for which the Agency has been appointed conservator or receiver, the Agency shall conduct its operations in a manner which--

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases; and

(iii) ensures adequate competition and fair and consistent treatment of offerors.

(12) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be--

(i) in the case of any contract claim, the longer of--

(I) the 6-year period beginning on the date on which the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of--

(I) the 3-year period beginning on the date on which the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of--

(i) the date of the appointment of the Agency as conservator or receiver; or

Ex. A39

(ii) the date on which the cause of action accrues.

(13) Revival of expired state causes of action

(A) In general

In the case of any tort claim described under clause (ii) for which the statute of limitations applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Agency as conservator or receiver, the Agency may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitations applicable under State law.

(B) Claims described

A tort claim referred to under clause (i) is a claim arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the regulated entity.

(14) Accounting and recordkeeping requirements

(A) In general

The Agency as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Agency, maintain a full accounting of each conservatorship and receivership or other disposition of a regulated entity in default.

(B) Annual accounting or report

With respect to each conservatorship or receivership, the Agency shall make an annual accounting or report available to the Board, the Comptroller General of the United States, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.

(C) Availability of reports

Any report prepared under subparagraph (B) shall be made available by the Agency upon request to any shareholder of a regulated entity or any member of the public.

Ex. A40

(D) Recordkeeping requirement

After the end of the 6-year period beginning on the date on which the conservatorship or receivership is terminated by the Director, the Agency may destroy any records of such regulated entity which the Agency, in the discretion of the Agency, determines to be unnecessary, unless directed not to do so by a court of competent jurisdiction or governmental Agency, or prohibited by law.

(15) Fraudulent transfers

(A) In general

The Agency, as conservator or receiver, may avoid a transfer of any interest of an entity-affiliated party, or any person determined by the conservator or receiver to be a debtor of the regulated entity, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Agency was appointed conservator or receiver, if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the regulated entity, the Agency, the conservator, or receiver.

(B) Right of recovery

To the extent a transfer is avoided under subparagraph (A), the conservator or receiver may recover, for the benefit of the regulated entity, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from--

(i) the initial transferee of such transfer or the entity-affiliated party or person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(C) Rights of transferee or obligee

The conservator or receiver may not recover under subparagraph (B) from--

(i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or

(ii) any immediate or mediate good faith transferee of such transferee.

(D) Rights under this paragraph

The rights under this paragraph of the conservator or receiver described under subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal Agency) under Title 11.

(16) Attachment of assets and other injunctive relief

Subject to paragraph (17), any court of competent jurisdiction may, at the request of the conservator or receiver, issue an order in accordance with rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the conservator or receiver under the control of the court, and appointing a trustee to hold such assets.

(17) Standards of proof

Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (16) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(18) Treatment of claims arising from breach of contracts executed by the conservator or receiver

(A) In general

Notwithstanding any other provision of this subsection, any final and unappealable judgment for monetary damages entered against the conservator or receiver for the breach of an agreement executed or approved in writing by the conservator or receiver after the date of its appointment, shall be paid as an administrative expense of the conservator or receiver.

(B) No limitation of power

Nothing in this paragraph shall be construed to limit the power of the conservator or receiver to exercise any rights under contract or law, including to terminate, breach, cancel, or otherwise discontinue such agreement.

(19) General exceptions

Ex. A42

(A) Limitations

The rights of the conservator or receiver appointed under this section shall be subject to the limitations on the powers of a receiver under sections 4402 through 4407 of this title.

(B) Mortgages held in trust

(i) In general

Any mortgage, pool of mortgages, or interest in a pool of mortgages held in trust, custodial, or Agency capacity by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally, except that nothing in this clause shall be construed to expand or otherwise affect the authority of any regulated entity.

(ii) Holding of mortgages

Any mortgage, pool of mortgages, or interest in a pool of mortgages described in clause (i) shall be held by the conservator or receiver appointed under this section for the beneficial owners of such mortgage, pool of mortgages, or interest in accordance with the terms of the agreement creating such trust, custodial, or other Agency arrangement.

(iii) Liability of conservator or receiver

The liability of the conservator or receiver appointed under this section for damages shall, in the case of any contingent or unliquidated claim relating to the mortgages held in trust, be estimated in accordance with the regulations of the Director.

(c) Priority of expenses and unsecured claims

(1) In general

Unsecured claims against a regulated entity, or the receiver therefor, that are proven to the satisfaction of the receiver shall have priority in the following order:

(A) Administrative expenses of the receiver.

Ex. A43

(B) Any other general or senior liability of the regulated entity (which is not a liability described under subparagraph (C) or (D).[1]

(C) Any obligation subordinated to general creditors (which is not an obligation described under subparagraph (D)).

(D) Any obligation to shareholders or members arising as a result of their status as shareholder or members.

(2) Creditors similarly situated

All creditors that are similarly situated under paragraph (1) shall be treated in a similar manner, except that the receiver may take any action (including making payments) that does not comply with this subsection, if--

(A) the Director determines that such action is necessary to maximize the value of the assets of the regulated entity, to maximize the present value return from the sale or other disposition of the assets of the regulated entity, or to minimize the amount of any loss realized upon the sale or other disposition of the assets of the regulated entity; and

(B) all creditors that are similarly situated under paragraph (1) receive not less than the amount provided in subsection (e)(2).

(3) Definition

As used in this subsection, the term "administrative expenses of the receiver" includes--

(A) the actual, necessary costs and expenses incurred by the receiver in preserving the assets of a failed regulated entity or liquidating or otherwise resolving the affairs of a failed regulated entity; and

(B) any obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the regulated entity.

(d) Provisions relating to contracts entered into before appointment of conservator or receiver

(1) Authority to repudiate contracts

Ex. A44

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any regulated entity may disaffirm or repudiate any contract or lease--

(A) to which such regulated entity is a party;

(B) the performance of which the conservator or receiver, in its sole discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in its sole discretion, will promote the orderly administration of the affairs of the regulated entity.

(2) Timing of repudiation

The conservator or receiver shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided under subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be--

(i) limited to actual direct compensatory damages; and

(ii) determined as of--

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

Ex. A45

For purposes of subparagraph (A), the term "actual direct compensatory damages" shall not include--

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be--

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (e), except as otherwise specifically provided in this section.

(4) Leases under which the regulated entity is the lessee

(A) In general

If the conservator or receiver disaffirms or repudiates a lease under which the regulated entity was the lessee, the conservator or receiver shall not be liable for any damages (other than damages determined under subparagraph (B)) for the disaffirmance or repudiation of such lease.

(B) Payments of rent

Notwithstanding subparagraph (A), the lessor under a lease to which that subparagraph applies shall--

(i) be entitled to the contractual rent accruing before the later of the date on which--

Ex. A46

(I) the notice of disaffirmance or repudiation is mailed; or

(II) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease;

(ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

(iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment, which shall be paid in accordance with this subsection and subsection (e).

(5) Leases under which the regulated entity is the lessor

(A) In general

If the conservator or receiver repudiates an unexpired written lease of real property of the regulated entity under which the regulated entity is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either--

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease, unless the lessee defaults under the terms of the lease after the date of such repudiation.

(B) Provisions applicable to lessee remaining in possession

If any lessee under a lease described under subparagraph (A) remains in possession of a leasehold interest under clause (ii) of subparagraph (A)--

(i) the lessee--

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease; and

Ex. A47

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, and any damages which accrue after such date due to the nonperformance of any obligation of the regulated entity under the lease after such date; and

(ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation, other than the amount of any offset allowed under clause (i)(II).

(6) Contracts for the sale of real property

(A) In general

If the conservator or receiver repudiates any contract for the sale of real property and the purchaser of such real property under such contract is in possession, and is not, as of the date of such repudiation, in default, such purchaser may either--

(i) treat the contract as terminated by such repudiation; or

(ii) remain in possession of such real property.

(B) Provisions applicable to purchaser remaining in possession

If any purchaser of real property under any contract described under subparagraph (A) remains in possession of such property under clause (ii) of subparagraph (A)--

(i) the purchaser--

(I) shall continue to make all payments due under the contract after the date of the repudiation of the contract; and

(II) may offset against any such payments any damages which accrue after such date due to the nonperformance (after such date) of any obligation of the regulated entity under the contract; and

(ii) the conservator or receiver shall--

Ex. A48

(I) not be liable to the purchaser for any damages arising after such date as a result of the repudiation, other than the amount of any offset allowed under clause (i)(II);

(II) deliver title to the purchaser in accordance with the provisions of the contract; and

(III) have no obligation under the contract other than the performance required under subclause (II).

(C) Assignment and sale allowed

(i) In general

No provision of this paragraph shall be construed as limiting the right of the conservator or receiver to assign the contract described under subparagraph (A), and sell the property subject to the contract and the provisions of this paragraph.

(ii) No liability after assignment and sale

If an assignment and sale described under clause (i) is consummated, the conservator or receiver shall have no further liability under the contract described under subparagraph (A), or with respect to the real property which was the subject of such contract.

(7) Service contracts

(A) Services performed before appointment

In the case of any contract for services between any person and any regulated entity for which the Agency has been appointed conservator or receiver, any claim of such person for services performed before the appointment of the conservator or receiver shall be--

(i) a claim to be paid in accordance with subsections (b) and (e); and

(ii) deemed to have arisen as of the date on which the conservator or receiver was appointed.

Ex. A49

(B) Services performed after appointment and prior to repudiation

If, in the case of any contract for services described under subparagraph (A), the conservator or receiver accepts performance by the other person before the conservator or receiver makes any determination to exercise the right of repudiation of such contract under this section--

(i) the other party shall be paid under the terms of the contract for the services performed; and

(ii) the amount of such payment shall be treated as an administrative expense of the conservatorship or receivership.

(C) Acceptance of performance no bar to subsequent repudiation

The acceptance by the conservator or receiver of services referred to under subparagraph (B) in connection with a contract described in such subparagraph shall not affect the right of the conservator or receiver to repudiate such contract under this section at any time after such performance.

(8) Certain qualified financial contracts

(A) Rights of parties to contracts

Subject to paragraphs (9) and (10), and notwithstanding any other provision of this chapter (other than subsection (b)(9)(B) of this section), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising--

(i) any right of that person to cause the termination, liquidation, or acceleration of any qualified financial contract with a regulated entity that arises upon the appointment of the Agency as receiver for such regulated entity at any time after such appointment;

(ii) any right under any security agreement or arrangement or other credit enhancement relating to one or more qualified financial contracts; or

(iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more contracts and agreements described in clause (i), including any master agreement for such contracts or agreements.

Ex. A50

(B) Applicability of other provisions

Subsection (b)(10) shall apply in the case of any judicial action or proceeding brought against any receiver referred to under subparagraph (A), or the regulated entity for which such receiver was appointed, by any party to a contract or agreement described under subparagraph (A)(i) with such regulated entity.

(C) Certain transfers not avoidable

(i) In general

Notwithstanding paragraph (11), or any other provision of Federal or State law relating to the avoidance of preferential or fraudulent transfers, the Agency, whether acting as such or as conservator or receiver of a regulated entity, may not avoid any transfer of money or other property in connection with any qualified financial contract with a regulated entity.

(ii) Exception for certain transfers

Clause (i) shall not apply to any transfer of money or other property in connection with any qualified financial contract with a regulated entity if the Agency determines that the transferee had actual intent to hinder, delay, or defraud such regulated entity, the creditors of such regulated entity, or any conservator or receiver appointed for such regulated entity.

(D) Certain contracts and agreements defined

In this subsection the following definitions shall apply:

(i) Qualified financial contract

The term "qualified financial contract" means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Agency determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph.

(ii) Securities contract

The term "securities contract"--

Ex A51

(I) means a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or any option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan, unless the Agency determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

(III) means any option entered into on a national securities exchange relating to foreign currencies;

(IV) means the guarantee by or to any securities clearing Agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(V) means any margin loan;

(VI) means any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) means any combination of the agreements or transactions referred to in this clause;

(VIII) means any option to enter into any agreement or transaction referred to in this clause;

(IX) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), (IV), (V), (VI) , (VII), or (VIII); and

(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

Ex. A52

(iii) Commodity contract

The term "commodity contract" means--

(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(II) with respect to a foreign futures commission merchant, a foreign future;

(III) with respect to a leverage transaction merchant, a leverage transaction;

(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(V) with respect to a commodity options dealer, a commodity option;

(VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) any combination of the agreements or transactions referred to in this clause;

(VIII) any option to enter into any agreement or transaction referred to in this clause;

(IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII); or

(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

Ex. A53

(iv) Forward contract

The term "forward contract" means--

(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than 2 days after the date on which the contract is entered into, including a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(II) any combination of agreements or transactions referred to in subclauses (I) and (III);

(III) any option to enter into any agreement or transaction referred to in subclause (I) or (II);

(IV) a master agreement that provides for an agreement or transaction referred to in subclauses (I), (II), or (III), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this clause, except that the master agreement shall be considered to be a forward contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), or (III); or

(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

(v) Repurchase agreement

The term "repurchase agreement" (including a reverse repurchase agreement)--

(I) means an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage-related securities (as such term is defined in section 78c of Title 15), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined for purposes of this clause as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development, as determined by regulation or order adopted by the appropriate Federal banking authority), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any Agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

Ex. A54

(II) does not include any repurchase obligation under a participation in a commercial mortgage loan, unless the Agency determines by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any combination of agreements or transactions referred to in subclauses (I) and (IV);

(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (III);

(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this clause, except that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

(vi) Swap agreement

The term "swap agreement" means--

(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option;

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

Ex. A55

(III) any combination of agreements or transactions referred to in this clause;

(IV) any option to enter into any agreement or transaction referred to in this clause;

(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agreement shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subclause (I), (II), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

(vii) Treatment of master agreement as one agreement

Any master agreement for any contract or agreement described in any preceding clause of this subparagraph (or any master agreement for such master agreement or agreements), together with all supplements to such master agreement, shall be treated as a single agreement and a single qualified financial contract. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.

