The FDIC's Enhanced Powers Over Savings Associations: Does FIRREA Make it "SAIF"?

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INTRODUCTION

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")\(^1\) was enacted to reform bank and savings association regulation in the wake of the savings association crisis.\(^2\) FIRREA dramatically altered the fundamental regulatory structure of the savings association industry, popularly known as the Savings and Loan ("S&L") industry, and marked a reversal of the trend toward liberalizing the powers of the savings associations begun in the early 1980s by the Reagan Administration.\(^3\)

One of FIRREA's major features is the regulatory restructuring of the S&L industry under the Federal Deposit Insurance Corporation ("FDIC").\(^4\) Pursuant to FIRREA, the FDIC has retained its traditional

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2. See Note, Playing with FIRREA, Not Getting Burned: Statutory Overview of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, in Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S23 (1991). FIRREA has made "savings association" a term of art to encompass "(A) any Federal savings association; (B) any State savings association; and (C) any corporation (other than a bank) that the Board of Directors [of the Federal Deposit Insurance Corporation] and the Director of the Office of Thrift Supervision jointly determine to be operating in substantially the same manner as a savings association." FIRREA, supra note 1, § 204(b)(1), 103 Stat. at 190 (to be codified at 12 U.S.C. § 1813(b)(1)). FIRREA also defines the term "Federal Savings Association" to mean "any Federal savings association or Federal savings bank which is chartered under section 5 of the Home Owners' Loan Act" and "State Savings Association" to mean "(A) any building and loan association, savings and loan association, or homestead association; or (B) any cooperative bank (other than a cooperative bank which is ... organized and operating according to the laws of the State. . . .)" FIRREA, supra note 1, § 204(b)(2), (b)(3), 103 Stat. at 190-91 (to be codified at 12 U.S.C. § 1813(b)(2), (b)(3)). Although FIRREA's scope also includes commercial banks and bank holding companies, this Note will be limited to a discussion of the FDIC's powers over savings associations.

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roles as deposit insurer, supervisor of state-chartered non-Federal Reserve member banks and liquidator of failed federally insured institutions.\(^5\) FIRREA also substantially strengthens and expands the FDIC's powers over savings associations from the supervisory and enforcement powers of the former Federal Home Loan Bank Board ("FHLBB").\(^6\) Despite the FDIC's enhanced powers to implement FIRREA's goals,\(^7\) "members of the 101st Congress - many are calling it the Hundred and Worst - . . . [have failed] to provide adequate funding for closing failed S&Ls . . . . The failure to act could 'increase the cost of the bailout by billions and billions,' by keeping money-losing S&Ls open."\(^8\) Although it is undisputed that FIRREA grants the FDIC extensive regulatory powers over savings associations, the extent and the effect of the FDIC's new powers are being questioned.\(^9\)

This Note will address the powers that FIRREA gives to the FDIC over savings associations. Part I will briefly explain the structure of savings association and banking regulation before the enactment of FIRREA. In addition, Part I will identify the new powers and responsibilities over savings associations that FIRREA grants to the FDIC. Part II will examine the FDIC's management of savings association insurance via the Savings Association Insurance Fund ("SAIF"). Part III will analyze the FDIC's regulation of savings associations under FIRREA. This Note concludes that the FDIC's newly acquired authority over savings associations is ineffective due to insufficient funds to cure the problems in the S&L industry.\(^10\)

deposits up to $100,000 per account. See Barron's Dictionary of Banking Terms 235-36 (1990).

5. FIRREA, supra note 1, § 205(1)(a)(1), 103 Stat. at 194 (to be codified at 12 U.S.C. § 1814(a)(1)).

6. See House Report No. 54, supra note 3, at 310-11, reprinted in 1989 U.S. Code Cong. & Admin. News, at 106-07; Clark, Murtagh & Corcoran, Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 45 Bus. Law. (ABA) No. 3, 1013, 1026 (May 1990) [hereinafter Regulation of Savings Associations]. "The primary purposes of [FIRREA] are to recapitalize the deposit insurance fund for savings associations, to provide for the resolution of the outstanding and anticipated failures of savings associations, and to improve the regulation of savings associations so as to prevent future insolvencies." Id. at 1015. FIRREA has given the FDIC a major role in accomplishing these objectives. Prior to FIRREA, the Federal Savings and Loan Insurance Corporation ("FSLIC") was responsible for insuring savings association deposits and the Federal Home Loan Bank Board ("FHLBB") was responsible for savings association regulation. See National Housing Act, §§ 402-405, 12 U.S.C. § 1725 (1988).

7. See Regulation of Savings Associations, supra note 6, at 1015.


10. Once again, "Congress adjourned without providing additional funds for the savings and loan bailout, in a striking demonstration of how big a political albatross the hugely expensive bailout has become." Duke, Congress Fails to Provide More Funding For S&L Bailout Raising Threat to RTC, Wall St. J., Oct. 29, 1990, at C19, col. 1. In March, 1991, the Senate finally approved a bill for $78 billion for the Resolution Trust Corporation to continue to cleanup the savings association mess, but the cleanup is still "vastly unpopular." Thomas, Senate Approves $78 Billion Measure For the Cleanup of
FDIC'S ENHANCED POWERS

I. THE PRE-FIRREA STRUCTURE AND AN INTRODUCTION TO FDIC'S ENHANCED ROLE UNDER FIRREA

A. The Pre-FIRREA Structure

In the pre-FIRREA world of banking, the federal banking regulatory agencies had fairly distinct jurisdictional responsibilities. Congress had carefully apportioned regulatory and supervisory responsibility for the "safety and soundness" of federal and state banks and of savings associations by assigning chartering and supervisory powers to various federal agencies.

Congress assigned responsibility for banks and savings associations as follows: chartering and supervising of national banks to the Comptroller of the Currency; state Federal Reserve member banks, bank holding companies and their non-bank "sisters" to the Federal Reserve Board; federally chartered and state non-Federal Reserve member banks to the FDIC; and federally chartered and state non-Federal Reserve member savings associations to the FHLBB and the Federal Savings and Loan Insurance Corporation ("FSLIC").

Ultimately, the FDIC gained substantial power over many state banks that were not otherwise subject to the Federal Reserve or to the Comptroller's regulation. Although state banks were not required to insure their deposits, these banks were at a competitive disadvantage in the marketplace if they did not insure because consumers typically demand deposit insurance. Once they obtained deposit insurance from the FDIC, state banks became subject to FDIC regulation.

The FDIC was responsible for insuring the deposits of commercial

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Insolvent Thrifts, Wall St. J., March 20, 1991, at A2, col. 1. It is estimated that the total cost of the cleanup will exceed $200 billion, even without the billions in interest that will be added. See id. If Congress continues such delays in approval of the necessary funding, this "narrow refinancing measure" will be grossly insufficient to pay for the cleanup. Id. at col. 2.

11. "Safety and soundness" is defined as a general objective of federal banking regulation. "Federal and state supervision of banking is designed to provide a financially stable industry that meets the public's credit and other financial needs, as well as to prevent runs or panics by providing depositors with assurances that their funds will be protected from loss." Barron's Dictionary of Banking Terms 539 (1990); see also Regulation of Savings Associations, supra note 6, at 1026 ("[T]he FDIC is authorized to examine any savings association and its affiliates in order to ensure the safety and soundness of the association.").


13. See 12 U.S.C. §§ 222, 1814(b); Malloy, supra note 12, at 1120.

14. See 12 U.S.C. §§ 1812(b)-(c), 1815(a); Malloy, supra note 12, at 1120.


16. White, supra note 4, at 1061.

17. See 12 U.S.C. §§ 1813(h), (q)(3) (1988). Cf. § 1818(b)(1) (1988) (any insured bank is subject to termination if FDIC determines it is engaging in unsafe or unsound practices); White, supra note 9, at 1061 (inferred from fact that power of federal regulators over state banks was increased by the creation of the FDIC).
banks while the FSLIC was responsible for insuring savings associations.\textsuperscript{18} Congress intended the FDIC and FSLIC to function as independent deposit-insurance companies whose premium collections from commercial banks and savings associations would cover losses in the event that individual institutions failed.\textsuperscript{19} In 1988, the FSLIC became insolvent because of the expense incurred in rescuing failed thrifts.\textsuperscript{20} Congress eventually responded to the crisis by passing FIRREA to bolster the regulatory and supervisory powers of the federal regulators.\textsuperscript{21}

