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## Playing with FIRREA, Not Getting Burned: Statutory Overview of the Financial Institutions Reform, Recovery and Enforcement Act of 1989

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**PLAYING WITH FIRREA, NOT GETTING BURNED:  
STATUTORY OVERVIEW OF THE FINANCIAL  
INSTITUTIONS REFORM, RECOVERY AND  
ENFORCEMENT ACT OF 1989**

**INTRODUCTION**

In response to the continuing crisis in the savings and loan ("S&L") industry, President Bush signed into law the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").<sup>1</sup> Approved by Congress in the Summer of 1989, the Act was designed, among other things, "to promote, through regulatory reform, a safe and stable system of affordable housing finance."<sup>2</sup>

While widely considered a bailout statute for failed depository institutions,<sup>3</sup> FIRREA was enacted to rectify existing problems in the thrift industry and to establish "a new era for insured institutions and their regulators."<sup>4</sup> This Note provides an overview of FIRREA, while emphasizing salient points of the statute not exhaustively addressed elsewhere in the survey. In addition, the Note discusses Congress' main objectives in enacting FIRREA, how these objectives were achieved through the Act, and FIRREA's effect on existing regulatory agencies.

**I. PRE-FIRREA**

Providing affordable home financing has been a priority of the Federal

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1. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at various sections of 12 and 15 U.S.C.) [hereinafter "FIRREA"].

2. FIRREA, *supra* note 1, § 101(1), 103 Stat. at 187 (to be codified at 12 U.S.C. § 1811).

3. *See id.* § 204(c)(1)-(5), 103 Stat. at 191 (amending section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. § 1813(c)(1)-(5))). These terms are defined as:

"(1) Depository Institution.—The term 'depository institution' means any bank or savings association.

"(2) Insured Depository Institution.—The term 'insured depository institution' means any bank or savings association the deposits of which are insured by the [Federal Deposit Insurance] Corporation pursuant to this Act.

"(3) Institutions Included for Certain Purposes.—The term 'insured depository institution' includes any uninsured branch or agency of a foreign bank or a commercial lending company owned or controlled by a foreign bank for purposes of section 8 of this Act.

"(4) Federal Depository Institution.—The term 'Federal depository institution' means any national bank, any Federal savings association, and any Federal branch.

"(5) State Depository Institution.—The term 'State depository institution' means any State bank, any State savings associations, and any insured branch which is not a Federal branch."

*Id.*

4. H.R. Rep. No. 54, 101st Cong., 1st Sess. 291, *reprinted in* 1989 U.S. Code Cong. & Admin. News 86, 87 [hereinafter House Report].

government for the better part of a century.<sup>5</sup> Since the 1930s, Congress and state legislatures have developed and refined the savings and loan industry<sup>6</sup> in order to supply the American public with affordable mortgage credit.<sup>7</sup> Notably, "[e]very thrift is chartered by the government and consequently, voluntarily assumes an enormous public responsibility in return for deposit insurance and other government benefits."<sup>8</sup>

The current crisis in the thrift industry<sup>9</sup> can be traced to a multitude of factors, including: (i) poorly timed industry-wide deregulation; (ii) the rising interest rate environment of the late 1970s and early 1980s; (iii) poor internal management in the thrift industry; (iv) a lack of adequate government supervision and regulation; (v) a regional economic collapse, specifically in the Southwest; and (vi) insider trading and fraud.<sup>10</sup>

As Congress observed, the Reagan Administration and the Federal Home Loan Bank Board ("Bank Board") "continually understated the magnitude of the S & L crisis, effectively delaying its resolution and needlessly adding billions of dollars to the cost of resolving the problem."<sup>11</sup> In response to this burgeoning fiscal dilemma, President Bush announced a program to deal expeditiously with troubled thrift institutions, while assuring the safety of insured depositors.<sup>12</sup> The President's program empowered a team of regulatory agencies to assume jurisdiction and control over a large number of failing savings and loan associations under the auspices of the Federal Deposit Insurance Company ("FDIC").<sup>13</sup> The named regulatory agencies included the Bank Board, the Federal Savings and Loan Corporation ("FSLIC"), the Office of the Comptroller of the Currency ("OCC"), and the Federal Reserve Board ("Fed").<sup>14</sup> The President's public statement announcing the program also emphasized that the depositors would still be insured under the federal deposit insurance program. His objective was "to deal with the problems in these troubled institutions in a way that promotes stability and fully assures the safety of insured deposits."<sup>15</sup>

The goals of the President's program were multi-faceted. Among

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5. See *id.* at 294, reprinted in 1989 U.S. Code Cong. & Admin. News at 90.