(viii) Transfer

The term "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the equity of redemption of the regulated entity.

(E) Certain protections in event of appointment of conservator

Notwithstanding any other provision of this section, any other Federal law, or the law of any State (other than paragraph (10) of this subsection and subsection (b)(9)(B)), no person shall be stayed or prohibited from exercising--

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a regulated entity in a conservatorship based upon a default under such financial contract which is enforceable under applicable noninsolvency law;

Ex. A56

(ii) any right under any security agreement or arrangement or other credit enhancement relating to 1 or more such qualified financial contracts; or

(iii) any right to offset or net out any termination values, payment amounts, or other transfer obligations arising under or in connection with such qualified financial contracts.

(F) Clarification

No provision of law shall be construed as limiting the right or power of the Agency, or authorizing any court or Agency to limit or delay in any manner, the right or power of the Agency to transfer any qualified financial contract in accordance with paragraphs (9) and (10), or to disaffirm or repudiate any such contract in accordance with subsection (d)(1).

(G) Walkaway clauses not effective

(i) In general

Notwithstanding the provisions of subparagraphs (A) and (E), and sections 4403 and 4404 of this title, no walkaway clause shall be enforceable in a qualified financial contract of a regulated entity in default.

(ii) Walkaway clause defined

For purposes of this subparagraph, the term "walkaway clause" means a provision in a qualified financial contract that, after calculation of a value of a party's position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of the status of such party as a nondefaulting party.

(9) Transfer of qualified financial contracts

In making any transfer of assets or liabilities of a regulated entity in default which includes any qualified financial contract, the conservator or receiver for such regulated entity shall either--

(A) transfer to 1 person--

Ex. A57

(i) all qualified financial contracts between any person (or any affiliate of such person) and the regulated entity in default;

(ii) all claims of such person (or any affiliate of such person) against such regulated entity under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such regulated entity);

(iii) all claims of such regulated entity against such person (or any affiliate of such person) under any such contract; and

(iv) all property securing, or any other credit enhancement for any contract described in clause (i), or any claim described in clause (ii) or (iii) under any such contract; or

(B) transfer none of the financial contracts, claims, or property referred to under subparagraph (A) (with respect to such person and any affiliate of such person).

(10) Notification of transfer

(A) In general

The conservator or receiver shall notify any person that is a party to a contract or transfer by 5:00 p.m. (Eastern Standard Time) on the business day following the date of the appointment of the receiver in the case of a receivership, or the business day following such transfer in the case of a conservatorship, if--

(i) the conservator or receiver for a regulated entity in default makes any transfer of the assets and liabilities of such regulated entity; and

(ii) such transfer includes any qualified financial contract.

(B) Certain rights not enforceable

(i) Receivership

A person who is a party to a qualified financial contract with a regulated entity may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(A) of this subsection or under section 4403 or 4404 of this title, solely by reason of or incidental to the appointment of a receiver for the regulated entity (or the insolvency or financial condition of the regulated entity for which the receiver has been appointed)--

Ex. A58

(I) until 5:00 p.m. (Eastern Standard Time) on the business day following the date of the appointment of the receiver; or

(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

(ii) Conservatorship

A person who is a party to a qualified financial contract with a regulated entity may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(E) of this subsection or under section 4403 or 4404 of this title, solely by reason of or incidental to the appointment of a conservator for the regulated entity (or the insolvency or financial condition of the regulated entity for which the conservator has been appointed).

(iii) Notice

For purposes of this paragraph, the conservator or receiver of a regulated entity shall be deemed to have notified a person who is a party to a qualified financial contract with such regulated entity, if the conservator or receiver has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A).

(C) Business day defined

For purposes of this paragraph, the term "business day" means any day other than any Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) Disaffirmance or repudiation of qualified financial contracts

In exercising the rights of disaffirmance or repudiation of a conservator or receiver with respect to any qualified financial contract to which a regulated entity is a party, the conservator or receiver for such institution shall either--

(A) disaffirm or repudiate all qualified financial contracts between--

(i) any person or any affiliate of such person; and

(ii) the regulated entity in default; or

(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).

Ex. A59

(12) Certain security interests not avoidable

No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any regulated entity, except where such an interest is taken in contemplation of the insolvency of the regulated entity, or with the intent to hinder, delay, or defraud the regulated entity or the creditors of such regulated entity.

(13) Authority to enforce contracts

(A) In general

Notwithstanding any provision of a contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of, or the exercise of rights or powers by, a conservator or receiver, the conservator or receiver may enforce any contract, other than a contract for liability insurance for a Director or officer, or a contract or a regulated entity bond, entered into by the regulated entity.

(B) Certain rights not affected

No provision of this paragraph may be construed as impairing or affecting any right of the conservator or receiver to enforce or recover under a liability insurance contract for an officer or Director, or regulated entity bond under other applicable law.

(C) Consent requirement

(i) In general

Except as otherwise provided under this section, no person may exercise any right or power to terminate, accelerate, or declare a default under any contract to which a regulated entity is a party, or to obtain possession of or exercise control over any property of the regulated entity, or affect any contractual rights of the regulated entity, without the consent of the conservator or receiver, as appropriate, for a period of--

(I) 45 days after the date of appointment of a conservator; or

(II) 90 days after the date of appointment of a receiver.

Ex. A60

(ii) Exceptions

This subparagraph shall not--

(I) apply to a contract for liability insurance for an officer or Director;

(II) apply to the rights of parties to certain qualified financial contracts under subsection (d)(8); and

(III) be construed as permitting the conservator or receiver to fail to comply with otherwise enforceable provisions of such contracts.

(14) Savings clause

The meanings of terms used in this subsection are applicable for purposes of this subsection only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any similar terms under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as that term is defined in section 78c(a)(47) of Title 15), and the Commodity Exchange Act.

(15) Exception for Federal Reserve and Federal Home Loan Banks

No provision of this subsection shall apply with respect to--

(A) any extension of credit from any Federal Home Loan Bank or Federal Reserve Bank to any regulated entity; or

(B) any security interest in the assets of the regulated entity securing any such extension of credit.

(e) Valuation of claims in default

(1) In general

Notwithstanding any other provision of Federal law or the law of any State, and regardless of the method which the Agency determines to utilize with respect to a regulated entity in default or in danger of default, including transactions authorized under subsection (i), this subsection shall govern the rights of the creditors of such regulated entity.

Ex. A61

(2) Maximum liability

The maximum liability of the Agency, acting as receiver or in any other capacity, to any person having a claim against the receiver or the regulated entity for which such receiver is appointed shall be not more than the amount that such claimant would have received if the Agency had liquidated the assets and liabilities of the regulated entity without exercising the authority of the Agency under subsection (i).

(f) Limitation on court action

Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.

(g) Liability of Directors and officers

(1) In general

A Director or officer of a regulated entity may be held personally liable for monetary damages in any civil action described in paragraph (2) brought by, on behalf of, or at the request or direction of the Agency, and prosecuted wholly or partially for the benefit of the Agency--

(A) acting as conservator or receiver of such regulated entity; or

(B) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator.

(2) Actions addressed

Paragraph (1) applies in any civil action for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care than gross negligence, including intentional tortious conduct, as such terms are defined and determined under applicable State law.

(3) No limitation

Nothing in this subsection shall impair or affect any right of the Agency under other applicable law.

(h) Damages

In any proceeding related to any claim against a Director, officer, employee, agent, attorney, accountant, appraiser, or any other party employed by or providing services to a regulated entity, recoverable damages determined to result from the improvident or otherwise improper use or investment of any assets of the regulated entity shall include principal losses and appropriate interest.

(i) Limited-life regulated entities

(1) Organization

(A) Purpose

The Agency, as receiver appointed pursuant to subsection (a)--

(i) may, in the case of a Federal Home Loan Bank, organize a limited-life regulated entity with those powers and attributes of the Federal Home Loan Bank in default or in danger of default as the Director determines necessary, subject to the provisions of this subsection, and the Director shall grant a temporary charter to that limited-life regulated entity, and that limited-life regulated entity may operate subject to that charter; and

(ii) shall, in the case of an enterprise, organize a limited-life regulated entity with respect to that enterprise in accordance with this subsection.

(B) Authorities

Upon the creation of a limited-life regulated entity under subparagraph (A), the limited-life regulated entity may--

(i) assume such liabilities of the regulated entity that is in default or in danger of default as the Agency may, in its discretion, determine to be appropriate, except that the liabilities assumed shall not exceed the amount of assets purchased or transferred from the regulated entity to the limited-life regulated entity;

(ii) purchase such assets of the regulated entity that is in default, or in danger of default as the Agency may, in its discretion, determine to be appropriate; and

(iii) perform any other temporary function which the Agency may, in its discretion, prescribe in accordance with this section.

Ex. A63

(2) Charter and establishment

(A) Transfer of charter

(i) Fannie Mae

If the Agency is appointed as receiver for the Federal National Mortgage Association, the limited-life regulated entity established under this subsection with respect to such enterprise shall, by operation of law and immediately upon its organization--

(I) succeed to the charter of the Federal National Mortgage Association, as set forth in the Federal National Mortgage Association Charter Act; and

(II) thereafter operate in accordance with, and subject to, such charter, this Act, and any other provision of law to which the Federal National Mortgage Association is subject, except as otherwise provided in this subsection.

(ii) Freddie Mac

If the Agency is appointed as receiver for the Federal Home Loan Mortgage Corporation, the limited-life regulated entity established under this subsection with respect to such enterprise shall, by operation of law and immediately upon its organization--

(I) succeed to the charter of the Federal Home Loan Mortgage Corporation, as set forth in the Federal Home Loan Mortgage Corporation Charter Act; and

(II) thereafter operate in accordance with, and subject to, such charter, this Act, and any other provision of law to which the Federal Home Loan Mortgage Corporation is subject, except as otherwise provided in this subsection.

(B) Interests in and assets and obligations of regulated entity in default

Notwithstanding subparagraph (A) or any other provision of law--

(i) a limited-life regulated entity shall assume, acquire, or succeed to the assets or liabilities of a regulated entity only to the extent that such assets or liabilities are transferred by the Agency to the limited-life regulated entity in accordance with, and subject to the restrictions set forth in, paragraph (1)(B);

Ex. A64

(ii) a limited-life regulated entity shall not assume, acquire, or succeed to any obligation that a regulated entity for which a receiver has been appointed may have to any shareholder of the regulated entity that arises as a result of the status of that person as a shareholder of the regulated entity; and

(iii) no shareholder or creditor of a regulated entity shall have any right or claim against the charter of the regulated entity once the Agency has been appointed receiver for the regulated entity and a limited-life regulated entity succeeds to the charter pursuant to subparagraph (A).

(C) Limited-life regulated entity treated as being in default for certain purposes

A limited-life regulated entity shall be treated as a regulated entity in default at such times and for such purposes as the Agency may, in its discretion, determine.

(D) Management

Upon its establishment, a limited-life regulated entity shall be under the management of a board of Directors consisting of not fewer than 5 nor more than 10 members appointed by the Agency.

(E) Bylaws

The board of Directors of a limited-life regulated entity shall adopt such bylaws as may be approved by the Agency.

(3) Capital stock

(A) No Agency requirement

The Agency is not required to pay capital stock into a limited-life regulated entity or to issue any capital stock on behalf of a limited-life regulated entity established under this subsection.

(B) Authority

If the Director determines that such action is advisable, the Agency may cause capital stock or other securities of a limited-life regulated entity established with respect to an enterprise to be issued and offered for sale, in such amounts and on such terms and conditions as the Director may determine, in the discretion of the Director.

Ex. A65

(4) Investments

Funds of a limited-life regulated entity shall be kept on hand in cash, invested in obligations of the United States or obligations guaranteed as to principal and interest by the United States, or deposited with the Agency, or any Federal reserve bank.

(5) Exempt tax status

Notwithstanding any other provision of Federal or State law, a limited-life regulated entity, its franchise, property, and income shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority.

(6) Winding up

(A) In general

Subject to subparagraphs (B) and (C), not later than 2 years after the date of its organization, the Agency shall wind up the affairs of a limited-life regulated entity.

(B) Extension

The Director may, in the discretion of the Director, extend the status of a limited-life regulated entity for 3 additional 1-year periods.

(C) Termination of status as limited-life regulated entity

(i) In general

Upon the sale by the Agency of 80 percent or more of the capital stock of a limited-life regulated entity, as defined in clause (iv), to 1 or more persons (other than the Agency)--

(I) the status of the limited-life regulated entity as such shall terminate; and

(II) the entity shall cease to be a limited-life regulated entity for purposes of this subsection.