\textbf{B. FDIC's Enhanced Role under FIRREA}

The FDIC's new responsibilities and powers over savings associations under FIRREA include the following: (1) administering the SAIF;\textsuperscript{22} (2) liquidating the assets of failed savings associations (previously held by the now-defunct FSLIC) through the newly established FSLIC Resolution Fund;\textsuperscript{23} (3) liquidating the assets of failed savings associations after 1992;\textsuperscript{24} (4) controlling the activities of savings associations;\textsuperscript{25} (5) monitoring new capital requirements for savings associations;\textsuperscript{26} and (6) managing the newly established Resolution Trust Corporation ("RTC").\textsuperscript{27}

\begin{itemize}
    \item 18. This separation of powers was deemed necessary when these agencies were created because of the striking differences between commercial banks and savings associations. Today, housing control over deposit insurance for both types of institutions under the FDIC alone makes more sense as the differences between commercial banks and savings associations have fallen away. See sources cited \textit{supra} note 4.
    \item 20. See \textit{Regulation of Savings Associations}, \textit{supra} note 6, at 1013-14 & nn. 5 & 12.
    \item 22. See FIRREA, \textit{supra} note 1, § 205(1)(a)(2), 103 Stat. at 194-95 (to be codified at 12 U.S.C. § 1814(a)(2)).
    \item 23. See FIRREA, \textit{supra} note 1, § 215(a)(1), 103 Stat. at 253 (to be codified at 12 U.S.C. § 1821a(a)(1)).
    \item 26. See FIRREA, \textit{supra} note 1, § 303(a)(m), 103 Stat. at 343-44 (to be codified at 12 U.S.C. § 1467a(m)). The "Qualified Thrift Lender Test" under the above section grants discretion to the FDIC to monitor savings association investments and apply exceptions and restrictions to these requirements it deems necessary in the circumstances. \textit{Id}.
\end{itemize}
FDIC'S ENHANCED POWERS

FIRREA apportioned the FSLIC and the FHLBB's former powers and responsibilities between the Office of Thrift Supervision ("OTS") and the FDIC.²⁶ Pursuant to FIRREA, the FDIC is now responsible for all aspects of insuring accounts, providing financial assistance to prevent default, and administering the SAIF.²⁹ In addition, the FDIC inherited responsibility for those FSLIC and FHLBB rules and regulations governing the conduct and powers of conservatorships and receiverships.³⁰ More specifically, under certain conditions, the FDIC has the power to appoint itself sole conservator or receiver of an insured state savings association.³¹

Although it is clear that FIRREA has enhanced the powers of the FDIC, the extent of the FDIC's authority is unclear.³² Since FIRREA's enactment, courts and scholars have questioned the FDIC's powers over savings associations.³³ The FDIC's most important and controversial functions regarding savings associations include its administration of SAIF,³⁴ its powers as conservator/receiver,³⁵ its emergency powers,³⁶ and its regulation of savings association activities and capital requirements.³⁷ The FDIC is constantly experimenting with new approaches to resolve the savings association crisis.³⁸ It is therefore necessary to review the FDIC's powers under FIRREA in light of current conditions in the

²⁹ See Allocation of Regulations, supra note 28, at 41,359.
³⁰ See id.
³¹ See FIRREA, supra note 1, § 212(a)(c)(1)(4), 103 Stat. at 222-23 (to be codified at 12 U.S.C. § 1821(c)(1)(4)).
A conservator is charged with protecting the assets of a troubled bank or savings association. See 12 U.S.C. § 1821 (1988). See also Barron's Dictionary of Banking Terms 142 (1990) (conservator is an "official appointed by a banking regulator to protect the assets of a troubled bank or savings institution while a permanent solution to its financial problems is worked out. A bank declared to be insolvent is placed under control of a RECEIVER, and assets sold to pay its creditors.").
³² See Malloy, supra note 12, at 1153.
³³ See, e.g., FDIC v. Gillard, 740 F. Supp. 427, 428 (N.D. Tex. 1990) ("Numerous post-FIRREA decisions recognize implicitly or explicitly that the FDIC succeeds to the rights of the FSLIC with respect to receiverships created prior to enactment."); see also Garten, supra note 9, at 1163-64 (questioning FDIC's new powers under FIRREA); Mitchell, The New Savings and Loan Bailout Bill, N.Y.L.J. at 6, col. 6 (Sept. 27, 1989) (same).
³⁴ See FIRREA, supra note 1, § 211(3)(4), (3)(6), 103 Stat. at 218-19 (to be codified at 12 U.S.C. § 1821(a)(4), (a)(6)).
³⁵ See FIRREA, supra note 1, § 212, 103 Stat. at 222 (to be codified at 12 U.S.C. § 1821).
³⁶ See FIRREA, supra note 1, §§ 901, 902, 903 Stat. at 446-57 (to be codified at 12 U.S.C. §§ 1786, 1818(b) and 12 U.S.C. 1818(e)(1) respectively).
³⁷ See FIRREA, supra note 1, § 222, 103 Stat. at 269-73 (to be codified at 12 U.S.C. § 1831e); Malloy, supra note 12, passim.
³⁸ See Garten, supra note 9, at 1163 n.24. The technical changes made to the
savings association industry. The scope of the FDIC's influence on the savings association industry is demonstrated most dramatically by its management of the SAIF and its regulation of savings association activities.

II. The Savings Association Insurance Fund

Although FIRREA created new regulatory agencies with extensive powers, one of the Act's most striking aspects was its restructuring of the FDIC. As part of the FDIC restructuring, FIRREA mandated a substantial reorganization of the regulation and insurance of savings associations.

A. Dissolution of FSLIC

The House Report accompanying FIRREA stated: "It is the objective of the Congress and the Administration to maintain separate federal deposit insurance funds. Both the commercial bank and thrift deposit insurance funds will be under the control of the FDIC." FIRREA thus dissolved the FSLIC and made the FDIC the sole administrator of the federal deposit insurance system. Since FIRREA's passage, the FDIC controls two newly created and separately maintained insurance funds—the Bank Insurance Fund ("BIF"), which collects deposit insurance premiums to cover commercial bank insolvencies, and the SAIF, which collects deposit insurance premiums to cover savings association insolvencies.

The FDIC is also responsible for managing the FSLIC Resolution Fund, which FIRREA established to house all the FSLIC's assets and liabilities as of August 8, 1989. Congress intended the FDIC to "man-

FDIC's powers under FIRREA did nothing to alter the FDIC's experimental approaches to savings association failures. See id.

40. See FIRREA, supra note 1, § 202, 103 Stat. at 188 (to be codified at 12 U.S.C. § 1811(1)).
42. See Description, Effects and Implications, supra note 27, at 3.
44. See FIRREA, supra note 1, § 211(3)(4), 103 Stat. at 218-19 (to be codified at 12 U.S.C. § 1821(a)(4)); Description, Effects and Implications, supra note 27, at 3; infra note 53 and accompanying text.
45. See FIRREA, supra note 1, § 215(a)(1), 103 Stat. at 252-53 (to be codified at 12 U.S.C. § 1821a(a)(1)).
age the FSLIC Resolution Fund to obtain some of the funding needed in connection with insolvencies of FSLIC-insured savings associations resolved prior to January 1, 1989.\footnote{FIRREA, supra note 1, § 215(a)(3), 103 Stat. at 253 (to be codified at 12 U.S.C. § 1821a(a)(3)).}

Although the FDIC manages the FSLIC Resolution Fund, FIRREA prohibits consolidation of the FSLIC assets and liabilities transferred to the FDIC with the other FDIC assets (i.e., any SAIF assets).\footnote{See id., § 215(a)(2)(B), 103 Stat. at 253 (to be codified at 12 U.S.C. § 1821a(a)(2)(B)); Regulation of Savings Associations, supra note 6, at 1024-25. As of FIRREA's effective date, August 9, 1989, the FSLIC Resolution Fund became liable for fees assessed to be paid into the SAIF. See FIRREA, supra note 1, § 215(a)(2)(B), 103 Stat. at 253 (to be codified at 12 U.S.C. § 1821a(a)(2)(B)).} Because the FSLIC Resolution Fund is required to pay fees into the SAIF for supervisory and administrative expenses,\footnote{See id., § 211(3)(6)(A), 103 Stat. at 219 (to be codified at 12 U.S.C. § 1821(a)(3)(6)(A)).} however, such fees will necessarily be commingled with current FDIC assets.\footnote{See id., § 211(1), 103 Stat. at 218 (to be codified at 12 U.S.C. § 1821(a)(1)).} The FSLIC Resolution Fund will be dissolved when all associated debts and liabilities have been satisfied and all assets sold.\footnote{See FDIC Names Members of SAIF Committee to Offer Advice on Deposit Insurance, 54 Banking Rep. (BNA) No. 3, at 110 (Jan. 22, 1990) [hereinafter FDIC Names Members].} Moreover, any judgment or legal proceeding commenced against the FDIC involving the FSLIC or the FSLIC Resolution Fund will be limited to the assets held in the FSLIC Resolution Fund.\footnote{FIRREA mandates that the logo used by SAIF-member savings associations contain a statement that insured deposits are “backed by the full faith and credit of the United States Government . . . [accompanied by] a symbol of an eagle.” FIRREA, supra note 1, § 221(a)(1)(A) and (C), 103 Stat. at 266. This is different from the traditional FDIC logo that banks are entitled to display. See FIRREA, supra note 1, § 221(a)(2), 103 Stat. at 266. Although SAIF-insured savings associations are technically insured by the FDIC, many commentators, including the American Bankers Association, objected strenuously to an FDIC proposal to permit savings associations to advertise themselves as “FDIC-
SAIF Advisory Committee to meet with the FDIC quarterly to discuss business conditions, regulations and any other issues regarding SAIF-insured savings associations.