6. See Note, *Too Many Consonants and Not Enough Consonance: The Development of the S&L Regulatory Framework*, in Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S263 (1991).

7. See House Report, *supra* note 4, at 294, reprinted in 1989 U.S. Code Cong. & Admin. News at 90.

8. *Id.*

9. See Note, *Causes of the Savings and Loan Debacle*, in Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S301, S316-17 (1991).

10. See House Report, *supra* note 4, at 294-295, reprinted in 1989 U.S. Code Cong. & Admin. News at 90-91.

11. *Id.* at 305, reprinted in 1989 U.S. Code Cong. & Admin. News at 101.

12. See FDIC Release PR-41-89, Feb. 24, 1989, reprinted in [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) 7,600 (Mar. 3, 1989).

13. See *id.* at 4,644.

14. See *id.*

15. *Id.*

those articulated were establishing control and oversight of each institution, promoting confidence in the industry, maintaining customer services, evaluating each institution's condition by identifying and accounting for all losses, ensuring that each institution is operated in a safe and sound manner, and recommending the most viable alternatives for cost effective resolution in the case of each thrift.<sup>16</sup> The Administration's proposal was introduced in the Senate on February 22, 1989<sup>17</sup> and in the House on March 6, 1989.<sup>18</sup> The Senate Committee on Banking, Housing, and Urban Affairs made minor revisions to the proposal and introduced the amended bill to the full Senate.<sup>19</sup> After three days of consideration, it was passed on April 19, 1989.<sup>20</sup>

Similarly, the House Committee on Banking, Finance, and Urban Affairs revised the bill and passed similar legislation on June 15, 1989.<sup>21</sup> Finally, on August 9, 1989, President Bush signed this "historic legislation"<sup>22</sup> into law, predicting that such measures would "preserve a safe, efficient, and equitable financial system for ourselves and . . . our kids."<sup>23</sup>

## II. PURPOSES OF FIRREA

FIRREA represents a broad legislative attempt to resolve the financial crisis confronting the S&L industry.<sup>24</sup> The primary goal of FIRREA is to "restore public confidence in the savings and loan industry in order to ensure a safe, stable, and viable system of affordable housing finance."<sup>25</sup> Its sweeping changes were designed to ameliorate mortgage financing and housing opportunities for medium and low-level income individuals by means of improved management, supervision and control of federal housing credit programs and resources.<sup>26</sup> The regulatory changes and purposes of FIRREA are expressed in part as follows:

- (i) To improve the supervision of savings associations by strengthening capital, accounting, and other supervisory standards.

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16. See *id.* at 644-94, 945.

17. See 135 Cong. Rec. S1513 (daily ed. Feb. 22, 1989) (statement of Sen. Riegle).

18. The bill was introduced in the House as "a bill to reform, recapitalize and consolidate the Federal deposit insurance system, to enhance the regulatory and enforcement powers of the Federal financial institutions regulatory agencies, and for other purposes; to the Committee on Banking, Finance and Urban Affairs." 135 Cong. Rec. H534 (daily ed. Mar. 6, 1989).

19. See House Report, *supra* note 4, at 21, reprinted in 1989 U.S. Code Cong. & Admin. News at 352 n.1.

20. 135 Cong. Rec. (daily ed. Apr. 19, 1989).

21. See 135 Cong. Rec. H2602-H2804 (daily eds. June 15-16, 1989).

22. *Remarks on Signing the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 25 Weekly Comp. Pres. Doc. 1226 (Aug. 9, 1989).

23. *Id.* at 1227.

24. See *Regulation of Savings Associations under the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 45 Bus. Law. 1013, 1013 (May 1990) [hereinafter *Regulation of Savings Associations*].

25. House Report, *supra* note 4, at 307, reprinted in 1989 U.S. Code Cong. & Admin. News at 103.

26. See *id.*

(ii) To curtail investments and other activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds.

(iii) To promote the independence of the Federal Deposit Insurance Corporation from the institutions the deposits of which it insures, by providing an independent board of directors, adequate funding, and appropriate powers.

(iv) To establish an Office of Thrift Supervision in the Department of the Treasury under the general oversight of the Secretary of the Treasury.