Ex. A66

(ii) Divestiture of remaining stock, if any

(I) In general

Not later than 1 year after the date on which the status of a limited-life regulated entity is terminated pursuant to clause (i), the Agency shall sell to 1 or more persons (other than the Agency) any remaining capital stock of the former limited-life regulated entity.

(II) Extension authorized

The Director may extend the period referred to in subclause (I) for not longer than an additional 2 years, if the Director determines that such action would be in the public interest.

(iii) Savings clause

Notwithstanding any provision of law, other than clause (ii), the Agency shall not be required to sell the capital stock of an enterprise or a limited-life regulated entity established with respect to an enterprise.

(iv) Applicability

This subparagraph applies only with respect to a limited-life regulated entity that is established with respect to an enterprise.

(7) Transfer of assets and liabilities

(A) In general

(i) Transfer of assets and liabilities

The Agency, as receiver, may transfer any assets and liabilities of a regulated entity in default, or in danger of default, to the limited-life regulated entity in accordance with and subject to the restrictions of paragraph (1).

Ex. A67

(ii) Subsequent transfers

At any time after the establishment of a limited-life regulated entity, the Agency, as receiver, may transfer any assets and liabilities of the regulated entity in default, or in danger of default, as the Agency may, in its discretion, determine to be appropriate in accordance with and subject to the restrictions of paragraph (1).

(iii) Effective without approval

The transfer of any assets or liabilities of a regulated entity in default or in danger of default to a limited-life regulated entity shall be effective without any further approval under Federal or State law, assignment, or consent with respect thereto.

(iv) Equitable treatment of similarly situated creditors

The Agency shall treat all creditors of a regulated entity in default or in danger of default that are similarly situated under subsection (c)(1) in a similar manner in exercising the authority of the Agency under this subsection to transfer any assets or liabilities of the regulated entity to the limited-life regulated entity established with respect to such regulated entity, except that the Agency may take actions (including making payments) that do not comply with this clause, if--

(I) the Director determines that such actions are necessary to maximize the value of the assets of the regulated entity, to maximize the present value return from the sale or other disposition of the assets of the regulated entity, or to minimize the amount of any loss realized upon the sale or other disposition of the assets of the regulated entity; and

(II) all creditors that are similarly situated under subsection (c)(1) receive not less than the amount provided in subsection (e)(2).

(v) Limitation on transfer of liabilities

Notwithstanding any other provision of law, the aggregate amount of liabilities of a regulated entity that are transferred to, or assumed by, a limited-life regulated entity may not exceed the aggregate amount of assets of the regulated entity that are transferred to, or purchased by, the limited-life regulated entity.

(8) Regulations

The Agency may promulgate such regulations as the Agency determines to be necessary or appropriate to implement this subsection.

Ex. A68

(9) Powers of limited-life regulated entities

(A) In general

Each limited-life regulated entity created under this subsection shall have all corporate powers of, and be subject to the same provisions of law as, the regulated entity in default or in danger of default to which it relates, except that--

(i) the Agency may--

(I) remove the Directors of a limited-life regulated entity;

(II) fix the compensation of members of the board of Directors and senior management, as determined by the Agency in its discretion, of a limited-life regulated entity; and

(III) indemnify the representatives for purposes of paragraph (1)(B), and the Directors, officers, employees, and agents of a limited-life regulated entity on such terms as the Agency determines to be appropriate; and

(ii) the board of Directors of a limited-life regulated entity--

(I) shall elect a chairperson who may also serve in the position of chief executive officer, except that such person shall not serve either as chairperson or as chief executive officer without the prior approval of the Agency; and

(II) may appoint a chief executive officer who is not also the chairperson, except that such person shall not serve as chief executive officer without the prior approval of the Agency.

(B) Stay of judicial action

Any judicial action to which a limited-life regulated entity becomes a party by virtue of its acquisition of any assets or assumption of any liabilities of a regulated entity in default shall be stayed from further proceedings for a period of not longer than 45 days, at the request of the limited-life regulated entity. Such period may be modified upon the consent of all parties.

Ex. A69

(10) No Federal status

(A) Agency status

A limited-life regulated entity is not an Agency, establishment, or instrumentality of the United States.

(B) Employee status

Representatives for purposes of paragraph (1)(B), interim Directors, Directors, officers, employees, or agents of a limited-life regulated entity are not, solely by virtue of service in any such capacity, officers or employees of the United States. Any employee of the Agency or of any Federal instrumentality who serves at the request of the Agency as a representative for purposes of paragraph (1)(B), interim Director, Director, officer, employee, or agent of a limited-life regulated entity shall not--

(i) solely by virtue of service in any such capacity lose any existing status as an officer or employee of the United States for purposes of Title 5 or any other provision of law; or

(ii) receive any salary or benefits for service in any such capacity with respect to a limited-life regulated entity in addition to such salary or benefits as are obtained through employment with the Agency or such Federal instrumentality.

(11) Authority to obtain credit

(A) In general

A limited-life regulated entity may obtain unsecured credit and issue unsecured debt.

(B) Inability to obtain credit

If a limited-life regulated entity is unable to obtain unsecured credit or issue unsecured debt, the Director may authorize the obtaining of credit or the issuance of debt by the limited-life regulated entity--

(i) with priority over any or all of the obligations of the limited-life regulated entity;

Ex. A70

(ii) secured by a lien on property of the limited-life regulated entity that is not otherwise subject to a lien; or

(iii) secured by a junior lien on property of the limited-life regulated entity that is subject to a lien.

(C) Limitations

(i)[2]In general

The Director, after notice and a hearing, may authorize the obtaining of credit or the issuance of debt by a limited-life regulated entity that is secured by a senior or equal lien on property of the limited-life regulated entity that is subject to a lien (other than mortgages that collateralize the mortgage-backed securities issued or guaranteed by an enterprise) only if--

(I) the limited-life regulated entity is unable to otherwise obtain such credit or issue such debt; and

(II) there is adequate protection of the interest of the holder of the lien on the property with respect to which such senior or equal lien is proposed to be granted.

(D) Burden of proof

In any hearing under this subsection, the Director has the burden of proof on the issue of adequate protection.

(12) Effect on debts and liens

The reversal or modification on appeal of an authorization under this subsection to obtain credit or issue debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so issued, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the issuance of such debt, or the granting of such priority or lien, were stayed pending appeal.

(j) Other Agency exemptions

(1) Applicability

The provisions of this subsection shall apply with respect to the Agency in any case in which the Agency is acting as a conservator or a receiver.

Ex. A71

(2) Taxation

The Agency, including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the Agency shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of the value of such property, and the tax thereon, shall be determined as of the period for which such tax is imposed.

(3) Property protection

No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency.

(4) Penalties and fines

The Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

(k) Prohibition of charter revocation

In no case may the receiver appointed pursuant to this section revoke, annul, or terminate the charter of an enterprise.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1367, Oct. 28, 1992, 106 Stat. 3980; Pub.L. 110-289, Div. A, Title I, § 1145(a), July 30, 2008, 122 Stat. 2734.)

Ex. A72

Notes of Decisions (61)

Footnotes

1 So in original. A second closing parenthesis probably should precede the period.

2 So in original. No cl. (ii) has been enacted.

12 U.S.C.A. § 4617, 12 USCA § 4617
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A73

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4618

§ 4618. Notice of classification and enforcement action

Effective: July 30, 2008

Currentness

(a) Notice

Before taking any action referred to in subsection (b) of this section, the Director shall provide to the regulated entity written notice of the proposed action, which states the reasons for the proposed action and the information on which the proposed action is based.

(b) Applicability

The requirements of subsection (a) of this section shall apply to the following actions:

(1) Classification or reclassification of a regulated entity within a particular capital classification under section 4614 of this title.

(2) Any discretionary supervisory action pursuant to section 4615 of this title.

(3) Any discretionary supervisory action pursuant to section 4616 of this title except a decision to appoint a conservator under section 4616(b)(6) of this title.

Notice of classification under paragraph (1) and notice of supervisory actions under paragraph (2) or (3) may be provided together in a single notice under subsection (a) of this section.

(c) Response period

Ex. A74

(1) In general

During the 30-day period beginning on the date that a regulated entity is provided notice under subsection (a) of this section of a proposed action, the regulated entity may submit to the Director any information relevant to the action that the regulated entity considers appropriate for consideration by the Director in determining whether to take such action. The Director may, at the discretion of the Director, hold an informal administrative hearing to receive and discuss such information and the proposed determination.

(2) Extended period

The Director may extend the period under paragraph (1) for good cause for not more than 30 additional days.

(3) Shortened period

The Director may shorten the period under paragraph (1) if the Director determines that the condition of the regulated entity so requires or the regulated entity consents.

(4) Failure to respond

The failure of a regulated entity to provide information during the response period under this subsection (as extended or shortened) shall waive any right of the regulated entity to comment on the proposed action of the Director.

(d) Consideration of information and determination

After the expiration of the response period under subsection (c) of this section or upon receipt of information provided during such period by the regulated entity, whichever occurs earlier, the Director shall determine whether to take the action proposed, taking into consideration any relevant information submitted by the regulated entity during the response period. The Director shall provide written notice of a determination to take action and the reasons for such determination to the regulated entity, the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate. Such notice shall respond to any information submitted during the response period.

(e) Effective date of actions

An action referred to in subsection (b) of this section shall take effect upon receipt by the regulated entity of notice of the determination of the Director under subsection (d) of this section, unless otherwise provided in such notice.

Ex. A75

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1368, Oct. 28, 1992, 106 Stat. 3980; Pub.L. 110-289, Div. A, Title I, § 1145(b)(1), July 30, 2008, 122 Stat. 2767.)

12 U.S.C.A. § 4618, 12 USCA § 4618
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A76

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4622

§ 4622. Capital restoration plans

Effective: July 30, 2008

Currentness

(a) Contents

Each capital restoration plan submitted under this subchapter shall set forth a feasible plan for restoring the core capital of the regulated entity subject to the plan to an amount not less than the minimum capital level for the regulated entity and for restoring the total capital of the regulated entity to an amount not less than the risk-based capital level for the regulated entity. Each capital restoration plan shall--

(1) specify the level of capital the regulated entity will achieve and maintain;

(2) describe the actions that the regulated entity will take to become classified as adequately capitalized;

(3) establish a schedule for completing the actions set forth in the plan;

(4) specify the types and levels of activities (including existing and new programs) in which the regulated entity will engage during the term of the plan; and

(5) describe the actions that the regulated entity will take to comply with any mandatory and discretionary requirements imposed under this subchapter.

(b) Deadlines for submission

The Director shall, by regulation, establish a deadline for submission of a capital restoration plan, which may not be more than 45 days after the regulated entity is notified in writing that a plan is required. The regulations shall provide that the Director may extend the deadline to the extent that the Director determines it necessary. Any extension of the deadline shall be in writing and for a time certain.

Ex. A77

(c) Approval

The Director shall review each capital restoration plan submitted under this section and, not later than 30 days after submission of the plan, approve or disapprove the plan. The Director may extend the period for approval or disapproval for any plan for a single additional 30-day period if the Director determines it necessary. The Director shall provide written notice to any regulated entity submitting a plan of the approval or disapproval of the plan (which shall include the reasons for any disapproval of the plan) and of any extension of the period for approval or disapproval.

(d) Resubmission

If the Director disapproves the initial capital restoration plan submitted by the regulated entity, the regulated entity shall submit an amended plan acceptable to the Director within 30 days or such longer period that the Director determines is in the public interest.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1369C, Oct. 28, 1992, 106 Stat. 3985; Pub.L. 110-289, Div. A, Title I, § 1145(b)(2), July 30, 2008, 122 Stat. 2767.)

12 U.S.C.A. § 4622, 12 USCA § 4622
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A78

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4623

§ 4623. Judicial review of Director action

Effective: July 30, 2008

Currentness

(a) Jurisdiction

(1) Filing of petition

A regulated entity that is not classified as critically undercapitalized and is the subject of a classification under section 4614 of this title or a discretionary supervisory action taken under this subchapter by the Director (other than action to appoint a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) may obtain review of the classification or action by filing, within 10 days after receiving written notice of the Director's action, a written petition requesting that the classification or action of the Director be modified, terminated, or set aside.

(2) Place for filing

A petition filed pursuant to this subsection shall be filed in the United States Court of Appeals for the District of Columbia Circuit.

(b) Scope of review

The Court[1] may modify, terminate, or set aside an action taken by the Director and reviewed by the Court[1] pursuant to this section only if the court finds, on the record on which the Director acted, that the action of the Director was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable laws.

(c) Unavailability of stay

The commencement of proceedings for judicial review pursuant to this section shall not operate as a stay of any action taken by the Director. Pending judicial review of the action, the court shall not have jurisdiction to stay, enjoin, or otherwise delay any supervisory action taken by the Director with respect to a regulated entity that is classified as significantly or critically undercapitalized or any action of the Director that results in the classification of a regulated entity as significantly or critically undercapitalized.

Ex. A79

(d) Limitation on jurisdiction

Except as provided in this section, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subchapter (other than appointment of a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) or to review, modify, suspend, terminate, or set aside such classification or action.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1369D, Oct. 28, 1992, 106 Stat. 3985; Pub.L. 110-289, Div. A, Title I, § 1145(b)(3), July 30, 2008, 122 Stat. 2767.)