C. Membership in SAIF

In general, savings associations are members of SAIF because those "that were insured by [the FSLIC] on August 8, 1989, the day before the date of enactment of FIRREA . . . became 'automatically' insured by the FDIC by operation of law." Federal and state savings associations not insured on or before August 8, 1990 must now apply directly to the FDIC for deposit insurance. Also, savings associations insured by SAIF must file an application with the FDIC for authorization to merge with non-insured institutions.

"From New Jersey to Texas to California, savings and loan institutions are trying to get state laws enacted that would allow them to convert into savings banks." Such conversions may require a switch in insured." See Commercial Banks Decry 'FDIC-Insured' Claims by Thrifts, Daily Rep. for Executives (BNA) No. 216, at A-6 (Nov. 9, 1989) (WESTLAW, BNA Library, DER File) [hereinafter Commercial Banks].

FIRREA does, in fact, bar savings associations from displaying the FDIC logo, but does not address the description "FDIC-insured." See FIRREA, supra note 1, § 221(1)(a)(1), 103 Stat. at 266. SAIF-insured institutions consider the logo distinction between savings associations and banks as "foster[ing] the idea that deposit insurance provided by SAIF is not as good as ... [bank insurance] protection." Commercial Banks, supra, at A-6. Washington Federal Savings Bank has skirted the debate by displaying a decal reading "all accounts insured by the FDIC." FDIC to Consider Solutions to "FDIC-Insured" Dispute, 14 Bank Letter (Institutional Investor) No. 13, at 6 (April 2, 1990) [hereinafter FDIC to Consider Solutions].

This controversy is expected to continue until the FDIC clarifies what savings associations may and may not do to attract deposits. FDIC to Consider Solutions, supra, at 6 (April 2, 1990).

The SAIF Advisory Committee is comprised of an eighteen-member board, one member elected from each of the twelve Federal Home Loan Banks and six members appointed by the FDIC to represent the public interest. See id., § 226(b), 103 Stat. at 276 (to be codified at 12 U.S.C. § 1831h(31)(b)(1)-(2)).

The SAIF Advisory Committee is directed by law to meet four times a year to confer with the FDIC. See also FDIC Names Members, supra note 55, at 110 (SAIF Advisory Committee "directed by law to meet four times a year to confer with the FDIC").


See FIRREA, supra note 1, § 206(a)(1),(a)(4)(2), 103 Stat. at 195 (to be codified at 12 U.S.C. § 1815(a)(1)-(2)).


Wayne, S&L's Seek State Charters, N.Y. Times, Nov. 7, 1990, at D1, col. 6. A state savings bank differs from a savings association in that it offers a mixture of commercial banking and thrift activities. See Comment, supra note 2; DiNuzzo, Some Thrifts Converting into State Savings Banks, Am. Banker, Aug. 10, 1990, at 4. Further, state "[s]avings banks can engage in such practices, which were prohibited for savings and
FDIC's enhanced powers

FDIC's enhanced powers membership between insurance funds. Since FIRREA's enactment, some states have allowed federal and state savings associations to convert their charters to state savings bank charters. Now that all federally insured savings associations are insured by the FDIC through SAIF, state-law requirements that an institution be FDIC-insured in order to become a savings bank are no longer an obstacle to charter conversions. Accordingly, charter conversions, and the resulting switches from SAIF to BIF insurance coverage, have become more attractive to SAIF-insured associations.

Some federal regulators view these conversions as attempts to evade strict new federal laws. However, L. William Seidman, chairman of the FDIC, does not perceive "charter flips" as attempts to circumvent the law, but merely as attempts to avoid "very costly, noncompetitive' assessments." Mr. Seidman maintains that the FDIC, whose supervision and regulation cannot be escaped via "charter flips," sufficiently controls the post-conversion institutions and that OTS supervision constitutes an unnecessary expense.

Moreover, "[b]y switching to a savings bank charter, the S&Ls will be able to get around the more restrictive lending rules mandated by . . .

loans by the 1989 bailout law." Wayne, supra. These activities include the authority to own interests in real estate projects, to purchase "junk bonds" and to extend large loans to a single borrower. See id.


63. "At least seven states have adopted or are considering legislation to permit federally and state-chartered S&Ls to convert to a more lucrative and less costly state savings bank charter . . . ." Thrifts Turn to Savings Bank Charters to Avoid High Cost of Supervision, 55 Banking Rep. (BNA) No. 8, at 296 (Aug. 20, 1990).

64. See DiNuzzo, supra note 61, at 4.

65. It is important to note that "[t]he conversion of a SAIF member savings association to a bank charter is not considered to be a 'conversion transaction' if the bank elects to remain a SAIF member and thereby continues to pay assessments to SAIF." Federal Deposit Insurance Corporation, supra note 58, at 8.

66. Savings institutions assert that these laws "are so onerous they can no longer do business under them." Wayne, supra note 61, at D5, col. 1.

67. Id.

68. See id. The FDIC does retain supervisory control over a savings association as long as it is insured by either the SAIF or BIF. Nevertheless, if savings associations are leaving the SAIF, the SAIF's premium income will decrease, along with its stability, and the SAIF could conceivably cease to exist. This is contrary to FIRREA's intent to maintain a separate thrift industry, to keep savings institutions in the SAIF, and to achieve financial soundness for the SAIF. See Regulation of Savings Associations, supra note 6, at 1100-01.

A major tenet of [FIRREA] . . . is a commitment to maintain a separate and viable industry charged with promoting home ownership through the provision of affordable mortgage credit. This commitment includes the maintenance of a separate deposit insurance fund for thrifts and the assurance that deposits in the thrifts up to $100,000 are backed by the full faith and credit of the Federal government.

Under FIRREA’s “Qualified Thrift Lender” test, savings associations must earmark seventy percent of their assets for residential mortgage lending. State savings banks are not held to this stringent requirement. This lower requirement for state savings banks leaves more assets open for commercial customers and thus more opportunity for profit.

There is also a public policy concern that institutions might convert their charters to escape the higher SAIF insurance premiums and the higher cost of OTS supervision. Not only is the cost of OTS regulation higher than the cost of state regulation, but the OTS represents an additional layer of regulation for savings associations that savings banks avoid.

Concerned that an exodus from SAIF insurance would hamper efforts to replenish SAIF reserves, the FDIC has instituted several measures to control such an exodus. First, on December 12, 1989, the FDIC approved a temporary rule, whose formulation FIRREA mandated, that establishes entrance and exit fees to be paid to the respective insurance fund for charter conversions resulting in transfers of insured deposits from SAIF to BIF and vice versa. While the regulators encourage BIF-
to-SAIF conversions, they discourage SAIF-to-BIF conversions.\textsuperscript{78} "[T]o encourage potential bidders to acquire failing banks, [and to] further the congressional intent of expeditiously resolving failed institutions," the FDIC set a low BIF-to-SAIF exit fee to be paid into BIF upon leaving that fund.\textsuperscript{79} Concomitantly, the FDIC set a higher exit fee for leaving SAIF for BIF to discourage such conversions. Savings associations support this exit-and-entry fee system.\textsuperscript{80} In its commentary on the interim rule, the United States League of Savings Associations stated that "as long as members of the SAIF are required to pay higher insurance premiums than members of the BIF, exit and entry fees help level the playing field for SAIF members."\textsuperscript{81}

The second measure intended to control the loss of income to the SAIF is a FIRREA-mandated five-year moratorium on conversions from SAIF to BIF.\textsuperscript{82} This moratorium is not to be construed as prohibiting conversion by a savings association to a state bank charter as long as the resulting bank remains a SAIF member for that five-year period.\textsuperscript{83}

Additionally, the FDIC retains discretion to decide whether the resulting post-conversion institution qualifies as a savings association or a bank.\textsuperscript{84} If the FDIC deems the entity a savings association, then it will remain subject to OTS regulation. If the post-conversion institution is not deemed a savings association, its regulatory and supervisory structure would exclude the OTS.\textsuperscript{85}