(v) To establish a new corporation, to be known as the Resolution Trust Corporation, to contain, manage, and resolve failed savings associations.

(vi) To strengthen the enforcement powers of Federal regulators of depository institutions.<sup>27</sup>

### A. Accounting Improvements

The rising interest rates of the late 1970s and early 1980s had a devastating effect on the S&L.<sup>28</sup> An unstable financial climate prompted thrift institutions to lobby for legislative relief in the form of capital assistance programs.<sup>29</sup> Once this relief was granted, the Bank Board compounded the situation by providing support through the promulgation of "regulatory accounting gimmicks that allowed thrifts to technically avoid insolvency, and thus . . . avoid being closed by the FSLIC."<sup>30</sup> In effect, the Bank Board's liberal accounting procedures and principles<sup>31</sup> allowed operators of weak thrifts to understate their financial difficulties.<sup>32</sup>

These accounting "gimmicks" included: enabling savings associations to defer losses from the sale of assets with below-market yields;<sup>33</sup> allowing the use of congressionally authorized income capital certificates in place of real capital;<sup>34</sup> permitting qualifying mutual capital certificates to be included as part of Regulatory Accounting Principal ("RAP") capital;<sup>35</sup> authorizing FSLIC member thrifts to exclude certain contra-asset accounts<sup>36</sup> from liabilities when computing net worth;<sup>37</sup> and allowing net

27. FIRREA, *supra* note 1, §§ 101(2)-(4), (6)-(7), (9), 103 Stat. at 187 (to be codified at 12 U.S.C. § 1811).

28. See House Report, *supra* note 4, at 291, reprinted in 1989 U.S. Code Cong. & Admin. News at 87.

29. See *id.* at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94.

30. *Id.*

31. The Bank Board allowed thrifts to adhere to Regulatory Accounting Principles ("RAP") rather than the more stringent and widely accepted Generally Accepted Accounting Principles ("GAAP"). See *infra* notes 33-43 and accompanying text.

32. See *supra* note 24, at 1022.

33. See House Report, *supra* note 1, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94.

34. See *id.*

35. See *id.*

36. A contra-asset account "is recorded by debiting an expense account and crediting [an asset account]. . . . Thus the latter account has a credit balance and is deducted in the

worth certificates,<sup>38</sup> qualifying subordinated debt and appraised capital in computing RAP net worth.<sup>39</sup> "By 1984, the differences between RAP and Generally Accepted Accounting Principles ("GAAP") net worth at S&L's stood at \$9 billion. This meant that the industry's capital position, or stated differently, its cushion to absorb losses was overstated by \$9 billion."<sup>40</sup> By 1986, the differential had swelled to \$13.3 billion, and at the close of 1988 the industry's capital position had proliferated to \$14.9 billion.<sup>41</sup>

FIRREA specifically addresses this problem by mandating that the Director ("DOTS") of the Office of Thrift Supervision, ("OTS") "prescribe uniform accounting and disclosure standards for 'savings associations', to be used in determining savings associations compliance with all applicable regulations."<sup>42</sup> Specifically, GAAP will be applied to depository institutions to determine their compliance with applicable regulations in the same way that these principles are used for such purposes within the federal banking agencies.<sup>43</sup>

The Director is afforded discretion in prescribing accounting standards that are more stringent than GAAP, if it is determined that such standards are needed "to ensure the safe and sound operation of savings associations."<sup>44</sup> At a minimum, FIRREA dictates that the standards employed must be as stringent as those utilized by the Comptroller of the Currency when supervising national banks.<sup>45</sup> Such rigid requirements

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balance sheet from the related asset account." G. Johnson and J. Gentry, Jr., *Finney and Miller's Principles of Accounting* 8th ed. (1980).

37. See House Report, *supra* note 1, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News, at 94. Excluded contra asset accounts include: "loans in process, unearned discounts, and deferred fees and credits." *Id.*

38. A net worth certificate is a "capital assistance certificate authorized by the Garn-St. Germain Depository Institution Act of 1982 to assist savings institutions in meeting mandatory net worth requirements. The assistance takes the form of a paper for paper exchange in which an eligible institution issues capital instruments called Net Worth Certificates to the [FHLBB] or the [FDIC]." Barron's Dictionary of Banking Terms (1990).