Notes of Decisions (1)

Footnotes

1 So in original. Probably should not be capitalized.

12 U.S.C.A. § 4623, 12 USCA § 4623
Current through P.L. 114-115 approved 12-28-2015

End of Document

Ex. A80

United States Code Annotated
Title 12. Banks and Banking
Chapter 46. Government Sponsored Enterprises
Subchapter II. Required Capital Levels for Regulated Entities, Special Enforcement Powers, and Reviews of Assets and Liabilities (Refs & Annos)

12 U.S.C.A. § 4624

§ 4624. Reviews of enterprise assets and liabilities

Effective: July 30, 2008

Currentness

(a) In general

The Director shall, by regulation, establish criteria governing the portfolio holdings of the enterprises, to ensure that the holdings are backed by sufficient capital and consistent with the mission and the safe and sound operations of the enterprises. In establishing such criteria, the Director shall consider the ability of the enterprises to provide a liquid secondary market through securitization activities, the portfolio holdings in relation to the overall mortgage market, and adherence to the standards specified in section 4513b of this title.

(b) Temporary adjustments

The Director may, by order, make temporary adjustments to the established standards for an enterprise or both enterprises, such as during times of economic distress or market disruption.

(c) Authority to require disposition or acquisition

The Director shall monitor the portfolio of each enterprise. Pursuant to subsection (a) and notwithstanding the capital classifications of the enterprises, the Director may, by order, require an enterprise, under such terms and conditions as the Director determines to be appropriate, to dispose of or acquire any asset, if the Director determines that such action is consistent with the purposes of this Act or any of the authorizing statutes.

CREDIT(S)

(Pub.L. 102-550, Title XIII, § 1369E, as added Pub.L. 110-289, Div. A, Title I, § 1109(a)(2), July 30, 2008, 122 Stat. 2675.)

12 U.S.C.A. § 4624, 12 USCA § 4624
Current through P.L. 114-115 approved 12-28-2015

Ex. A81

End of Document

Ex. A82

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL LLC, FOR AND ON BEHALF OF INVESTMENT FUNDS FOR WHICH IT ACTS AS INVESTMENT MANAGER,		
Appellant,		
v.	:	No. 14-5243, et al.
JACOB J. LEW, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF THE TREASURY, ET AL.,		
Appellees.		

Friday, April 15, 2016
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES BROWN AND MILLETT, AND SENIOR CIRCUIT JUDGE GINSBURG

APPEARANCES:

ON BEHALF OF THE APPELLANT:
THEODORE B. OLSON, ESQ.
HAMISH P.M. HUME, ESQ.

ON BEHALF OF THE APPELLEES:
HOWARD N. CAYNE, ESQ.
MARK B. STERN, ESQ.

C O N T E N T S

ON BEHALF OF THE FHFA

MR. CAYNE: May it please the Court, Howard Cayne for Federal Housing Finance Agency, Fannie Mae, and Freddie Mac. Your Honors, Judge Lamberth's decision should be affirmed actually now based on a notice we were provided by the Court earlier today for three independent reasons, first, a statutory jurisdictional bar precludes review of Plaintiff's claim, in addition to the bar laid out in our statute, Your Honors, the statute reference in the Court notice to Counsel also fully precludes each and every claim in this matter seeking relief, Your Honors.

JUDGE GINSBURG: So, you overlooked a dispositive jurisdictional bar to this case?

MR. CAYNE: I'm sorry, Your Honor?

JUDGE GINSBURG: You overlooked a dispositive judicial --

MR. CAYNE: Your Honor --

JUDGE GINSBURG: I mean, a jurisdictional bar?

MR. CAYNE: Your Honor, as is many litigations this case morphed over time.

JUDGE GINSBURG: More morphing.

MR. CAYNE: And I would, I said to my colleagues I applauded the member of the Panel, or the Clerk who saw this, but it just supplements what we have said, because let me just get to --

JUDGE GINSBURG: So, you're saying the equitable, pardon me, the Third Amendment, that's what we're talking about, right, the Third Amendment was a discretionary supervisory action?

MR. CAYNE: No, Your Honor, let me --

JUDGE GINSBURG: Okay, go ahead.

MR. CAYNE: -- tell, say to the Court, and this is what wasn't so clear in the complaints, but as the case has developed and we heard this morning, Plaintiffs essentially allege that the FHFA is violating all sorts of rules, laws, regulations, safe and sound banking practices by allowing these institutions to operate with as little as zero capital, that is the point that this statute gets to, Your Honor, because as you Court will know from the statute, it says that the, if the Agency as regulator, and again, Your Honor, when we filed out papers we were focusing on the conservatorship allegations in the complaints, but when the Agency is regulator, reclassifies or changes capital classification, that might be challenge, but beyond that anything relating to a changed capital classification according to the statute is not subject, it may not be affected in any way by an order of any court. So, what we have here at the outset in 2008 at the time the institutions were put into conservatorship, a new capital paradigm was established, and that capital paradigm said as long, by the

Director of the Agency as regulator, and that capital paradigm said as long as these institutions are not forced into mandatory receivership they may operate. And the new paradigm was rather than requiring them to maintain eight percent, five percent, six percent capital, whatever the standard was as a normal banking institution, it was determined that as long as the Treasury commitment was out there ready to come in to cure any insolvency, which as the Court knows if the institutions were insolvent for more than 60 days the Agency would have been forced to place them into mandatory receivership, so the new paradigm was we'll have the 100, 200, eventually Treasury committed to 467 billion, nearly a half a trillion dollars to support these enterprises, and the regulator made the regulatory decision that we will, the Agency will allow that to satisfy capital standards. So, again, this, it was not challenged at the time, and so what the statute says is that this action by the Agency as regulator to establish a new capital paradigm for the duration of the conservatorships may not be affected by injunction or otherwise in any manner, it's similar to the banking cite in here, and the banking cite is 12 U.S.C. 1818(i), no court may effect by injunction or otherwise a cease and desist order that has been issued. What was happening there, and there's case law on this, this provision essentially parrots what are called on the banking

landscape capital directives. Capital directives were first enacted by Congress in 1983 pursuant to the International Lending Supervision Act of 1983. And what a capital directives -- and it was issued, Your Honors, in response to a Fifth Circuit decision, the Fifth Circuit back in 1983 in a case called *Comptroller Currency v. First National Bank of Bel Aire* ruled that the Comptroller's cease and desist order requiring the bank to increase its capital was not supported by substantial evidence. And to overrule that decision the Congress enacted what are called capital directives, and capital directives provide that the agencies, the comptroller, the FDIC, the Fed, the NCUA, I believe, can require institutions to maintain whatever capital level they deem appropriate under the circumstances, and this was the key point, those determinations are subject to no judicial review. In 1990 that point that they were subject to no judicial review was challenged in the Fifth Circuit in a case called *FDIC v. Bank of Coushatta*, reported at 930 F.2d 1122, and on a three-judge Fifth Circuit panel including the esteemed Judge John Minor Wisdom, the Court ruled that the statute comported with due process. There's a lengthy analysis, and the statute, the capital directive statute at issue there that provided no judicial review to banks, when the agencies changed, increased, decreased their capital guidelines was not subject to judicial review. Your Honors,

that is precisely what is implicated by the statute that the Court has referenced.

JUDGE MILLETT: And so your view here is that they're challenging this what you call capital paradigm of, that was created here of, in the Third Amendment getting rid of obligations that the GSEs had under the prior amendments, and the PSPAs and replacing them with this just pay us whatever you can each month, that's a new capital paradigm decision by the Director?

MR. CAYNE: No, what I'm referring to, Your Honor, is the, it's throughout their briefs, it came up in my esteemed colleague Mr. Olson's presentation many times that we, the Agency is driving these institutions out of business. It's allegedly not allowing them to grow capital, it's keeping them at zero, how can that be? Well, the reason that can be is the paradigm, the new capital program that never has been challenged that was established in 2008 sets precisely that, an action was taken by the Director at that time, in September, 2008, that said going forward the normal capital classifications, whatever the percentage was, I don't recall, three, four, five, six, seven, eight percent no longer applied. Instead, we're going to have this new paradigm, and the new paradigm is, and we all have to understand, much of the presentation by my colleagues, it's like we're dealing with this fabulously successful financial

Exhibit C

Docket No. 14-6167

In the United States Court of Appeals for the Sixth Circuit

LARRY HIGGINS, *et al.*,

Plaintiffs-Appellees,

v.

BAC HOME LOANS SERVICING, LP, *et al.*,

Defendants

and

FEDERAL HOUSING FINANCE AGENCY; FEDERAL NATIONAL MORTGAGE ASSOCIATION

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Kentucky (Case No. 5:12-cv-183)

CORRECTED JOINT OPENING BRIEF OF APPELLANTS FEDERAL HOUSING FINANCE AGENCY and FEDERAL NATIONAL MORTGAGE ASSOCIATION

Howard N. Cayne
Asim Varma
Michael A.F. Johnson
Dirk C. Phillips
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
Michael.Johnson@aporter.com
Counsel for Appellant Federal Housing Finance Agency

Jill L. Nicholson
FOLEY & LARDNER LLP
321 North Clark Street
Suite 2800
Chicago, IL 60654
(312) 832-4500
jnicholson@foley.com

Counsel for Appellant Federal National Mortgage Association

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-6167 Case Name: Higgins v. Fed Housing Finance Agency

Name of counsel: Jill L. Nicholson

Pursuant to 6th Cir. R. 26.1, Federal National Mortgage Association
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. Fannie Mae does not have a parent corporation and according to SEC filings, no publicly held corporation owns more than 10% of Fannie Mae's common (voting) stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 11, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jill L. Nicholson

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

REQUEST FOR ORAL ARGUMENT

Defendants-Appellants respectfully request oral argument. This appeal raises an important question of first impression, the outcome of which has the potential to affect other cases involving similar statutes. Defendants-Appellants seek the normal allotment of 15 minutes per side, *see* Circuit Rule 34(f)(1), in addition to whatever amount of argument time the Court deems appropriate in the companion appeal, Case No. 14-6168.

INTRODUCTION

Federal law mandates that, while in conservatorship, Fannie Mae "shall not be liable for any amounts in the nature of penalties." 12 U.S.C. § 4617(j)(4). Kentucky law requires recordation of mortgage assignments and makes non-complying assignees liable for treble damages or a statutory minimum award of $500 per assignment—regardless of whether non-recordation causes any actual harm. KRS § 382.365(5). This Court must decide whether the Kentucky statute imposes liability "in the nature of [a] penalt[y]," from which Fannie Mae is federally exempt. It does.

Congress created the Federal Housing Finance Agency ("FHFA" or the "Conservator") at the height of the recent financial crisis, granting it comprehensive regulatory authority over the Federal National Mortgage Association ("Fannie Mae") and empowering it to place Fannie Mae into conservatorship, if necessary. To aid FHFA in performing these critical functions, Congress granted FHFA broad immunities, including a statutory provision mandating that FHFA and entities under its conservatorship "shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." 12 U.S.C. § 4617(j)(4) (the "Penalty Bar").

The Kentucky statute at issue, Section 382.365(5), makes mortgage assignees who do not promptly record the assignment liable for either a statutory minimum amount of $500 per occurrence (the "Statutory Award") or treble damages. The Statutory Award is available regardless of whether *any* actual damages can be pled or shown. Functionally, therefore, Section 382.365(5) makes assignees liable for the *greater* of three times actual damages or $500; where no actual harm exists, a plaintiff will naturally seek the $500 Statutory Award, as Plaintiffs do here.

The liability that Section 382.365(5) imposes extends far beyond compensation for actual injury. Indeed, it arises from a statutory structure the Kentucky Supreme Court recently described as "designed to penalize" those who fail to comply with the state's real-property recording system. *Hall v. Mortg. Elec. Registration Sys., Inc.*, 396 S.W.3d 301, 307 (Ky. 2012). As such, the monetary award Plaintiffs seek is "in the nature of [a] penalt[y]."

Given the Penalty Bar, Fannie Mae cannot be liable to Plaintiffs under Section 382.365(5), and this Court must reverse the judgment below.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1332. It denied FHFA and Fannie Mae's motion to dismiss. Record 74, Opinion and Order, PAGE ID #1492-1503. The district court

subsequently certified its ruling for interlocutory review on July 3, 2014. Record 90, Opinion and Order, PAGE ID #1797-1804. FHFA and Fannie Mae timely filed their Petition for Permission to Appeal on July 11, 2014. This Court subsequently granted their petition. Order, *In re Fed. Hous. Fin. Agency*, No. 14-506, Dkt. No. 21-2 (6th Cir. Sept. 24, 2014). Accordingly, this Court has jurisdiction over the district court's denial of FHFA and Fannie Mae's motion to dismiss pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUE

Does KRS § 382.365(5) impose liability "in the nature of [a] penalt[y]," from which Fannie Mae is federally exempt under 12 U.S.C. § 4617(j)(4)?