These conversions have caused considerable debate. The OTS objects vehemently to savings associations converting to state savings bank status because, after conversion, the FDIC supplants the OTS as primary
Timothy Ryan, director of the OTS, fears that permitting charter conversion "will give these institutions the same freedoms that led to abuses and to the Federal bailout of the savings and loan industry." 87

Commentators argue, however, that such conversions result in cheaper operations for institutions. They suggest that the FDIC consider facilitating conversions in order to gain the benefits of efficiency and standardized rules by collapsing the BIF and SAIF into one fund. 88 For instance, the United States League of Savings Institutions' Brian Smith suggests a merger of BIF and SAIF. 89 Not only would exit and entrance fees become unnecessary, but the "'administrative complexities' that impose an imbalanced premium burden on institutions" would be eliminated. 90

D. Current Financial Condition

Pursuant to FIRREA, SAIF is to receive up to two billion dollars in funding from the Treasury for each of the years 1992 to 1999. 91 Additionally, FIRREA authorizes increases in deposit insurance premiums paid by SAIF-member institutions to augment SAIF income. 92 The FDIC may levy increasingly high annual deposit premiums on savings associations over the next few years to replenish SAIF reserves, which are currently depleted. 93 If necessary, premiums can rise to a maximum

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86. See id. at D1, col. 5.
87. Id.
88. See Interim In-Out Fees, supra note 60, at 923.
89. See id.
90. Id.
91. See FIRREA, supra note 1, § 211(3)(6)(E), 103 Stat. at 219 (to be codified at 12 U.S.C. § 1821(a)(6)(E)).
92. The FDIC sets the SAIF deposit-insurance premiums to be paid by savings associations. See FIRREA, supra note 1, § 208(4)(1)(D), 103 Stat. at 209 (to be codified at 12 U.S.C. § 1817(b)(1)(D)).
93. See id., § 208(4)(1)(D), 103 Stat. at 209 (to be codified at 12 U.S.C. § 1817(b)(1)(D)). FIRREA sets forth the following schedule of premiums to be paid by SAIF members:

(Basis Points)...

Under FIRREA

<table>
<thead>
<tr>
<th>Year</th>
<th>Premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>20.8</td>
</tr>
<tr>
<td>1991-93</td>
<td>23.0</td>
</tr>
<tr>
<td>1994-97</td>
<td>18.0</td>
</tr>
<tr>
<td>1998</td>
<td>15.0</td>
</tr>
</tbody>
</table>

Id. See Description, Effects and Implications, supra note 27, at 3. In reference to bonds, basis points are defined as 0.01% of yield. One basis point for purposes of deposit insurance would equal 0.01% of each one hundred dollars of deposits. See Barron's Dictionary of Banking Terms 74 (1990).

of 32.5 cents for each $100 of insured deposits, but the increase in one year is restricted to 7.5 cents.94 Once the insurance fund exceeds 1.25% of total deposits, the FDIC will issue premium rebates.95 One commentator has noted that the "'Skids Are Greased' for Congress to pass legislation giving the FDIC unlimited authority to raise deposit insurance assessment rates."96 The SAIF's current financial condition indicates, however, that the FDIC is effectively paralyzed until Congress assigns funds to the SAIF,97 or, alternatively, to the RTC, which must cover costs for the SAIF until the fund's reserves are replenished.98

E. Operation of SAIF

1. SAIF Assistance

FIRREA established SAIF "open-thrift assistance" to bolster savings associations that are not yet insolvent.99 Technically, SAIF should provide financial assistance to savings associations that are still operating;100 because SAIF is entirely depleted, however, any open-thrift assistance must come from the RTC.101

94. See FIRREA, supra note 1, § 208(4)(D)(v)(II)-(III), 103 Stat. at 209 (to be codified at 12 U.S.C. § 1817(b)(I)(D)(v)(II)-(III)).
97. "The S&L cleanup has already plowed through the $50 billion initially requested for failed thrifts, along with the $53 billion in temporary spending. Overall costs are expected to reach $200 billion, plus hundreds of billions more in interest costs over several decades." Thomas, Temporary Funding for S&L Cleanup Unlikely to Be Fully Repaid, GAO Says, Wall St. J., Feb. 21, 1991, at B2, col. 1. "The failure to provide new funds raises the possibility that the [RTC], the agency created to manage the bailout, will have to stop seizing and selling bankrupt thrifts." Duke, supra note 10, at col. 1.
98. See FIRREA, supra note 1, § 211(3)(6)(H), 103 Stat. at 220 (to be codified at 12 U.S.C. § 1821(a)(6)(H)).

If amounts available to the [SAIF] for purposes other than the payment of administrative expenses are insufficient for the [SAIF] to carry out the purposes of this Act, the [FDIC] may request the [RTC] to provide, and the Oversight Board of the [RTC] (in the discretion of the Oversight Board) may pay, such amount as may be needed for such purposes.

Id.

101. See FIRREA, supra note 1, § 211(3)(6)(H), 103 Stat. at 220 (to be codified at 12 U.S.C. § 1821(a)(6)(H)); see also RTC Considers Open-Thrift Assistance, supra note 99, at A-13 ("Technically, open-thrift assistance would be provided through the SAIF, set up under FIRREA to insure those S&Ls not already insolvent." SAIF had a zero-balance at
FIRREA mandates that the FDIC, as SAIF administrator, must consider requests from troubled SAIF-member savings associations for financial assistance if the associations meet nine criteria.102 In addition to these nine criteria, savings associations should be able to demonstrate, among other things, that the cost to the FDIC in assisting the institution will be less than other available alternatives and that the assistance will not be diverted to other purposes.103

Such federal financial assistance would allow financially weakened, but well-run, savings associations with a good chance of survival to remain operating, thereby minimizing the ultimate risk to the SAIF. Critics of open-thrift aid, however, argue that such assistance is tantamount to prolonging the inevitable demise of these savings institutions and thus constitutes throwing good money after bad.104 Advocating a survival-of-the-fittest theory, such critics would prefer to see near-insolvent savings associations fail in due course rather than prolong their lives artificially.105

L. William Seidman, Chairman of the FDIC and a defender of open-thrift aid, acknowledges that members of Congress have been critical of open-thrift aid, arguing that “it would be a reincarnation of a forbearance program that basically allowed insolvent savings institutions to remain open and thereby compound losses[,] and raised the government's cleanup costs for every day these thrifts stayed in business.”106 Seidman stresses, however, that financial assistance to savings associations will only be considered if the cost of assistance is “clearly less than” the cost of closing the institution or placing it in conservatorship or receivership.107 Because the criteria that the FDIC uses to examine assistance proposals are flexible,108 it is uncertain whether Seidman's assurance will...
hold true.109

2. Funding

FIRREA authorizes the FDIC to use the SAIF as the source of funds for resolving failed or failing savings associations.110 SAIF will only fund the resolution of those insolvent savings associations that were not insured by the FSLIC, or for which a conservator or receiver is ap-

(II) that it is unlikely that the member can achieve positive tangible capital without assistance; and
(III) that providing assistance pursuant to the member's proposal would be likely to lessen the risk to the Corporation.

(ii) Other Criteria. — The member meets the following criteria:
(I) Before enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the member was solvent under applicable regulatory accounting principles but had negative tangible capital.
(II) The member's negative tangible capital position is substantially attributable to its participation in acquisition and merger transactions that were instituted by the Federal Home Loan Bank Board or the Federal Savings and Loan Insurance Corporation for supervisory reasons.
(III) The member is a qualified thrift lender (as defined in section 10(m) of the Home Owners' Loan Act) or would be a qualified thrift lender if commercial real estate owned and nonperforming commercial loans acquired in acquisition and merger transactions that were instituted by the Federal Home Loan Bank Board or the Federal Savings and Loan Insurance Corporation for supervisory reasons were excluded from the member's total assets.
(IV) The appropriate Federal banking agency has determined that the member's management is competent and has complied with applicable laws, rules, and supervisory directives and orders.
(V) The member's management did not engage in insider dealing or speculative practices or other activities that jeopardized the member's safety and soundness or contributed to its impaired capital position.
(VI) The member's offices are located in an economically depressed region.

(B) Corporation Consideration of Assistance Proposal. — If a member meets the requirements of clauses (i) and (ii) of subparagraph (A), the Corporation shall consider providing direct financial assistance.

(C) Economically Depressed Region Defined. — For purposes of this paragraph, the term 'economically depressed region' means any geographical region which the Corporation determines by regulation to be a region within which real estate values have suffered serious decline due to severe economic conditions, such as a decline in energy or agricultural values or prices.