39. See *id.*

40. *Id.*

41. See *id.*

42. FIRREA, *supra* note 1, § 301(4)(b)(1), 103 Stat. at 280 (to be codified at 12 U.S.C. § 1463).

43. See *id.* § 301(4)(b)(2)(A), 103 Stat. at 280 (to be codified at 12 U.S.C. § 1463).

The standard within the Federal banking industry is one that insures "safety and soundness" in order to "provide a financially stable industry that meets the public's credit and other financial needs . . ." See Barron's Dictionary of Banking Terms (1990).

44. *Id.* § 301(4)(b)(3), 103 Stat. at 280 (to be codified at 12 U.S.C. § 1463).

45. See *id.* § 301(4)(c), 103 Stat. at 280 (to be codified at 12 U.S.C. § 1463).

[The] Comptroller of the Currency [is the] chief regulator of national banks, appointed by the President for a five-year term, with Senate confirmation. The Office of the Comptroller of the Currency is the supervisory agency for nationally chartered banks. Each NATIONAL BANK is required to file a statement of condition not less than four times a year. National bank examiners, under the direction of 14 regional administrators of national banks, conduct national bank examinations at least three times every two years. The Comptroller of the

leave no doubt that FIRREA intended to eliminate gimmick accounting.

### B. *Qualified Thrift Lender Test*

FIRREA also modifies the Qualified Thrift Lender ("QTL") Test, which Congress created as part of the Competitive Equality Banking Act of 1987 ("CEBA")<sup>46</sup> to "ensure that savings associations fulfill their mission of providing affordable home financing."<sup>47</sup> For an insured institution to qualify as a thrift lender under CEBA, its average qualified thrift investments<sup>48</sup> must equal or exceed sixty percent of the total tangible assets of the thrift on an average basis in three out of four quarters, and in two out of three years.<sup>49</sup> "However, companies that owned a thrift before March 5, 1987 would be allowed to keep their thrift regardless of the company's activities."<sup>50</sup>

Moreover, a savings association that fails CEBA's QTL test is not eligible for advances from a Federal Home Loan Bank.<sup>51</sup> "In addition, a unitary savings and loan holding company controlling a savings association that failed the QTL test [is] subject to certain restrictions on its activities."<sup>52</sup>

CEBA's Qualified Thrift Lender test was retained until July 1, 1991,<sup>53</sup> at which point FIRREA's regulations will take effect. Under FIRREA's modified QTL test, a savings association will be classified as a qualified thrift lender only if at least seventy percent of the savings association's portfolio assets are qualified thrift investments.<sup>54</sup> These investments are defined as the total assets of the thrift, "minus the sum of (i) goodwill and other intangible assets; (ii) the value of property used by the savings association to conduct its business; and (iii) liquid assets . . . not exceeding . . . ten percent of the savings associations' total assets."<sup>55</sup>

In an effort to induce thrifts to invest in a financially sound manner, FIRREA narrows the type of assets that may be included as qualified

Currency also serves as one of the three directors of the Federal Deposit Insurance Corp.

Barron's Dictionary of Banking Terms (1990).

46. Pub. L. No. 100-86, 101 Stat. 552 (1987).

47. *Regulation of Savings Associations*, *supra* note 24, at 1065 (citing H.R. Rep. No. 261, 100th Cong., 1st Sess. 137 (1987)).

48. For a complete listing of assets includable without limit and those subject to a percentage restriction, see FIRREA, *supra* note 1, § 303(a)(4)(C), 103 Stat. at 347 (to be codified at 12 U.S.C. § 1467a).

49. See 12 U.S.C.A. § 1730a(o)(1)(B) (West 1989).

50. S. Rep. No. 100-19, 100th Cong., 1st Sess. 15, *reprinted in* 1987 U.S. Code Cong. & Admin. News 489, 505.

51. See *id.* at 14, *reprinted in* 1987 U.S. Code Cong. & Admin. News 489, 504.

52. *Regulation of Savings Associations*, *supra* note 24, at 1065 (citing 12 U.S.C.A. § 1730a(c)(3) (West 1989)).