STATEMENT OF THE CASE

I. FACTUAL AND STATUTORY BACKGROUND

During the Great Depression, Congress created Fannie Mae to "establish secondary market facilities for residential mortgages," to "provide stability in the secondary market for residential mortgages," and to "promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1716. In July 2008—to avert a complete collapse of the residential housing market—Congress created FHFA to regulate Fannie Mae, the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and certain other entities. Housing & Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. § 4511 *et*

seq.). Within months, FHFA placed Fannie Mae and Freddie Mac (together, the "Enterprises") into conservatorships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. § 4617(a)(2). The Enterprises remain under FHFA's conservatorship.

Under HERA, the Conservator's statutory mandate is to "preserve and conserve" the Enterprises' "assets and property." 12 U.S.C. § 4617(b))(2)(B)(iv). And in enacting HERA, Congress recognized that the Conservator would need broad authority to act swiftly and decisively, and accordingly granted it sweeping privileges and immunities—including the Penalty Bar. In addition to the Penalty Bar, Congress granted the Conservator several other immunities, including immunity from the direction or supervision of any state or federal agency; protection from judicial orders that would restrain or affect the Conservator's exercise of its powers and functions; exemption from state and local taxation; and exemption of conservatorship property from lien, levy, attachment, garnishment, and foreclosure. 12 U.S.C. § 4617(a)(7), (f), (j)(1)-(3). These privileges and immunities underscore the extent to which Congress desired to protect the billions of taxpayer dollars invested in the Enterprises and to ensure that the Conservator be unencumbered in carrying out its important functions.

II. PROCEDURAL HISTORY

Plaintiffs filed a putative class action in Kentucky state court against several lenders, Fannie Mae, and FHFA as Conservator for Fannie Mae (collectively, "Defendants"). *See* Record 1-1, State Court Complaint, PAGE ID #13-28. FHFA and Fannie Mae removed the matter to the Eastern District of Kentucky. Plaintiffs subsequently filed an amended complaint, Record 32, PAGE ID #448-64, and, at the district court's direction, a Second Amended Complaint, Record 76, PAGE ID #1523-45 ("SAC"). Plaintiffs allege that in utilizing the Mortgage Electronic Registration System ("MERS") to maintain certain mortgage records, Defendants violated KRS § 382.360 by failing to timely record alleged assignments of liens and mortgages and thereby became liable for the monetary award authorized by KRS § 382.365(5). *See* Record 76, SAC ¶¶ 84-92, PAGE ID #1541-42.

Plaintiffs seek certification of a proposed class of Kentucky landowners that Plaintiffs estimate will number in the "tens of thousands." Record 76, SAC ¶ 72, PAGE ID #1537. On behalf of the entire putative class, they request the Statutory Award of $500 per assignment rather than pleading any actual damages. *Id.* ¶¶ 69, 88, PAGE ID #1536, 1541-42. Plaintiffs allege that class members' mortgages were "often ... assigned multiple times," *id.* ¶ 42, PAGE ID #1530-31, meaning that Plaintiffs seek to impose tens of millions of dollars of liability upon

Defendants, including Fannie Mae and the FHFA Conservator, without any allegation of actual harm.

FHFA and Fannie Mae moved to dismiss the claims against them on the ground that the Penalty Bar exempts them from liability for amounts awarded under KRS § 382.365(5). Record 52, PAGE ID #610-11. The district court denied the Motion. *See* Record 74, Penalty Bar Order, PAGE ID #1492-1503. Although it correctly determined that the Penalty Bar applies to both the Conservator and to Fannie Mae in conservatorship, *id.* at 4-5, PAGE ID #1495-96, the district court incorrectly ruled that KRS § 382.365(5) does not impose liabilities "in the nature of penalties," *id.* at 5-10, PAGE ID #1496-1501.[1]

In reaching that conclusion, the district court considered whether the statute allowed damages "wholly disproportionate to the actual harm suffered." *Id.* at 9, PAGE ID #1500. In so doing, the court held that because KRS § 382.365(5) permits individuals to recover either trebled actual damages or the $500 minimum but not both, "the provision is more properly viewed as a 'liquidated damages' provision." *Id.* at 9, PAGE ID #1500. According to the court, a liquidated-

---

[1] In the district court, all Defendants (including the Conservator and Fannie Mae) moved to dismiss on other grounds as well. Record No. 53, PAGE ID #638-40. The district court's order denying that motion is the subject of the related appeal pending in case number 14-6168, to which Fannie Mae and Freddie Mac are parties. Record 75, PAGE ID #1504-22. Other than in this note, case number 14-6168 is not addressed in this brief.

damages provision is "not properly characterized as a fine or penalty." *Id.* at 10, PAGE ID #1501. The district court thus held that KRS § 382.365(5) is remedial rather than penal and not subject to the Penalty Bar.

Nevertheless, the district court ordered Plaintiffs to amend their complaint to clarify whether they seek actual damages, where such allegation was necessary to proceed on their civil conspiracy claim. *Id.* at 10-11, PAGE ID #1501-02. Plaintiffs then filed a Second Amended Complaint, clarifying that they seek only the $500 Statutory Award. Record 76, SAC ¶¶ 88, 92, PAGE ID #1541-42.

The district court certified the Order denying FHFA and Fannie Mae's Motion to Dismiss for interlocutory review under 12 U.S.C. § 1292(b), and this Court granted their timely petition for permission to appeal.

STANDARD OF REVIEW

This Court reviews denials of Rule 12(b)(6) motions *de novo*. *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005).

SUMMARY OF ARGUMENT

Plaintiffs' claims against FHFA and Fannie Mae turn on the purely legal question whether KRS § 382.365(5) imposes liability "in the nature of [a] penalt[y]"—if it does, the Penalty Bar protects FHFA and Fannie Mae from liability. The district court acknowledged that Kentucky imposes treble actual damages or a Statutory Award of $500 per technical violation—*regardless of*

whether Plaintiffs plead or show any actual harm—but nevertheless concluded that the statute is not "penal" because it is "more properly viewed as a 'liquidated damages' provision." Record 74, Penalty Bar Order at 9, PAGE ID #1500. This was error.

The Penalty Bar is a sweeping provision that precludes the relief authorized by KRS § 382.365(5). The Penalty Bar precludes not only awards that are strictly penalties, but any awards "in the nature" of a penalty. This reveals a broad legislative intent to preserve the resources of Fannie Mae—a taxpayer-funded entity—by shielding Fannie Mae from any award that has a significant punitive element. Section 382.365(5)'s provision for treble damages or the Statutory Award of $500 per assignment, whichever is greater, easily meets this criterion.

In any event, Section 382.365(5) *is* strictly a penalty. Numerous formulations have been offered for determining when a statute is penal, but the critical question has always been whether the award provides compensation for harm suffered. If so, the statute is remedial, and if not, it is penal. Here, the award of treble damages or $500 per assignment goes far beyond merely providing compensation for actual harm. Plaintiffs have expressly disclaimed actual damages and have not articulated a concrete harm suffered by *any* class member in this case. Even if such harm did exist, the Statutory Award of $500 *per assignment* is wholly disproportionate to such harm. Rather than provide compensation to

injured borrowers, Section 382.365(5) clearly was designed to deter and punish non-compliance with the statute's recording scheme; it is quintessentially a penalty provision.

In reaching a contrary conclusion, the district court incorrectly determined that the $500 Statutory Award represents a liquidated-damages provision. There is no indication that the Legislature intended the Statutory Award of $500 per assignment to approximate actual damages. The district court then compounded its error by misinterpreting this Court's decision in *Murphy v. Household Fin. Corp.*, 560 F.2d 206 (6th Cir. 1977), reading *Murphy* incorrectly as holding that all liquidated-damages provisions necessarily are remedial, not punitive. Neither *Murphy* nor this Court's other precedent supports that conclusion. Instead, those cases—and, more recently, the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)—confirm that statutory awards can be punitive even if they are designated as "liquidated damages," and that courts must look not to labels but to the substance of statutory award provisions to determine if they are punitive.

In substance, the Kentucky statute imposes liability "in the nature of [a] penalt[y]," and the Penalty Bar immunizes FHFA and Fannie Mae from the punitive award Plaintiffs seek. The district court erred in ruling otherwise, and this Court should therefore reverse.

ARGUMENT

I. THE MONETARY AWARD PLAINTIFFS SEEK IS BARRED BY FEDERAL STATUTE

The Penalty Bar provides that FHFA, as Fannie Mae's Conservator, "shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." 12 U.S.C. § 4617(j)(4). A substantively identical provision protects Federal Deposit Insurance Corporation ("FDIC") receiverships from liability for "any amounts in the nature of penalties or fines," including those imposed under statutes analogous to the Kentucky provision at issue here. *See* 12 U.S.C. § 1825(b)(3). This Court has not previously interpreted or applied either statute.[2]

This appeal turns on whether KRS § 382.365(5)—which authorizes trebled actual damages or, if there are no (or de minimis) actual damages, the $500-per-

---

[2] Section 1825(b)(3) is part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Courts routinely look to cases interpreting FIRREA when interpreting and applying HERA. *See, e.g.*, *FHFA v. UBS Ams., Inc.*, 712 F.3d 136, 142 n.2 (2d. Cir. 2013) (citing FIRREA cases as persuasive authority when interpreting HERA); *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (same); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009) (finding FIRREA cases persuasive in case involving Conservator's statutory powers because FIRREA's "provisions regarding the powers of federal bank receivers and conservators are substantially identical to those of HERA").

occurrence Statutory Award that Plaintiffs seek here—imposes liability "in the nature of [a] penalt[y]" for purposes of the Penalty Bar. It does.

A. The Penalty Bar Applies Broadly

In enacting HERA, Congress recognized that FHFA would need broad authority to act in the interest of an Enterprise in conservatorship, that the Conservator would face enormous and unprecedented challenges, and that the Conservator—in carrying out its statutory mandate to "preserve and conserve" Fannie Mae's assets and property—would need the flexibility to act swiftly and decisively. Accordingly, Congress granted the Conservator sweeping powers and broad immunities, including the Penalty Bar. These powers and immunities help to protect the billions of taxpayer dollars infused into the Enterprises to keep them solvent.

1. The Plain Language of the Penalty Bar Confirms that Congress Intended It to Apply Broadly

Congress enacted the Penalty Bar to immunize FHFA conservatorships from not only liabilities expressly denominated as "penalties" or "fines," but also from those "*in the nature* of penalties or fines."[3] Courts have recognized that such

---

[3] The district court's holding that the Penalty Bar applies to Fannie Mae while in FHFA conservatorship is plainly correct. *See* Record 74, Penalty Bar Order at 4-5, PAGE ID #1495-96. The Penalty Bar expressly applies to FHFA when acting "as a conservator." 12 U.S.C. § 4617(j). In that capacity, FHFA has succeeded to all of Fannie Mae's "rights, title, powers, and privileges," with the power to "take over [Fannie Mae's] assets … and operate [it] with all the powers of [its]

(footnote continued on next page)

language is "indicative of the drafters' intent to widen the scope of [a] provision." *See Frye v. Thompson Steel Co.*, 657 F.3d 488, 496 (7th Cir. 2011). In *Frye*, for example, the Seventh Circuit interpreted a pension contract that required deductions for workers' compensation payments made for disabilities "in the nature of a permanent disability." *Id.* at 491. The court held that "the phrase 'in the nature of' suggests a broad and somewhat fluid concept" that could "include disabilities that are like permanent disabilities but are not permanent in the strictest sense." *Id.* at 496. Courts similarly have accorded a "broad interpretation" to 11 U.S.C. § 523(a)(5), which precludes a party from discharging through bankruptcy any liability "in the nature of alimony, maintenance, or support." *See In re Maddigan*, 312 F.3d 589, 595 (2d Cir. 2002); *In re Kassicieh*, 425 B.R. 467, 481 (Bankr. S.D. Ohio 2010). The phrase carries dispositive effect, as in *Triplett v. United States*, No. C97-2251, 1998 WL 78127, at *2 (N.D. Cal. Feb. 13, 1998), where the court contrasted the "use of 'in the nature of'" in an IRS regulation

---

(footnote continued from previous page)
shareholders, … directors, and … officers[,] and to conduct all [of its] business." *Id.* § 4617(b)(2). Accordingly, courts have uniformly rejected any argument that Section 4617(j) immunities do not apply to Fannie Mae (or other entities) while in FHFA conservatorship. *See Nevada v. Countrywide Home Loans Servicing, LP,* 812 F. Supp. 2d 1211, 1218 (D. Nev. 2011) ("while under the conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is"); *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1064 (N.D. Ill. 2013) (argument is "meritless"); *Cnty. of Fairfax, Va. v. FDIC,* No. 92-0858, 1993 WL 62247 (D.D.C.1993) (same result as to FDIC receivership under 12 U.S.C. § 1825(b)(3)).

against the absence of such "broadening" language in an exception clause the court therefore ruled inapplicable.