109. See Definitions of Distressed Areas, supra note 104.
110. See FIRREA, supra note 1, § 501(a), 103 Stat. at 363-69 (to be codified at 12 U.S.C. § 1441(a)). FIRREA intends SAIF to be the source of funding for insolvent and near-insolvent savings associations. See id. There is currently a zero-balance in SAIF, however, and Congress appears unwilling to provide sufficient funds for this purpose. See RTC Considers Open-Thrift Assistance, supra note 99 and accompanying text; Duke, Congress Fails to Provide More Funding for S&L Bailout, Raising Threat to RTC, Wall St. J., Oct. 29, 1990, at Cl9, col. 1; supra note 10.
pointed after August 9, 1992. Savings associations insured by the FSLIC prior to FIRREA’s enactment and appointed a conservator or receiver between January 1, 1990 and August 9, 1992 will be funded by the RTC. Those insolvent savings associations not insured by the FSLIC prior to August 9, 1989 will be funded by the FDIC through the FSLIC Resolution Fund.

3. Procedure for Seizing/Liquidating Savings Associations

The FDIC has been given broad resolution authority. It may either liquidate the assets of a failed savings association or find an acquirer, using the proceeds of such disposition to pay off depositors. The FDIC's broad resolution authority includes the power to "slash appraised real estate prices to find buyers [for savings associations]." As an FDIC staff member stated, "‘We go after maximizing collection’... ‘Everything we have is for sale; that’s our motto.’" In addition, under FIRREA, the FDIC may even "nullify all the failed [institutions’] contracts in order to speed up liquidation."

III. THE FDIC’S REGULATION OF SAVINGS ASSOCIATIONS UNDER FIRREA

The House Committee on Banking, Finance and Urban Affairs “adopted provisions which expand, enhance and clarify enforcement powers of the financial institution regulatory agencies.” This expansion of the FDIC’s powers under FIRREA is characterized by its broad mandate to act in the name of ensuring the “safety and soundness” of the savings association industry.

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111. See FIRREA, supra note 1, § 501(a), 103 Stat. at 363-69 (to be codified at 12 U.S.C. § 1441(a)).
113. See Regulation of Savings Associations, supra, note 6, at 1024-25.
115. See id.
117. Id.
118. Id. See FIRREA, supra note 1, § 212(a)(e)(1), 103 Stat. at 234 (to be codified at 12 U.S.C. § 1821(e)(1)).
120. Regulation of Savings Associations, supra, note 6, at 1026.
121. See FIRREA, supra note 1, § 912, 103 Stat. at 482-83 (to be codified at 12 U.S.C. § 1818); Regulation of Savings Associations, supra note 6, at 1026.
A. Powers Transferred from the FHLBB

All deposit insurance regulations and orders of the FHLBB or the FSLIC that were in effect as of August 9, 1989 remain in effect and are enforceable by the FDIC. FIRREA, however, "significantly expands the supervisory and enforcement authority of the FDIC with respect to savings associations over that which the [FHLBB] possessed with respect to FSLIC-insured institutions." The FDIC must administer the rules and regulations of the FHLBB and the FSLIC relating to: (1) savings association conservatorships and receiverships, (2) savings association account insurance, (3) financial assistance to savings associations to prevent default, and (4) the FSLIC deposit insurance fund. FIRREA charges the FDIC with responsibility for reviewing its own deposit insurance scheme, as well as the FSLIC's, to create a uniform set of regulations applicable to all insured deposits. In doing so, the FDIC must "consider all relevant factors necessary to promote safety and soundness, depositor confidence, and the stability of deposits in insured depository institutions."126

B. FDIC's Enhanced Powers Over Activities

The FDIC has broad discretion in determining savings association al-

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122. See FIRREA, supra note 1, § 402(a), 103 Stat. at 357-58 (to be codified at 54 Fed. Reg. 41,359 (1989)).
123. Regulation of Savings Associations, supra note 6, at 1026.
124. Id. at 1027. The FDIC assumes the responsibility for the following former FHLBB and FSLIC regulations and rules for savings associations: powers and conduct of conservatorship; powers and conduct of receivership; applications for insurance of accounts; corporations' right of purchase; premium assessment; premiums in mergers, consolidations, or purchases of bulk assets; secondary reserve; advertising of insurance of accounts; continuation of insurance; reservation of right concerning advertising; other insurance of guaranty; equal opportunity in employment; settlement of insurance; termination of insurance; possession by receiver; powers and duties as receiver; priority of claims; creditor claims; claims of accountholders; audits; accounting practices; reports; final discharge and release of receiver; purchase and assumption transactions; receivership rules; insurance of accounts evidenced by negotiable instruments; insurance of annuity accounts; net worth certificates; voluntary assisted-merger program; procedures for the administration and determination of claims filed with the FSLIC as receiver; presentment of claims to receiver prior to commencing litigation; procedures for the processing and determination of review of the determinations of the FSLIC as receiver; procedures for the administration and determination of requests for expedited relief from decisions or threatened actions of the FSLIC as receiver; and FSLIC financial operations. See FDIC, OTS Divide Former FHLBB Rules Governing Conservatorships/Receiverships, 53 Banking Rep. (BNA) No. 15, at 538-40 (Oct. 16, 1989).
125. See FIRREA, supra note 1, § 402(c)(3), 103 Stat. at 358 (to be codified at 54 Fed. Reg. 41,359 (1989)).
126. FIRREA, supra note 1, § 402(c)(4), 103 Stat. at 358-59 (to be codified at 54 Fed. Reg. 41,359 (1989)).
allowable and non-allowable activities based on the risk that such activities pose to the SAIF.\footnote{127} The FDIC's extended oversight powers, cease-and-desist powers, investment regulation powers, deposit-termination powers, capital-requirement powers and special powers are all intended to safeguard the SAIF from further losses.

1. Oversight Authority

FIRREA gives the OTS oversight authority for savings associations.\footnote{128} Yet under FIRREA, the FDIC has authority to recommend to the Director of the OTS enforcement action for an insured savings association.\footnote{129} The FDIC may also proceed directly against an insured savings association if the OTS has not taken any enforcement action within sixty days following the FDIC's recommendation. Further, the FDIC may initiate enforcement proceedings against an insured savings association prior to the expiration of sixty days if "exigent circumstances" exist.\footnote{130}

2. Cease-and-Desist Powers

FIRREA authorizes the FDIC to prohibit, by regulation or order, any specific activity, act or practice conducted by an insured savings association that the FDIC considers a serious threat to SAIF.\footnote{131} Such a "cease-

\footnote{127. See id., § 221(4)(m)(3), 103 Stat. at 268 (to be codified at 12 U.S.C. § 1828(m)(3)); see also Regulation of Savings Associations, supra note 6, at 1096 ("The FDIC is authorized to prohibit, by regulation or order, any savings association from directly engaging in any activity that the FDIC determines to pose a serious threat to SAIF."). See generally FIRREA, supra note 1, § 222, 103 Stat. at 269-73 (to be codified at 12 U.S.C. § 1831(o)) (setting forth activities of savings associations).


129. See FIRREA, supra note 1, § 912, 103 Stat. at 482-83 (to be codified at 12 U.S.C. § 1818(t)(1)).


If the Director does not take the recommended enforcement action or provide an acceptable plan for addressing the FDIC's concerns within sixty days, the FDIC is authorized to take such enforcement action itself if it determines that the association is in an unsafe or unsound condition or that the failure to take such enforcement action will result in the continuance of an unsafe or unsound practice. The FDIC would not be required to wait sixty days if it determines that exigent circumstances exist that require immediate action.

\footnote{131. See FIRREA, supra note 1, § 902(a)(1), 103 Stat. at 450 (to be codified at 12 U.S.C. § 1818(b)). Under enhanced "cease-and-desist" powers, the FDIC may restrict insured savings associations from any activity deemed to pose a threat to SAIF. See Regulation of Savings Associations, supra note 6, at 1096.

The FDIC's authority to prohibit activities that pose a serious threat to SAIF is not limited to activities authorized for state-chartered savings associations. The FDIC may prohibit federal savings associations from engaging in an activity

\footnote{132.}
and-desist” order may include general restrictions on growth or specific restrictions on operational or investment activities by a savings association.\footnote{132} FIRREA extends the FDIC’s cease-and-desist powers beyond the institution itself to an “institution-affiliated party.”\footnote{133} Moreover, the FDIC may require a savings association or “institution-affiliated party” to take affirmative action to correct an unsafe and unsound condition.\footnote{134} The FDIC thus has the augmented discretionary power to issue a cease-and-desist order against an institution or any individual who qualifies as an “institution-affiliated party.”