53. See FIRREA, *supra* note 1, § 303(b), 103 Stat. at 350 (to be codified at 12 U.S.C. § 1467a).

54. See *id.* § 303(a)(1)(A), 103 Stat. 344 (to be codified at 12 U.S.C. § 1467a).

55. *Id.* § 303(a)(4)(B), 103 Stat. at 347 (to be codified at 12 U.S.C. § 1467a).

thrift investments.<sup>56</sup> Similarly, the Act allows savings associations to double the value of certain loans and investments for the purpose of the QTL test.<sup>57</sup> FIRREA further states that thrifts must meet a seventy-percent qualified thrift-asset requirement on a daily or weekly basis "for the 2-year period beginning on July 1, 1991, and for each 2-year period thereafter."<sup>58</sup> This provision makes it considerably more difficult for a thrift to satisfy the QTL test. "By basing part of the QTL Test on a two year average, the revised test makes it more difficult for an association to requalify if the association fails to meet the seventy percent requirement by a large margin or for an extended period of time."<sup>59</sup> A thrift that marginally fails the QTL Test or fails to satisfy the test for a short time, however, will be able to requalify promptly.<sup>60</sup>

Currently, a thrift that does not meet the QTL test is restricted in terms of investments, activities, branching, advances and dividends.<sup>61</sup> Additional limitations attach if a thrift fails to qualify as a QTL within three years of August 9, 1989.<sup>62</sup> These limitations include the confinement of the thrift's activities to those comporting to a national bank. Moreover, the limitations mandate repayment of "outstanding advances from any Federal home loan bank as promptly as can be prudently done consistent with the safe and sound operation of the saving association."<sup>63</sup>

Finally, a member that does not satisfy the QTL test may only receive capital advances if it currently holds stock in the Federal Home Loan Bank in an amount greater than or equal to five percent of the thrift's total advances, divided by<sup>64</sup> its actual thrift investment percentage.<sup>65</sup> However, the Director may grant a member thrift a grace period of up to three years in order to achieve compliance.<sup>66</sup>

56. For a complete listing of assets subject to percentage restrictions, see *id.* § 303(a)(4)(c)(iii)(I)-(II), 103 Stat. 347 (codified at U.S.C. § 1467a).

57. For a complete listing of the assets that are doubled when determining compliance with the qualified thrift lender test, see FIRREA, *supra* note 1, § 303(a)(4)(c)(iii)(III)-(IV), 103 Stat. at 348 (codified at U.S.C. § 1467a).

The effect of doubling the value of certain assets in computing the QTL test is to place a premium on certain types of assets in order to promote safety within the system.

58. *Id.* § 303(a)(1)(B), 103 Stat. at 344 (to be codified at 12 U.S.C. § 1467a).

59. *Regulation of Savings Associations*, *Supra* note 24, at 1068.

60. *See id.*

61. *See* FIRREA, *supra* note 1, § 301(m)(3)(B)(i), 103 Stat. at 332-333 (to be codified at 12 U.S.C. § 1467a).

62. *See id.* § 301(m)(3)(B)(ii), 103 Stat. at 332-333 (to be codified at 12 U.S.C. § 1467a).

63. *Id.* § 301(m)(3)(B)(ii)(II), 103 Stat. at 332-333 (to be codified at 12 U.S.C. § 1467a).

64. *See id.* § 714(b)(e)(1)(A), 103 Stat. at 420 (to be codified at 12 U.S.C. § 1430(a)).

65. *See id.* § 714(b)(e)(1)(B), 103 Stat. at 420 (to be codified at 12 U.S.C. § 1430(a)).

"The term 'actual thrift investment percentage' means the percentage determined by dividing—

(i) the amount of the qualified thrift investments of an insured institution, by

(ii) the total amount of tangible assets of such insured institution." 12 U.S.C. § 1730a(o)(5)(A).

66. *See id.* § 301(10)(c)(5), 103 Stat. at 322 (to be codified at 12 U.S.C. § 1467(a)).



### C. Improved Capital Requirements

A savings association's capital<sup>67</sup> provides "a cushion against losses incurred in times of poor financial performance."<sup>68</sup> The Bush Administration and Congress believed that in order to avoid another staggering crisis in the S&L industry, it is vital that thrifts are adequately capitalized.<sup>69</sup> It is the function of the Director of the OTS ("DOTS") "to prescribe and maintain adequate capital standards for savings associations."<sup>70</sup>

These standards include a leverage limit, a tangible capital requirement and a risk-based capital requirement.<sup>71</sup> In order to comply with the Act's capital standards, a savings association must meet all three requirements.<sup>72</sup> FIRREA also mandates that the capital standards be no less stringent than those that apply to national banks.<sup>73</sup>