These cases reaffirm what is clear from the plain text of the Penalty Bar: Congress intended to shield FHFA conservatorships from "any" liabilities that have any significant punitive characteristics.[4] This was part and parcel of Congress' intention to limit the costs of the conservatorships, for which taxpayers bear ultimate responsibility. Moreover, Congress's apparent intent in enacting the Penalty Bar was to preclude awards available under statutory schemes addressing the same general subject matter as the Kentucky statute at issue here. Congress specifically contemplated charges arising from a failure to comply with a statutory scheme governing the recordation of real-property instruments, and extended FHFA's immunity to cover them by including a clause barring claims "in the nature of penalties or fines, *including those arising from the failure of any person to pay any ... recording tax or any recording or filing fees when due*." 12 U.S.C. § 4617(j)(4) (emphasis added).[5] It is telling that, of the many types of fees and

---

[4] The breadth Congress intended is also evident from the fact that the Penalty Bar covers liabilities arising from the actions of "any person," not just Fannie Mae itself. 12 U.S.C. § 4617(j)(4). *See Irving Indep. Sch. Dist. v. Packard Props.*, 970 F.2d 58, 59 (5th Cir. 1992); *In re Cnty. of Orange*, 262 F.3d 1014, 1022 (9th Cir. 2001) (similar).

[5] This clause is illustrative and in no way limits the scope of the Penalty Bar. *See Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes

(footnote continued on next page)

penalties covered by the Penalty Bar, Congress chose to highlight compliance with statutory schemes governing the recordation of real-property instruments as an example of what is covered.[6]

2. The Strong Federal Interests Underlying the Penalty Bar Warrant Broad Application

The rationale behind the sweeping immunity of the Penalty Bar is that imposing any punitive monetary liability on FHFA conservatorships (or FDIC receiverships) would be damaging and counterproductive to the overriding federal interest in resolving troubled financial institutions quickly and efficiently. Making conservatorships liable for penalties would "diminish[] available assets" to "innocent creditors." *Monrad v. FDIC*, 62 F.3d 1169, 1175 (9th Cir. 1995); *see also FDIC v. Claycomb*, 945 F.2d 853, 861 (5th Cir. 1991) (same). The content of HERA evinces that when Congress adopted the Penalty Bar, at the height of the

---

(footnote continued from previous page)
simply an illustrative application of the general principle."); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (similar).

[6] Though the Statutory Award is levied when parties fail to record an assignment, not when they fail to pay a fee associated with that recording, this is an immaterial distinction. The thrust of Plaintiffs' case is that Defendants failed to record assignments for the specific purpose of avoiding payment of the applicable fees. *E.g.*, Record 76, SAC ¶¶ 43, 54, PAGE ID #1531, 1533 ("Defendants established MERS in order to avoid the requisite payment of recording fees to County Clerks for assignments of mortgage loans"); Record 57, Plaintiffs' Opposition to the Conservator and Fannie Mae's Motion to Dismiss at 14, PAGE ID #1054 ("through their membership in MERS, the Defendants have participated in a common design and plan to attempt to avoid paying Kentucky recording fees").

recent financial crisis, its desire to sustain a robust secondary mortgage market through a robust conservatorship was matched by its concern that protections be in place to limit the stress the conservatorships would place on the taxpayers. The Penalty Bar reflects Congress's policy judgment that liability for any award "in the nature of [a] penalt[y]" would unnecessarily burden taxpayers. 12 U.S.C. § 4617(j)(4).

Any penalties imposed on the conservatorship would fail to meet the goals of the legislatures that enacted them, as they have "no deterrent effect" against federal conservators and receivers. *Claycomb*, 945 F.2d at 861. "The primary target of any punitive damages," the defaulted institution, "cannot be deterred from any future conduct," as it is already subject to control by a federal conservator or receiver. *Alexander v. Washington Mut., Inc.*, No. 07-4426, 2011 WL 2559641, at *4 (E.D. Pa. June 28, 2011) (internal quotation marks omitted); *see also Monrad*, 62 F.3d at 1175; *Poku v. FDIC*, No. RDB-08-1198, 2011 WL 1599269, at *4 (D. Md. Apr. 27, 2011). Here, burdening a federal conservatorship with the penalties Plaintiffs seek would do little to change its behavior. It would, however, reduce the conservatorship's ability to carry out its congressionally mandated mission and expose taxpayers to substantial losses—a result that clearly runs afoul of congressional intent.

3. The Substantively Identical Statute Protecting FDIC Receiverships Has Always Been Applied Broadly

Congress adopted a substantially identical penalty bar to govern FDIC receiverships, 12 U.S.C. § 1825(b)(3), and courts routinely acknowledge its breadth. Indeed, courts have often voided—and have never permitted, so far as Appellants have determined—attempts to hold FDIC receiverships liable under statutes that, in contrast to Section 382.365(5), provide *solely* for treble damages. *See, e.g.*, *Alexander*, 2011 WL 2559641, at *6; *Horn v. FDIC*, No. CIV. A. ELH-11-2127, 2011 WL 6132309, at *1 (D. Md. Dec. 8, 2011); *Deerborne Cottages, LLC v. First Bank*, No. 1:11CV178, 2012 WL 1835240, at *8 (W.D.N.C. Apr. 9, 2012), *report and recommendation adopted*, No. 1:11CV178, 2012 WL 1836093 (W.D.N.C. May 21, 2012); *Summers v. FDIC*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984). Under fundamental principles of statutory construction, FHFA should receive the same protection under the Penalty Bar in the context of the Kentucky statutory scheme, which provides for the *greater* of treble damages or a statutory minimum, and is therefore even more severe. *See Hall v. United States*, 677 F.3d 1340, 1344-45 (Fed. Cir. 2012) (discussing principle of *in pari materia*); 2B Sutherland Statutory Construction § 53.3 (7th ed.) (similar).

B. Statutory Awards That Are Not Limited to Compensation for Actual Injury Are Penal

Courts have long analyzed the distinction between penal and remedial statutes, and numerous formulations have been offered for distinguishing between the two. But no matter the formulation, the inquiry principally turns on a simple question: Is the statute intended to compensate a party for an actual injury? If so, the statute is remedial. If not—e.g., if the statute's purpose is punishment or deterrence—it is properly classified as a penalty.

1. More than a Century of Precedent Confirms that Whether a Statute Is Penal Turns on Whether It Is Compensatory

The Supreme Court explored the distinction in *Huntington v. Attrill*, 146 U.S. 657 (1892). There, the issue was whether a Maryland court was required to enforce a New York court's judgment under the Full Faith and Credit Clause. The Court explained that no state was required to "execute the penal laws of another," and thus the inquiry turned on whether the New York statute that provided the basis for the judgment was "penal." *Id.* at 666 (internal quotation marks omitted). The Court explained that "[t]he question whether a statute ... is a penal law, in the ... sense ... that it cannot be enforced in the courts of another state, ... depends upon ... whether [the statute's] purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." *Id.* at 673-74. The Court held that the New York statute was "clearly remedial,"

since it afforded a private remedy to an injured creditor limited to the "amount of ... debt" the creditor was owed. *Id.* at 676-77.

This Court addressed the issue half a century later in *Bowles v. Farmers Nat'l Bank of Lebanon*, 147 F.2d 425 (6th Cir. 1945). *Bowles* concerned the Emergency Price Control Act of 1942, which allowed for an award of treble the amount that a price exceeded the statutorily prescribed limit, or $50, whichever was greater. *Id.* at 427. The court had to determine whether the statute was penal—if so, the death of the purportedly injured party would terminate the claim, but if not, the claim would survive. The *Bowles* court held the statute was penal, explaining that "the sum to be paid" was "so greatly in excess of the loss incurred that it [could not] be explained except upon the theory that the statute intend[ed] to subject the wrongdoer to an extraordinary liability *not limited to the damage suffered*." *Id.* at 429 (emphasis added) (internal quotation marks omitted). The court found it particularly "significant" in this regard that the statute allowed for the *greater* of treble damages or the minimum statutory award. *Id.*

This Court reaffirmed *Bowles* sixteen years later in *United States v. Price*, 290 F.2d 525 (6th Cir. 1961). The statute in *Price* was materially identical to the one in *Bowles*, and the issue again was whether a claim transferred upon the death of a party. The court reiterated that a statute is remedial where it allows for recovery "to *compensate* for an injury," but that "[i]f, on the other hand, *no direct*

injury has been done to the [plaintiff], the action is *not for compensation but for the recovery of a penalty*." *Id.* at 526 (emphases added) (internal quotation marks omitted). .

This Court engaged in a similar analysis in *United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954). The statute there permitted the government to recover $2,000 per fraudulent act committed, plus double any damages. *Id.* at 861. The *Witherspoon* court explained that "the term 'penalty'" is "*distinguished from compensation* for the loss suffered by the injured person." *Id.* (emphasis added) (internal quotation marks omitted). Rather, "[a] penalty … is the punishment, generally pecuniary, inflicted by a law for its violation." *Id.* (internal quotation marks omitted). The court concluded that the statutory award of $2,000 per violation was "without regard to" harm suffered, and therefore was penal. *Id.*

2. *Murphy* Did Not Alter the Background Principle that the Compensatory Nature of the Award Is Critical

It was against the backdrop of the above cases that this Court decided *Murphy*, the 1977 case upon which the district court relied in holding the Penalty Bar inapplicable to Plaintiffs' Section 382.365(5) claim. *Murphy* concerned whether a cause of action under the Truth in Lending Act ("TILA") transferred to the bankruptcy trustee upon the injured party's filing for bankruptcy. The defendant provided a married couple a loan but failed to make certain disclosures to the couple as required under TILA. 560 F.2d at 207. The couple shortly

thereafter went bankrupt, and the bankruptcy trustee filed suit under TILA—which allowed for recovery of actual damages plus twice the finance charge paid to the defendant, subject to an overall cap of $1,000 and a minimum recovery of $100. *Id.* at 206-07 & n.1.

Murphy surveyed the long line of cases exploring the distinction between penal and remedial provisions, including *Huntington* and *Bowles*, discerning several "guidelines" for resolving the question in the case:

> (1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.

Id. at 209. The court's analysis shows that the third factor, proportionality, is of primary importance, while the second is far less significant than the other two. With respect to the third factor—whether recovery was disproportionate to the harm caused—the court concluded that the harms to consumers were quite real: "the [lender] has *injured* the [consumer] *in his monetary interests* by misrepresenting the cost of credit" and "prevent[ing] the [consumer] from obtaining cheaper credit after comparison shopping." *Id.* at 210 (emphases added) (internal quotation marks omitted). The court concluded that these pecuniary harms were difficult to quantify and that therefore the statutory award of twice the finance charge served as compensation in the form of "liquidated damages." *Id.* at

210 (internal quotation marks omitted). As to the first factor, the *Murphy* court held that the purpose of TILA was remedial; Congress passed the statute to address the wrongs to individual consumers when lenders facilitate the "uninformed use of credit." *Id.* at 209-10. The second factor—which the court addressed in two cursory sentences—was consistent, as recovery ran to the individual. *Id.* at 210. The court thus deemed the statute remedial.

3. Since *Murphy*, Courts Have Eschewed Rigid Formulations and Focused Instead on Whether an Award Is Compensatory

In the decades since *Murphy*, this Court has not treated the three "guidelines" outlined in the decision as a rigid formulation for assessing whether a statute is penal. Indeed, this Court has not always invoked *Murphy* in deciding whether statutory liabilities constitute penalties. For example, in *La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327 (6th Cir. 2010), this Court decided whether a treble damages award under the Lanham Act could be deemed a "penalty" without citing *Murphy*. The *La Quinta* court relied on *Bowles*, holding that a statutory award "constitutes a penalty" "if a sum of money is to be recovered by a third person ... instead of a person injured, . . . ***or*** *if the sum exacted is greatly*

disproportionate to the actual loss." *Id.* at 343 (quoting *Bowles*, 147 F.2d at 428) (internal citations omitted) (first emphasis added).[7]

Also since *Murphy*, the Supreme Court has examined the penal versus remedial distinction in an area previously left unexplored: the Excessive Fines Clause of the Eighth Amendment, which is triggered only if a sanction is a "punishment" and not remedial. In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Supreme Court defined a "remedial action" for these purposes as one "brought to obtain compensation." *Id.* at 329 (quoting *Black's Law Dictionary* 1293 (6th ed. 1990)). The *Bajakajian* Court held that the civil forfeiture provision at issue constituted "punishment" because it primarily served a deterrent function and "[did] not serve the remedial purpose of compensating the Government for a loss." *Id.* at 329. Following *Bajakajian*, the Supreme Court has drawn an even brighter-line rule for determining when the Excessive Fines Clause is triggered: where "[a] civil sanction ... cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent

---

[7] In *La Quinta*, the court held that the treble damages at issue did not constitute a penalty because the damages as calculated were "inadequate to compensate [the plaintiff] for the true extent of its injuries." 603 F.3d at 345. Here, by contrast, the Statutory Award would greatly *overcompensate* Plaintiffs, who have not pled *any* actual injury.

purposes," it is "punishment." *Austin v. United States*, 509 U.S. 602, 621 (1993) (internal quotation marks omitted).[8]

The jurisprudence thus establishes that in determining whether a statute is penal, the primary question is whether the statute is compensatory. *See Bajakajian*, 524 U.S. at 329; *La Quinta*, 603 F.3d at 342-43, 345; *Murphy*, 560 F.2d at 210; *Price*, 290 F.2d at 526; *Witherspoon*, 211 F.2d at 861; *Bowles*, 147 F.2d at 429; *Huntington*, 146 U.S. at 676-77. In the *Murphy* framework, the third factor—whether the award is "wholly disproportionate" to the harm suffered—is therefore most probative. Indeed, this Court confirmed in *La Quinta* that this factor alone can be dispositive: an award "[g]enerally" is considered penal "if the sum exacted is greatly disproportionate to the actual loss." *La Quinta*, 603 F.3d at 343 (citing *Bowles*, 147 F.2d at 428); *see also Innovation Ventures, LLC v. N2G Distrib., Inc.*, No. 08-CV-10983, 2012 WL 1468470, at *4 (E.D. Mich. Apr. 27, 2012) (resting solely on this criterion in finding treble damages award under Lanham Act to be a penalty). And *Bowles*—the pre-*Murphy* precedent this Court relied on in *La Quinta*—plainly emphasizes proportionality as the decisive criterion. *See* 147 F.2d at 429.