FIRREA also expands the FDIC’s jurisdiction in enforcement proceedings against institution-affiliated parties. Under FIRREA, the offending institution-affiliated party need not be associated with the savings association at the time of the FDIC action so long as notice of the action is served within six years of the individual’s separation from the institution. In contrast, the FHLBB could only proceed against an institution-
affiliated party if such a relationship still existed.135

Additionally, the FDIC has been given broader power to issue temporary cease-and-desist orders than had been given to the FHLBB and the FSLIC. Neither the FHLBB nor the FSLIC had explicit authority to issue temporary cease-and-desist orders in response to the incomplete or inaccurate status of a savings association's financial records.136 Pursuant to FIRREA, however, the FDIC may issue temporary cease-and-desist orders requiring the cessation of any activity or practice if the FDIC is unable to determine the financial condition of the savings association or the status of a transaction due to the savings association's incomplete financial records.137 In addition, the burden of proof that the FDIC must meet to issue a temporary cease-and-desist order is reduced from that formerly required of the FHLBB.138 The FHLBB could not issue a temporary cease-and-desist order against a savings association absent a showing that the "association or [a] person participating in the conduct of the association's affairs was engaged in an unsafe or unsound practice, the continuation of which was likely to cause a 'substantial' dissipation of the association's assets."139 The FDIC, however, need only show that the continuation of the unsafe or unsound practice is likely to cause more than a minimal or nominal dissipation of the savings association's assets.140

In addition to cease-and-desist powers, FIRREA also authorizes the FDIC to permit a state savings association to perform otherwise "impermissible" activities. The criteria for approval require that the FDIC first determine that the well-being of the SAIF is not jeopardized, that the FIRREA-prescribed capital standards are not compromised, and that

135. See Regulation of Savings Associations, supra note 6, at 1030.

[FIRREA] provides that, even if an institution-affiliated person resigns, is fired, or becomes separated from an association . . . in any other manner, the . . . FDIC may proceed against the party as long as notice of such action is served within six years from when the individual becomes separated from the institution.

Id; see FIRREA, supra note 1, § 905(a), 103 Stat. at 459 (to be codified at 12 U.S.C. § 1818(i)(3)).

The FHLBB's authority was more limited than the FDIC's for two reasons: 1) termination of the relationship between the individual and the institution may have terminated the authority to issue a cease-and-desist order, and 2) "institution-affiliated party" is a broader term than "person participating," which was the operative term in the FHLBB's statute. See Regulation of Savings Associations, supra note 6, at 1030.

136. See Regulation of Savings Associations, supra note 6, at 1029-30.

137. See FIRREA, supra note 1, § 902(a)(2), 103 Stat. at 451 (to be codified at 12 U.S.C. § 1818(c)(3)(i)).


139. Regulation of Savings Associations, supra note 6, at 1030.

140. See FIRREA, supra note 1, § 902(a)(2), 103 Stat. at 451 (to be codified at 12 U.S.C. § 1818(c)(1)); see also Malloy, supra note 12, at 1151 (FIRREA provides for issuance of temporary cease and desist order on less stringent, alternatively set out findings.).
the activity would benefit the health of the savings association.\textsuperscript{141}

3. Investments
   a. Equity Investments

Before FIRREA, savings associations could invest up to one percent of their assets in sub-investment-grade corporate debt securities and commercial paper,\textsuperscript{142} and up to five percent of their assets in commercial loans that included sub-investment-grade corporate debt securities and commercial paper.\textsuperscript{143} These securities, popularly known as "junk bonds," represent a very risky, high-yield investment opportunity. Pursuant to FIRREA, insured savings associations may no longer purchase non-investment-grade securities, and they are required to divest themselves of any currently held junk bonds by 1994.\textsuperscript{144}

Under FIRREA, the same limitations apply to a federally insured savings association's equity investments,\textsuperscript{145} whether made by a state or federal savings association. As a general rule, FIRREA prohibits a state savings association from engaging as principal in activities impermissible for a federal savings association. FIRREA thus holds federal and state savings associations to the same standard and effectively precludes state-chartered savings associations from taking advantage of activities permitted under state law.\textsuperscript{146} In addition, "[t]he FDIC has the responsibility to require divestiture of impermissible equity investments 'as quickly as can be prudently done, and in any event not later than July 1, 1994.'"\textsuperscript{147} FDIC regulations require any state-chartered savings association holding one or more impermissible equity investments as of August 9, 1989\textsuperscript{148} to file an application outlining divestiture plans for the impermissible investments and requesting the FDIC's approval of the divestiture plan.\textsuperscript{149}

To regulate a savings association's equity investments, the FDIC re-

\textsuperscript{141} See FIRREA, supra note 1, § 222(a), 103 Stat. at 269 (to be codified at 12 U.S.C. § 1831e).
\textsuperscript{142} See 12 C.F.R. § 545.75(d) (1989).
\textsuperscript{143} See 12 C.F.R. § 545.46 (1989).
\textsuperscript{144} See FIRREA, supra note 1, § 222(d), 103 Stat. at 270 (to be codified at 12 U.S.C. § 1831e(d)). Investments are only considered "of investment grade" if they are rated in one or the four highest categories of a nationally recognized statistical rating organization. See FIRREA, supra note 1, § 222, 103 Stat. at 270 (to be codified at 12 U.S.C. § 1831d(4)(A)).
\textsuperscript{145} FIRREA does not define "equity investment." Id., § 222(c)-(d), 103 Stat. at 269-70 (to be codified at 12 U.S.C. § 1831(c)-(d)). However, the "legislative history indicates that the restriction on equity investments is intended to apply to investments in equity securities, equity investments in real estate, and any other equity investment." Regulation of Savings Associations, supra note 6, at 1081.
\textsuperscript{146} See FIRREA, supra note 1, § 222(c)-(d), 103 Stat. at 269-70 (to be codified at 12 U.S.C. § 1831(c)-(d)); Regulation of Savings Associations, supra note 6, at 1075.
\textsuperscript{147} Malloy, supra note 12, at 1138; FIRREA, supra note 1, § 222(d), 103 Stat. at 270 (to be codified 12 U.S.C. § 1831e(d)).
\textsuperscript{148} FIRREA was enacted on August 9, 1989. See supra note 1.
\textsuperscript{149} See Regulation of Savings Associations, supra note 6, at 1082. Savings associations entering commitments to engage in impermissible investment activities prior to August 9,
quires that state and federally chartered savings associations file notice with the FDIC at least thirty days before acquiring or establishing a subsidiary or commencing a new activity.\textsuperscript{150} The FDIC further requires a state savings association to file a letter application with the FDIC at least sixty days prior to initiating activities permissible for state savings associations but impermissible for federal savings associations.\textsuperscript{151}

The purpose of these restrictions\textsuperscript{152} is to safeguard the SAIF from further losses.\textsuperscript{153} Thus, although the FDIC may grant exceptions, it may do so only for institutions that meet the new, tougher capital requirements.\textsuperscript{154}

\begin{itemize}
\item The purpose of these restrictions\textsuperscript{152} is to safeguard the SAIF from further losses.\textsuperscript{153} Thus, although the FDIC may grant exceptions, it may do so only for institutions that meet the new, tougher capital requirements.\textsuperscript{154}
\end{itemize}


\textsuperscript{151} See id.

\textsuperscript{152} Activities considered impermissible for federally chartered savings associations are those unrelated to traditional home-mortgage lending. See Regulation of Savings Associations, supra note 6, at 1076-77, n.469.

\textsuperscript{153} See id. at 1076. FIRREA's activity restrictions are meant for FDIC-insured state and federally chartered savings associations. Because a state-chartered savings association is not required to be FDIC-insured, it may opt out of the more stringent requirements by voluntarily terminating its deposit insurance. It would then be governed only by state-law restrictions on savings-association activities. Voluntary termination is unlikely, however, because the lack of FDIC insurance puts a savings association at a competitive disadvantage in the marketplace. See supra notes 14 & 15 and accompanying text. But see Regulation of Savings Associations, supra note 6, at 1075 & n.459 (state-chartered savings associations can voluntarily terminate their federal deposit insurance except if the savings association is chartered in a state that makes federal deposit insurance compulsory.)


A state-chartered savings association would be permitted to engage in an activity that is not permissible for a federal savings association only if the association was in compliance with the fully phased-in capital standards applicable to savings associations, and if the FDIC determines by regulation or order that the activity or investment would pose no significant risk of loss to the [SAIF].

\textsuperscript{150} See id. at 1082-83.

\textsuperscript{151} See id.

\textsuperscript{152} See Regulation of Savings Associations, supra note 6, at 1076-77, n.469.

\textsuperscript{153} See id. at 1076. FIRREA's activity restrictions are meant for FDIC-insured state and federally chartered savings associations. Because a state-chartered savings association is not required to be FDIC-insured, it may opt out of the more stringent requirements by voluntarily terminating its deposit insurance. It would then be governed only by state-law restrictions on savings-association activities. Voluntary termination is unlikely, however, because the lack of FDIC insurance puts a savings association at a competitive disadvantage in the marketplace. See supra notes 14 & 15 and accompanying text. But see Regulation of Savings Associations, supra note 6, at 1075 & n.459 (state-chartered savings associations can voluntarily terminate their federal deposit insurance except if the savings association is chartered in a state that makes federal deposit insurance compulsory.)