---

[8] If a sanction is considered a "punishment," it is then subject to a proportionality analysis to determine whether it is constitutional. *See Bajakajian*, 524 U.S. at 334-35. But regardless of its ultimate constitutionality, any sanction that serves *some* retributive or deterrent purposes is considered a penalty subject to the protections of the Excessive Fines Clause.

C. The Section 382.365(5) Statutory Award Is Punitive and Cannot Withstand the Penalty Bar

Applying the *Murphy* factors here, KRS § 382.365(5) is penal. Most significantly, the award of treble damages or $500 per assignment, whichever is greater, is grossly disproportionate to the harm suffered by individual borrowers. Indeed, Plaintiffs have disclaimed *any* actual damages and have made *no* showing that even a single class member suffered any harm at all. The next most relevant *Murphy* factor—the purpose of the award—also supports a finding that KRS § 382.365(5) is penal. The statute's text and legislative history make plain that the statute was designed to punish or deter violations, not to compensate individual borrowers. The remaining *Murphy* factor—who receives the recovery—is neutral. Where, as here, recovery runs to the individual rather than to the government, the award can be either compensatory or punitive and the other factors are decisive.

1. The Statutory Award Is Disproportionate to Any Harm Incurred by Plaintiffs

Applying the controlling *Murphy* factor, the statutorily authorized award of treble damages or $500 *per assignment* must be deemed penal because it is wholly disproportionate to any harm suffered. One need look no further than the facts of this case to illustrate this point. Plaintiffs seek the Statutory Award of $500 per assignment—which they allege could reach into the tens of millions of dollars if a class were to be certified—despite not being able to allege a single dollar of actual

damages or point to any concrete harm suffered by *any* member of the putative class. *Cf. Bowles*, 147 F.2d at 429 (statute penal where plaintiff identified no "items of loss ... in the complaint."). In fact, the district court directed Plaintiffs to amend their complaint to specify what actual damages they suffered, but Plaintiffs disclaimed any entitlement to actual damages and limited their claims to the fixed Statutory Award. *See* Record 74, Penalty Bar Order at 11, PAGE ID #1502 (ordering Plaintiffs to amend their complaint to specify whether they seek actual damages); Record 76, SAC ¶¶ 67-69, PAGE ID #1536-37 (requesting only the $500 Statutory Award). That concession speaks volumes.[9]

The only purported harms Plaintiffs have identified in this case are wholly speculative ones, such as potentially not knowing "who to pay" or "who to approach to obtain a release[] or to determine if a release of a mortgage was given by a correct party." Dkt. No. 10-1 at 4. But Plaintiffs never alleged that even a

---

[9] In the district court, Plaintiffs asserted that they are seeking "actual damages" measured by "the minimum amount quantified by KRS § 382.365(5)." Record 76, SAC ¶ 92, PAGE ID #1542. But a statutory award unrelated to actual harm does not constitute "actual damages." To the extent Plaintiffs' pleading could be read to assert otherwise, any such assertion should be disregarded as conclusory and unsupported. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009). In any event, the district court ordered Plaintiffs to specify whether they "assert a claim for both" "actual damages and the $500 minimum," or whether they "seek only the $500 statutory minimum." Record 74, Penalty Bar Order at 10-11, PAGE ID #1501-02. Plaintiffs clarified that they pursue only the statutory minimum award, which requires no proof of damages, and thus relinquished any claim to actual damages.

single class member experienced any such trouble, or that any class member paid off his or her loan but was unable to obtain a lien release. That is no surprise, as borrowers *already* receive notice of loan ownership changes directly: under federal law, when a lender transfers its interest in a loan, it must notify the borrower of the change in writing within thirty days of the transfer. *See* 15 U.S.C. § 1641(g). Furthermore, borrowers generally have a consistent source of information in the *servicer*, and so are unaffected by changes in the *mortgagee*. *See Catalan v. GMAC Mortg.*, 629 F.3d 676, 687 (7th Cir. 2011) (under 12 U.S.C. § 2605, servicers must respond to "[a]ny reasonably stated written request for account information"); *Pilgeram v. Greenpoint*, 313 P.3d 839, 842 n.2 (Mont. 2013) ("The servicer of the loan collects payments from the borrower, sends payments to the lender, and handles administrative aspects of the loan." (internal quotation marks omitted)).

It would make no difference to this Court's analysis even if such problems could occur. Plaintiffs make no effort to demonstrate that their purported non-pecuniary harms are commensurate with the Statutory Award—which is provided not based on the number of times a given borrower confronted any such issues, but for each failure to record an assignment. *See De Fontbrune v. Wofsy*, No. 13-cv-05957, 2014 WL 1266999, at *5 (N.D. Cal. Mar. 27, 2014) (award was penal

where it depended on "[d]efendants' behavior" rather than circumstances of plaintiff).

Plaintiffs thus offer no plausible account of how the Statutory Award serves as *compensation* for harm suffered. And the fact that KRS § 382.365(5) allows for a $500 award or treble damages, *whichever is greater*, provides further confirmation that it does not serve as compensation. An equivalent floor-or-multiple-damages structure was deemed "significant" in *Bowles*, and it is every bit as important here; it forecloses any argument that the legislature's "intent [was] . . . merely [to] make the [plaintiff] whole."[10] *See Bowles*, 147 F.2d at 429. Indeed, as noted above, courts applying the identical bar applicable to FDIC receiverships have uniformly held that treble damages awards—even standing alone, without the sort of statutory minimum award available under Section 382.365(5)—are "in the nature of penalties" and thus precluded. *E.g.*, *Alexander*, 2011 WL 2559641, at *2, 6; *Horn*, 2011 WL 6132309, at *1; *Deerborne Cottages*, 2012 WL 1835240, at *8.

2. The Kentucky Statute Purports to Redress a Public Wrong

The second *Murphy* factor also strongly supports the conclusion that the Statutory Award is penal: its purpose is to redress wrongs to the public by

---

[10] KRS § 382.365(5) is plainly more punitive than TILA, the statute at issue in *Murphy*. KRS § 382.365(5) has a higher statutory floor ($500 versus $100), provides for a greater multiple of actual damages (treble damages versus actual damages plus double the finance charge), and, most importantly, does not cap the recovery. *See Murphy*, 560 F.2d at 206 n.1 (statutory cap of $1,000).

punishing or deterring non-compliance, not to remedy private grievances. Courts recognize that legislatures commonly use minimum statutory awards "to sanction or punish ... conduct in order to deter future violations." *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1205 (11th Cir. 2009); *accord Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1067 (9th Cir. 2011) ("Statutory damages under the [Fair Debt Collection Practices Act] are intended to deter violations by imposing a cost on the defendant even if his misconduct imposed no cost on the plaintiff.") (citation and internal quotation marks omitted); *Munson v. Del Taco, Inc.*, 522 F.3d 997, 1001 (9th Cir. 2008) ("provision allowing for … treble the actual damages suffered with a stated minimum amount reveals a desire to punish"); *Rice v. Gustavel*, 891 F.2d 594, 596-97 (6th Cir. 1989) ("the array of techniques provided by Congress for controlling violators" includes "treble damages [and] minimum civil penalties"). And "when determining whether a particular statutory provision is punitive, courts generally look in the first instance to whether the purpose of the statute *as a whole* primarily redresses individual wrongs or more general wrongs to the public." *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 912 (3d Cir. 1991).

The overall statutory scheme here—*i.e.*, the Kentucky statutory provisions on mortgage assignments—is punitive. Indeed, the Kentucky Supreme Court recently characterized it as "clearly designed to *penalize* unacceptable behavior."

Hall, 396 S.W.3d at 307 (emphasis added). Moreover, both this Court and the Kentucky Supreme Court have expressly referred to the other awards in KRS § 382.365—for failure to release a satisfied lien—as "penalties." *See id.* at 305-06; *Cnty. Clerk ex rel. Kem v. Mortg. Elec. Registration Sys., Inc.*, 515 F. App'x 451, 457 (6th Cir. 2013); *see also Union Planters Bank, N.A. v. Hutson*, 210 S.W.3d 163, 164-68 (Ky. Ct. App. 2006) (characterizing awards in subsection (5) as penalties); *JP Morgan Chase Bank ex rel. ABFS Mortg. Loan Trust 2003-1 v. Engle*, No. 2006-CA-001182-MR, 2007 WL 2744046, at *1-3 (Ky. Ct. App. Sept. 21, 2007) (same); *Forester v. Stearns Bank, N.A.*, No. 5:12-CV-00080, 2013 WL 1453376, at *2 (W.D. Ky. Apr. 9, 2013) (same).[11]

The legislative history of the Statutory Award further confirms that the legislature intended to redress a perceived public wrong. In debating the 2006 bill that added both the minimum $500 award and treble damages to the provision, the Kentucky Legislature explained that the provision was intended to encourage compliance with the recording requirement and thereby improve the recording system for all users. *See* Record 53-6, Ky. Sen. Banking & Ins. Cmte. Hearing (Jan. 26, 2006), 3:16-4:24; Ky. Sen. Chambers (Apr. 10, 2006), 2:2-8, PAGE ID

[11] Prior to the renumbering associated with the 2006 amendment of the statute, the language currently in Section (5) was found in Section (4) of KRS § 382.365.

#782-83, 823. It is also telling that the Kentucky legislature chose to add the relevant language to KRS § 382.365(5), a pre-existing punitive provision.

Furthermore, the legislators never suggested that the Statutory Award was intended to compensate borrowers for harm—or that borrowers could be expected to suffer any actual harm at all. *See generally id.*, PAGE ID #778-827. This legislative history is similar to that at issue in *Trans World Airlines*, in which the Supreme Court found a damages provision under the Age Discrimination in Employment Act ("ADEA") to be "punitive in nature," in part based on Congress's discussion of the provision's influence on behavior and its placement within the structure of a punitive section of the statute. 469 U.S. at 125. As the Kentucky statute's legislative history indicates, the provision provided incentives both for assignees to comply with the recording requirements and for borrowers to bring actions against assignees. Borrowers, in particular, were incentivized by the availability of treble damages—or more, if injury was de minimis or non-existent—as well as attorneys' fees and costs under the statute. This Court and others have recognized that a statute designed to encourage plaintiffs to bring actions and serve as "private attorney generals" often indicates it is punitive in nature. *See, e.g.*, *Bowles*, 147 F.2d at 428 (finding it relevant to the analysis of whether the award was punitive that "[t]he amount of such payments ... supplies a direct and powerful incentive for the enforcement of the Act by the individual").

The district court accordingly was correct in holding that the Statutory Award effects the "public purpose" of maintaining accurate records. Record 74, Penalty Bar Order at 9, PAGE ID #1500.[12] Even if the Kentucky statute served a dual purpose of addressing public and individual harms, however, it still would be penal for purposes of the Penalty Bar. The Penalty Bar precludes not only awards that are strictly "penalties," but any awards "*in the nature of*" a penalty. Thus, as in the context of the Excessive Fines Clause, this Court should hold that the only awards not precluded by the Penalty Bar are those that serve "*solely* ... a remedial purpose." *Austin*, 509 U.S. at 621 (internal quotation marks omitted).

3. The Remaining *Murphy* Factor Is Not Relevant Here

The remaining *Murphy* factor—whether the award runs to individuals or to the government—is the least applicable, and thus deserves the least weight, in the present context. If the Statutory Award were payable to the government, this would be highly probative that it was punitive, as it could not possibly serve to compensate Plaintiffs in that circumstance. But this factor offers little insight into the compensatory function of an award where an individual can recover. As

---

[12] The district court also concluded that the statute was enacted with equal purpose to "ensur[e] that individuals can readily determine the name of the entity that currently owns their mortgage and note." *Id.* This finding still did not identify any individual wrongs that the statute was seeking to *compensate*, but merely articulated a desired goal of maintaining an accurate system of property records. Thus, the district court did not identify any purpose of the Statutory Award to redress individual wrongs.

described above, awards to individuals can nonetheless serve punitive purposes: for example, where the recovery to the individual is "greatly disproportionate to the actual loss." *See, e.g.*, *Innovation Ventures*, 2012 WL 1468470, at *4 (treble damages award to private plaintiffs was penalty based on lack of proportionality). Thus, where the award runs to individual plaintiffs, as here, this factor is neutral.

In sum, the two most significant *Murphy* factors—proportionality and statutory purpose—show that the Kentucky statute is penal, while the third factor is neutral. Under the *Murphy* framework, therefore, KRS § 382.365(5) imposes liability "in the nature of [a] penalty," which the federal Penalty Bar precludes.