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\item A state-chartered savings association would be permitted to engage in an activity that is not permissible for a federal savings association only if the association was in compliance with the fully phased-in capital standards applicable to savings associations, and if the FDIC determines by regulation or order that the activity or investment would pose no significant risk of loss to the [SAIF].
\end{itemize}
FIRREA further limits savings association lending activities by requiring savings associations to hold an average of seventy percent of portfolio assets in "qualified investments." Qualified investments are restricted to home financing activities. Prior to FIRREA, the investment requirement for residential mortgage assets was sixty percent of total assets. FIRREA's qualified-investment requirements thus effectively force savings associations to specialize in home mortgage services.

4. Power to Terminate Deposit Insurance

FIRREA both reaffirms and enhances the FDIC's power to terminate deposit insurance and establishes new authority to suspend insurance temporarily if the FDIC determines that a savings association's activities constitute "unsafe and unsound" banking practices. This power en-

155. See FIRREA, supra note 1, § 303(a)(m)(1)(A)-(B), 103 Stat. at 344 (to be codified 12 U.S.C. § 1467a); Description, Effects and Implications, supra note 27, at 3.
156. See FIRREA, supra note 1, § 303(a)(m)(4)(C)(ii)-(fii), 103 Stat. at 347 (to be codified at 12 U.S.C. § 1467(a)).
158. The qualified thrift lender test "was toughened by FIRREA with the intent of pushing thrifts back towards their traditional housing role. However, this shove was so strong that it encourages thrifts to continue lending to the homebuilding industry when the oversupply in some markets would suggest otherwise." Cocheo, Cleanup, Year I, ABA Banking J. 35, 38 (Oct. 1990).
159. See FIRREA, supra note 1, § 926(7)(8)(A)-(B), 103 Stat. at 491 (to be codified at 12 U.S.C. § 1818(a)(8)(A)-(B)).
ables the FDIC to “limit its potential pay-out and . . . effectively control
the growth of an insolvent institution.” 160  FIRREA authorizes the
FDIC to suspend the deposit insurance of savings associations that have
no tangible capital, 161 to determine the length of time (within certain
statutorily prescribed limits) in which deposits will remain insured fol-
lowing insurance termination, 162 and to issue a temporary order sus-
pending deposit insurance after termination proceedings have begun if
the FDIC finds the association has no tangible capital. 163

Although the FDIC may suspend deposit insurance whenever a sav-
ings association has no tangible capital, FIRREA provides special ex-
emptions in certain circumstances. 164 “Savings associations which have
no tangible capital, but which have goodwill, will be considered ‘special
supervisory associations’ for temporary-suspension-of-insurance pur-
poses.” 165 The FDIC may, however, issue a temporary order suspending
insurance on all deposits received by a “special supervisory” savings as-
sociation if:

a) its capital has suffered a material decline; b) it is engaging in an
unsafe or unsound practice; c) it is in an unsafe or unsound condition;
or d) it is in violation of any law, rule, regulation, order agreement, or
condition, including the failure to enter into an acceptable capital im-
provement plan as required by [FIRREA]. 166

5. Capital Requirements

There are “three keys to survival for existing savings and loans under

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160. FIRREA Expands Civil Enforcement Powers of Regulators, Increases Penalties Al-
lowed, 53 Banking Rep. (BNA) No. 12, at 424 (Sept. 25, 1989) [hereinafter
FIRREA Expands Powers].

161. See FIRREA, supra note 1, § 926, 103 Stat. at 490-91 (to be codified at 12 U.S.C.
§ 1818(a)(8)). “Tangible capital” is defined as including common stockholders' equity,
certain noncumulative perpetual preferred stock and related surplus, minority interests in
the equity accounts of fully consolidated subsidiaries, qualifying supervisory goodwill,
and functional equivalents of noncumulative perpetual preferred stock, except that all
intangible assets (besides qualifying supervisory goodwill and certain purchased mortgage
servicing rights) are deducted from the institution’s capital base. See Regulation of Sav-
ings Associations, supra note 6, at 1033, n.169.

162. See infra note 166 and accompanying text.

163. See FIRREA, supra note 1, § 926(7), 103 Stat. at 491 (to be codified at 12 U.S.C.
§ 1818(a)(8)).

164. See infra note 166 and accompanying text.

165. FIRREA Expands Powers, supra note 160, at 424; FIRREA, supra note 1,
§ 926(7)(8)(B), 103 Stat. at 491 (to be codified at 12 U.S.C. § 1818(a)(8)(B)).

166. FIRREA Expands Powers, supra, note 160, at 424; see FIRREA, supra note 1,
§ 926(7), 103 Stat. at 491 (to be codified at 12 U.S.C. § 1818(a)(8)); Regulation of Savings
Associations, supra note 6, at 1033, n.169.
FIRREA: capital, capital and capital.\textsuperscript{167} Accordingly, FIRREA establishes new, more stringent capital requirements for savings associations.\textsuperscript{168} In order to comply with FIRREA’s capital requirements, many savings associations will have to raise additional capital by issuing new stock or bonds or selling off assets.\textsuperscript{169}

Upon FIRREA’s enactment, the FDIC took over non-complying institutions, raised their capital to meet FIRREA’s requirements, and then sold them.\textsuperscript{170} This action proved too costly a remedy in light of the large number of savings associations that failed to comply with FIRREA’s new capital requirements.\textsuperscript{171} The FDIC’s current approach to curing capital deficiencies in savings associations is, therefore, to seek out private investors and to use other methods to raise levels of capital.\textsuperscript{172}

Failure to satisfy the capital requirements will result in the imposition of numerous restrictions on an association’s activities, including limitations on an association’s asset growth, acceptance of brokered deposits, and, in the case of state-chartered savings associations, the ability to engage in activities pursuant to state-granted authority that are impermissible for federal savings associations.\textsuperscript{173}

As one indirect method of controlling capital levels, FIRREA restricts a savings association’s acceptance of brokered deposits.\textsuperscript{174} Brokered de-


\textsuperscript{168.} Thirty-eight percent of currently solvent savings associations fail to meet the tough capital requirements. See Description, Effects and Implications, supra note 27, at 3. The imposition of higher capital standards for savings associations is intended to discourage participation in excessively risky activities by requiring higher levels of capital for risky activities and forcing equity owners to face greater risk of loss if the association becomes insolvent. See Regulation of Savings Associations, supra note 6, at 1034. Further, the deposit-insurance fund is afforded increased protection against the large losses involved in an insolvency if higher capital standards are required. See id. at 1034.

\textsuperscript{169.} See Description, Effects and Implications, supra note 27, at 3.

\textsuperscript{170.} Florida Federal Savings Bank probably will need a combination of investor capital, government financial assistance and a resolution to its student loan problem to comply with government capital standards. . . . Florida Federal was among the banks and savings and loans required to submit recapitalization plans to the government for failing to meet capital standards under [FIRREA] . . . .

\textsuperscript{171.} See Bank Officials: Florida Federal Needs Help, supra note 169.

\textsuperscript{172.} See id.

\textsuperscript{173.} See Regulation of Savings Associations, supra note 6, at 1034 (footnotes omitted).

\textsuperscript{174.} The term “deposit broker” is defined as:

(1) Any person engaged in the business of placing funds, or facilitating the placement of funds, of third parties with insured banks, or the business of placing funds with insured banks for the purpose of selling interests in those deposits to third parties; and (2) an agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured bank to use the proceeds of the account to fund a prearranged loan.
posits include deposits acquired through a mediator and deposits on which an interest rate "significantly higher" than prevailing rates on similar deposits in the same market area is offered.\footnote{5} FIRREA generally prohibits brokered deposits, unless the FDIC grants special permission to engage in such activity.\footnote{1} If the FDIC considers a savings association undercapitalized, it is unlikely to allow a savings association to accept certain brokered deposits.\footnote{7} However, a savings association may apply to the FDIC for a waiver of the ban on brokered deposits.\footnote{8} A waiver may be granted if the FDIC determines that a savings association's use of brokered deposits does not constitute an unsafe and unsound practice and the waiver is necessary to maintain the savings association's liquidity or to restructure its debt.\footnote{9} The FDIC will not grant a waiver, however, if allowing the savings association to accept brokered deposits will permit the savings association to grow in asset size.\footnote{0}

FIRREA exempts a savings association that is under conservatorship or receivership of the FDIC or RTC from this prohibition on brokered deposits, provided that the acceptance, renewal or rollover of the brokered deposit is not considered unsafe and unsound.\footnote{10} All savings associations under conservatorship or receivership are deemed to pass this test.\footnote{11}

C. Special Powers

"The interests of the American taxpayer demand an expedited resolution to the monumental problems involved with the unprecedented costs of dealing with hundreds of insolvent thrifts and the orderly disposition of the assets of these failed institutions."\footnote{12} To accomplish this, FIR-
REA expands the powers of the FDIC as conservator and receiver for SAIF-member institutions in default. In order to carry out the objective of providing for the efficient resolution of savings association failures, the FDIC is required to reevaluate the FHLBB's 1988 savings association transactions and to renegotiate agreements where more favorable terms to the federal government and taxpayers can be obtained. The FHLBB's savings association transactions have been highly criticized for practically giving away failed savings associations to acquirers, while billing taxpayers for billions in federal subsidies.