D. The District Court Erred in Concluding that the Statutory Minimum Award Is a Remedial Liquidated-Damages Provision

The district court failed to ask the question at the heart of *Murphy* and the cases that precede it: whether the Statutory Award is compensatory. Instead, the court avoided answering this question by resting on two interrelated and erroneous conclusions: (1) that the Statutory Award constitutes a liquidated-damages provision; and (2) that liquidated-damages provisions necessarily are remedial rather than punitive, and thus are not covered by the Penalty Bar. *See* Record 74, Penalty Bar Order at 9-10, PAGE ID #1500-01. Neither conclusion is correct.

1. The District Court Erred in Holding that the Statutory Minimum Award Is a Liquidated-Damages Provision

The district court made an initial assumption that Section 382.365(5) is a liquidated-damages provision. This is incorrect, as evinced both by the provision's function and by the language the Legislature used in drafting it.

The Statutory Award does not have any of the hallmarks of a liquidated-damages provision. Such statutory provisions (like contractual terms for liquidated damages) anticipate that "actual damages must be difficult to ascertain," but that "the amount stated must bear some relation to the actual injury." *G.D. Deal Holdings, Inc. v. Baker Energy, Inc.*, 501 F. Supp. 2d 914, 923 (W.D. Ky. 2007), *aff'd*, 291 F. App'x 690 (6th Cir. 2008); *see Gustav Hirsch Org., Inc. v. E. Ky. Rural Elec. Co-op. Corp.*, 201 F. Supp. 809, 812 (E.D. Ky. 1962). Thus, liquidated damages are those "having been arrived at by good faith effort to estimate actual damage that will probably ensue from breach." *Marley Cooling Tower Co. v. Caldwell Energy & Envtl., Inc.*, 280 F. Supp. 2d 651, 657 (W.D. Ky. 2003) (quoting *Black's Law Dictionary* 353 (5th ed. 1979)). Indeed, "the purpose in permitting [liquidated] damages … is to render certain and definite that which appear[s] to be uncertain and not easily proven." *Exar Corp. v. Nartron Corp.*, 89 F.3d 833 (6th Cir. 1996) (citation omitted).

Here, nothing in the legislative history suggests that the Kentucky Legislature believed that borrowers suffer any actual damages from assignees'

failure to record, much less that such damages were difficult to ascertain. Rather, the Legislature discussed the fact that the bill was aimed at improving the recordation system. *See supra* 29-30. Indeed, the Legislature chose to draft a provision that would incentivize individuals to bring their own actions by offering an award of at least treble damages. *See supra* 30. There never was any comment during the debates on the bill that the Statutory Award was designed to estimate what borrowers' actual injuries might be. *See id.*

Furthermore, the Kentucky Legislature "well knew how to write a statute" designating a statutory award as liquidated damages, "but chose not to do so here." *See Prewett v. Weems*, 749 F.3d 454, 460 (6th Cir. 2014). When the legislature "[o]mit[s] a phrase from one statute that [it] has used in another statute with a similar purpose, [it] 'virtually commands the ... inference' that the two have different meanings." *Id.* at 461 (quoting *United States v. Ressam*, 553 U.S. 272, 276-77 (2008)). The Kentucky Legislature did not designate the Statutory Award in KRS § 382.365(5) as "liquidated damages," even though it *has* affixed that label to other statutory awards, where the award was intended to serve that purpose. *See, e.g.*, KRS § 207.260(1)(b) (providing for "liquidated damages of five thousand dollars ... or actual damages" under employment discrimination statute); KRS § 367.365(12)(b) (providing for "liquidated damages of not less than one hundred dollars" for consumer-reporting violations). Indeed, the Legislature

enacted a consumer-reporting statute's liquidated-damages provision in *the very same legislative session* it enacted KRS § 382.365(5). *Compare* 2006 Kentucky Laws ch. 42, § 3 (HB 54) (enacting consumer-reporting liability provision) *with* 2006 Kentucky Laws ch. 183, § 18 (SB 45) (enacting mortgage-assignment liability provision).

Therefore, because Section 382.365(5) does not function as a liquidated-damages provision, and because there is no evidence in its legislative history or text that suggests the Kentucky Legislature intended it to serve as one, the district court's contrary conclusion, rendered without any analysis, was incorrect.

2. In Any Event, Statutory Liquidated-Damages Provisions Can Be Punitive Rather than Remedial

Even if the Statutory Award were a liquidated-damages provision, the district court erred in concluding that, under *Murphy*, any liquidated-damages provision necessarily is not "disproportionate to the harm suffered." Record 74, Penalty Bar Order at 9, PAGE ID #1500.

This categorical assertion overlooks the reason why the liquidated-damages provision in *Murphy* was deemed remedial—*i.e.*, because it reasonably approximated and compensated for actual harm suffered. The *Murphy* court emphasized that failure to abide by TILA "prevented the debtor from obtaining cheaper credit after comparison shopping" and led to "the uninformed use of credit." 560 F.2d at 210 (internal quotation marks omitted). The injuries resulting

from these harms were "difficult to ascertain" and to "calculat[e]," making the fixed statutory award appropriate to compensate for these wrongs. *Id.* (internal quotation marks omitted). *Murphy* did not hold that the label "liquidated damages" confers talismanic significance overriding the substantive purpose of the *Murphy* test, which is to determine whether an award is compensatory.

Indeed, such an interpretation of *Murphy* is inconsistent with later Supreme Court precedent. Subsequent to *Murphy*, the Supreme Court, in *Trans World*, 469 U.S. 111, rejected the premise that liquidated-damages provisions cannot be punitive. The *Trans World* Court concluded that the liquidated-damages provision of the ADEA was "punitive in nature." 469 U.S. at 125. In doing so, the Court relied in part on the legislative history of the relevant amendment, noting that it was proposed to influence the behavior of employers by "furnish[ing] an effective deterrent," and that it replaced a previously proposed criminal liability provision. *Id.* (citation omitted).

Courts have recognized that *Trans World* supplanted prior decisions that assumed liquidated-damages provisions always are remedial. In *Smith v. Department of Human Services*, for instance, the Tenth Circuit held that in light of *Trans World*, it was "not required to apply the *Murphy* factors in order to *infer* the nature of a liquidated damages claim." 876 F.2d 832, 835 (10th Cir. 1989). The Tenth Circuit thus followed the guidance of the Supreme Court in recognizing that

liquidated-damages provisions could indeed be punitive. *Id.* at 835-36; *see also Hawes v. Johnson & Johnson*, 940 F. Supp. 697, 703 (D.N.J. 1996).

Accordingly, after *Trans World*, all federal courts must look beyond the label to evaluate the substance of each statutory liquidated-damages provision, just as courts in this Circuit were directed to do by cases such as *Bowles* and *Murphy*. A liquidated-damages provision, like any other statutory award, "constitute[s] a penalty" when it is designed "to deter" wrongful conduct, as opposed to "compensat[ing]" aggrieved individuals "for [a] loss." *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 265 (2d Cir. 1999) (evaluating liquidated-damages provision of New York Labor Law); *see also Maher v. City of Chicago*, 463 F. Supp. 2d 837, 842 & n.9 (N.D. Ill. 2006) (holding liquidated damages available under Uniformed Services Employment and Reemployment Rights Act are punitive, relying in part on legislative history indicating that provision was intended to increase litigation); *Hager v. First Va. Banks, Inc.*, No. 7:01-cv-53, 2002 WL 57249, at *3 (W.D. Va. Jan. 10, 2002) (liquidated damages requested pursuant to ADA are punitive).

This test harmonizes with the analogous context of interpreting *contractual* liquidated-damages provisions, where courts must determine whether the provisions are unenforceable as penalties, even where parties agree to deem them "liquidated damages." *See In re Late Fee & Over-Limit Fee Litig.*, 741 F.3d 1022,

1026 (9th Cir. 2014) ("Liquidated damages are customarily unenforceable as penalties when they are in excess of actual damage caused by a contractual breach."); *G.D. Deal Holdings*, 501 F. Supp. 2d at 923 (under Kentucky law, the amount provided in a liquidated damages clause "must bear some relation to the actual injury rather than serving as a penalty"); Restatement (Second) of Contracts § 356 ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.").

This Court has long recognized this principle that contractual damages, while labeled as liquidated damages, are punitive and unenforceable if "they lack [a] proportional relation[ship] to the damages which may actually flow from failure to perform under a contract," they are "designed to coerce performance by punishing nonperformance," and they do not "compensat[e] for the losses suffered by the nonbreaching party." *Demczyk v. Mut. Life Ins. Co. of N.Y. (In re Graham Square, Inc.)*, 126 F.3d 823, 828 (6th Cir. 1997) (internal quotation marks omitted); *see also Bd. of Commerce of Ann Arbor, Mich. v. Security Trust Co. (In re Climax Specialty Co.)*, 225 F. 454, 461 (6th Cir. 1915) (similar).

Accordingly, the district court's interpretation of *Murphy*—that one need only characterize a provision as liquidated damages in order to decide it is not disproportionate—conflicts with settled precedent establishing that such provisions must be evaluated on a case-by-case basis.

CONCLUSION

If left uncorrected, the district court's decision will affect not only Fannie Mae and Freddie Mac, but also other entities Congress has insulated from liability for penalties—such as the many financial institutions in FDIC receivership—leaving them vulnerable to a panoply of state statutes that, like KRS § 382.365(5), provide for the greater of a minimum statutory award or some multiple of actual damages. *See, e.g.*, Mich. Comp. Laws § 445.1611(2) (Mortgage Lending Practices Act); *id.* § 487.2070(c) (Consumer Financial Services Act); *id.* § 488.21(2) (Electronic Funds Transfer Act); *id.* § 445.1681(1)(c) (Mortgage Brokers, Lenders, and Servicers Licensing Act); *id.* § 445.86(2) (Social Security Number Privacy Act); *id.* § 445.911(2) (Consumer Protection Act); Ohio Rev. Code § 2741.07(A) (Right of Publicity). And, more broadly, the district court's decision would tear at the tapestry Congress wove to enable the conservatorships to carry out the expansive functions that Congress intended them to perform.

While the issue is important, its resolution is straightforward. The controlling law of this Circuit and the Supreme Court requires that courts investigate the substance of a damages provision to determine if it is punitive or remedial. Where a statute authorizes awards that are intended to coerce compliance rather than to compensate, and where awards under the statute would be wholly disproportionate to any actual injury, the statute creates liability "in the

nature of [a] penalt[y]." Here, the Kentucky Supreme Court has described the relevant statutory structure as "designed to penalize" certain conduct, and the Statutory Award Plaintiffs seek would be grossly disproportionate to any actual injury—despite the potential for a treble damages award, Plaintiffs pled no actual damages whatsoever.

KRS § 382.365(5) is a penalty provision. As a result, the Penalty Bar insulates FHFA and Fannie Mae from the Statutory Award Plaintiffs seek, and this Court should reverse the judgment below.

Dated: December 11, 2014

Respectfully submitted,

/s/ Michael A.F. Johnson
Howard N. Cayne
Michael A.F. Johnson
Asim Varma
Dirk C. Phillips
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
(202) 942-5999 (fax)
Howard.Cayne@aporter.com
Michael.Johnson@aporter.com
Asim.Varma@aporter.com
Dirk.Phillips@aporter.com

Counsel for Appellant Federal Housing Finance Agency

/s/ Jill L. Nicholson
Jill L. Nicholson
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 2800
Chicago, IL 60654
(312) 832-4500
jnicholson@foley.com

Counsel for Appellant Federal National Mortgage Association

CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,435 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief also complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

Dated: December 11, 2014

/s/ Michael A.F. Johnson
Michael A.F. Johnson

Counsel for Appellant Federal Housing Finance Agency

DESIGNATION OF RELEVANT DOCUMENTS FROM DISTRICT COURT'S ELECTRONIC RECORD

Document Description	Record No.	Page Rage	Date
EXHIBIT A - STATE COURT COMPLAINT	1-1	13-28	6/7/2012
AMENDED COMPLAINT AGAINST ALL DEFENDANTS	32	448-464	10/8/2012
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BY FEDERAL HOUSING FINANCE AGENCY, FEDERAL NATIONAL MORTGAGE ASSOCIATION	52	610-611	4/1/2013
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BY BAC HOME LOANS SERVICING, LP, BANK OF AMERICA, NA, JPMORGAN CHASE BANK, N.A., WELLS FARGO BANK, N.A. (CERTAIN DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' "FIRST AMENDED INDIVIDUAL AND CLASS ACTION COMPLAINT")	53	638-640	4/1/2013
RESPONSE IN OPPOSITION RE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BY FEDERAL HOUSING FINANCE AGENCY, FEDERAL NATIONAL MORTGAGE	57	1054	5/31/2013
OPINION AND ORDER	74	1492-1503	3/31/2014

OPINION AND ORDER	75	1504-1522	3/31/2014
AMENDED COMPLAINT (SECOND AMENDED INDIVIDUAL AND CLASS ACTION COMPLAINT PER COURT ORDER OF 3/31/14) AGAINST ALL DEFENDANTS	76	1523-1545	4/11/2014
OPINION AND ORDER	90	1797-1804	7/3/2014

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2014, I electronically filed the foregoing document with the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael A.F. Johnson
Michael A.F. Johnson

Counsel for Appellant Federal Housing Finance Agency