Confusion over the FDIC's receivership powers since the passage of FIRREA has generated a number of cases. The courts, however, have clearly found that under FIRREA the FDIC inherits the role and the powers of the FSLIC for purposes of receivership. In *FDIC v. Gillard*, which was decided after FIRREA's passage, the FDIC moved to change its designation from manager of the FSLIC Resolution Fund for Empire Savings and Loan Association to receiver for that institution. Although admitting that "FIRREA is not a model of clarity in this regard," the court held that the FDIC succeeded to the rights of the FSLIC as receiver after FIRREA. The court also found that FIRREA gave the FDIC the responsibility for the day-to-day operations of

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The government last year paid out $4.6 billion in federal assistance to acquirers of thrifts under controversial transactions the former [FHLBB] arranged in 1988, according to data the [FDIC] recently provided to the House Banking Committee.

According to the FDIC division that oversees operations of the former [FSLIC], $3.5 billion of that total went to acquirers of thrifts under the FHLBB's controversial Southwest Plan to resolve troubled S&Ls in that region. And $1.2 billion of the $3.5 billion went to acquirers who completed their deals in December 1988, shortly before certain key tax law provisions that made the thrift deals attractive to investors were set to expire.

Id.

186. See id.

187. See, e.g., Carrollton-Farmers Branch Indep. School Dist. v. Johnson & Cravens, 889 F.2d 571, 572-73 (5th Cir. 1989) (FDIC controls former FSLIC Resolution Fund cases); Triland Inv. Group v. FDIC, 735 F. Supp. 698, 699-700 & n.2 (N.D. Tex. 1990) (there would be no successor to the FSLIC for institutions placed into receivership prior to FIRREA's enactment if FDIC did not succeed to power, thus, where pre-Act creditor would have received nothing had association been liquidated, creditor has no claim against FDIC as FSLIC's successor); FSLIC v. T.F. Stone-Liberty Land Assoc., 787 S.W.2d 475, 480 (Tex. Ct. App. 1990) (the FDIC succeeds to the FSLIC as manager of the FSLIC Resolution Fund because savings association closed prior to January 1, 1989).


189. See id. at 427.

190. See id. at 428.
the RTC and compelled the FDIC to perform all of the RTC's responsibilities.

If appointed conservator or receiver by the OTS, the FDIC may transfer the savings association's assets or liabilities or merge the troubled or failed savings association into another insured depository institution. The FDIC's power selectively to transfer the liabilities of an insolvent savings association to a healthy institution has been questioned.

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FIRREA now grants to the FDIC as receiver the power to make additional payments in its discretion to certain creditors from its own resources without becoming obligated to make payments to any other claimant or category of claimants. Thus, the FDIC now has the power to select those obligations to creditors that it will assume and those obligations that it will reject.

In addition, FIRREA confirmed the FDIC's authority to organize new national savings associations to perform the functions of defaulted savings associations in order to reduce the impact of the financial loss on the community. Similarly, FIRREA gave the FDIC the power to organize “bridge banks” to assume the deposits of a failed savings association temporarily until the savings association can be sold. As conservator or receiver, the FDIC can permit the merger of a savings association with any other savings association or bank without the approval of other federal banking agencies.

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191. See FIRREA, supra note 1, § 501(b)(1)(C), 103 Stat. at 369 (to be codified at 12 U.S.C. § 1441a(b)(1)(C)).
201. See FIRREA, supra note 1, § 212(a)(c)(2)(C), 103 Stat. at 222 (to be codified at 12 U.S.C. § 1821(c)(2)(C)); Description, Effects and Implications, supra note 27, at 7.
FIRREA also created an emergency provision that authorized the FDIC “to arrange an assisted acquisition of a troubled savings association by another savings association, a [bank holding company], or a savings association holding company ‘notwithstanding any provision of state law.’”

This provision has called into question the FDIC’s power to override state bank-branching laws. FIRREA seems to allow the acquirer to maintain and operate the acquired savings association branches contrary to state law, or, in the alternative, to treat the acquired savings association as a separate entity and open new branches within the same state. One recent case, *Arkansas Bank Commissioner v. Resolution Trust Corporation*, ruled in favor of the federal regulators on this issue, but a number of other courts have ruled against the federal regulators’ powers to preempt state branching laws.

FIRREA gives further resolution powers to the FDIC with its “cross-guarantee” provision. “As originally advanced by President Bush... FIRREA would have provided the [FDIC] with far-reaching authority to hold depository institutions within a holding company structure liable for losses incurred by the insurance fund because of an affiliated institution’s default.”

Lobbyists and regulators, concerned that such a stringent provision would discourage acquisitions of failed or failing savings...


203. See *Arkansas Bank Comm’r. v. Resolution Trust Corp.*, 911 F.2d 161 (8th Cir. 1990).


205. 911 F.2d 161 (8th Cir. 1990).

206. See id. at 170.

207. See id. at 176-77 (Heany, J., dissenting) (citing cases in which decisions of the Comptroller conflicting with state bank branching laws have been overruled).

208. FIRREA’s “cross-guarantee” provision has received attention. See Glass, *Cross-Guarantee is Seen as Risk to Holding Companies*, Am. Banker, July 19, 1990, at 19, col. 1; *Lobbying Efforts*, supra note 194, at 261. The provision can be interpreted as authorizing the FDIC to cover the losses of a troubled or failed “commonly controlled” savings association with the assets of a healthy “sister.” See generally *FIRREA*, supra note 1, § 212(a)(d)(2), 103 Stat. at 225-27 (to be codified at 12 U.S.C. § 1821(d)(2)) (describing the broad general powers of FDIC as conservator and receiver).

As parent, a bank-holding company by statute is not subjected to the cross-guarantee provision, which its subsidiaries are. It is nevertheless affected by the provision because the FDIC’s claims against the failed subsidiary are superior to those of the parent. See *FIRREA*, supra note 1, § 212(a)(d)(4),(5), 103 Stat. at 227-28 (to be codified at 12 U.S.C. § 1821(d)(4),(5)). Although the cross-guarantee authority may save the FDIC money that would otherwise have come out of the insurance fund, the constitutionality of forcing a healthy affiliate to cover losses of a sick affiliate and thus driving the healthy “sister” into insolvency has been questioned. See Glass, * supra*, at 25, col. 2; Note, *A Note to Congress and the FDIC: After FIRREA, Where’s the BIF?,* supra note 43, at S449. There is a five-year exemption for insured institutions that acquired troubled savings associations prior to FIRREA.

associations, however, amended the original law to soften its blow. 210 These amendments include a five-year exemption from the cross-guaranteeprovision, 211 and the possibility of FDIC exemption from the provision if the FDIC determines it is in the SAIF’s best interests. 212

CONCLUSION

Two years after its enactment, FIRREA’s impact on the savings association industry is still not entirely clear. FIRREA’s quick passage, only six months after the bill was proposed, insured that technical glitches in the language of the Act, especially with regard to the FDIC’s powers over insolvent savings associations, would create problems. Meanwhile, despite the substantially enhanced powers of the FDIC under FIRREA with respect to savings associations, the SAIF’s zero-balance, combined with Congress’ unwillingness to commit sufficient funds to the bailout effort, effectively renders the FDIC’s resolution powers moot.

In a strained economy, FIRREA’s requiring weakened savings associations to meet more stringent minimum capital requirements and to pay higher insurance premiums will increase the likelihood of savings association insolvency, rather than create more efficient management of savings association failures. The FDIC will continue to face complex decisions regarding the costs and benefits of providing open-thrift assistance versus liquidating insolvent savings associations. FIRREA gives the FDIC sweeping discretion to decide on a case-by-case basis how to handle insolvencies, but such broad discretion does not make the results easy to predict. Keeping an insolvent savings association alive with the objective of curing its financial condition may increase its ultimate losses, causing the “resolution” to be more costly to the FDIC than it would have been had the FDIC allowed it to fail. Added to the complexity of the cost equation is the pressure of inadequate funding for the resolution process. These problems may necessitate new savings association laws that give the FDIC more specific guidance with regard to resolution procedures.

Anne M. Taylor

210. See id.
211. See supra note 208.
212. See Lobbying Efforts, supra note 194, at 262.