The leverage limit requires thrifts "to maintain core capital<sup>74</sup> in an amount equal to [no] less than [three] percent of the savings association's total assets."<sup>75</sup> The three percent core capital standard became effective June 1, 1990.<sup>76</sup> "Beginning then, certain qualifying intangible's [sic] can be included on a declining basis until, by January 1, 1995, the 3 percent requirement must be met without any qualifying intangibles."<sup>77</sup> FIRREA's phasing out of supervisory goodwill<sup>78</sup> is set forth below:

67. The Comptroller of the Currency defines capital as follows:

"(a) *Capital*. The term "capital" as used in provisions of law relating to the capital of national banking associations shall include the amount of common stock outstanding and unimpaired plus the amount of perpetual preferred stock outstanding and unimpaired." 12 C.F.R. § 3.100(a) (January 1, 1990).

68. House Report, *supra* note 4, at 310, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 106.

69. *See id.*

70. *Developments in Banking Law: 1989*, 9 Ann. Rev. Banking L. 16 (1990).

71. *See* FIRREA, *supra* note 1, § 301(5)(t)(2)(A)-(C), 103 Stat. at 304 (to be codified at 12 U.S.C. § 1464).

72. *See id.* § 301(5)(t)(1)(B), 103 Stat. at 304 (to be codified at 12 U.S.C. § 1464).

73. *See id.* § 301(5)(t)(1)(C), 103 Stat. at 304 (to be codified at 12 U.S.C. § 1464).

74. Core capital is defined as core capital as defined by the Comptroller of the Currency for national banks, less any unidentifiable intangible assets, plus any purchased mortgaged servicing rights excluded from the Comptroller's definition of capital but included in calculating the core capital of savings associations. *See* FIRREA, *supra* note 1, § 301(5)(t)(9)(A), 103 Stat. at 310 (to be codified at 12 U.S.C. § 1464).

75. *Id.* § 301(5)(t)(2)(A), 103 Stat. at 304 (to be codified at 12 U.S.C. § 1464).

76. *See* House Report, *supra* note 4, at 311, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 107.

77. *Id.* at 311, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 107.

78. Supervisory goodwill is defined as, "supervisory goodwill existing on April 12, 1989, amortized on a straightline basis over the shorter of—

(i) 20 years, or

(ii) the remaining period for amortization in effect on April 12, 1989." FIRREA *supra* note 1, § 301(5)(t)(9)(B), 103 Stat. at 310 (to be codified at 12 U.S.C. § 1464).

*available percentage of supervisory goodwill  
includable in core capital for the period*

Prior to 1/1/92	1.500
1/1/92 - 12/31/92	1.000
1/1/93 - 12/31/93	.750
1/1/94 - 12/31/94	.375
After 1/1/95	0 <sup>79</sup>

The tangible capital requirement states that a thrift must maintain tangible capital comprising at least 1.5% of total assets.<sup>80</sup> Tangible capital is defined as core capital minus any intangible assets as defined by the Comptroller of the Currency for national banks.<sup>81</sup>

The final standard is the risk-based capital requirement, which mandates that thrifts have total capital of eight percent of total assets, adjusted for relative risk, by December 31, 1992.<sup>82</sup> "The risk based capital requirement will be phased-in over two transition periods."<sup>83</sup> By December 31, 1990, savings associations were required to have capital equal to eighty percent of the final risk-based requirement.<sup>84</sup> Currently, thrifts are required to meet ninety percent of the total capital requirement until December 31, 1992, when full compliance becomes mandatory.<sup>85</sup> The Act states that thrifts

may deviate from the risk-based capital standards applicable to national banks to reflect interest-rate risk or other risks, but such deviations shall not . . . result in materially lower levels of capital being required of saving associations under the risk-based capital requirement than would be required under the risk-based capital standards applicable to national banks.<sup>86</sup>

If a savings association failed to comply with FIRREA's capital standards requirement prior to January 1, 1991, the Director had the discretion to restrict that thrift's asset growth<sup>87</sup> on a case-by-case basis. In addition, within sixty days of the date of non-compliance, the thrift is required to submit a plan that:

- (i) addresses the savings association's need for increased capital;
- (ii) describes the manner in which the savings association will increase its capital so as to achieve compliance with capital standards;

79. *See id.* § 301(5)(t)(9)(C), 103 Stat. at 310 (to be codified at 12 U.S.C. § 1464).

80. *See id.* § 301(5)(t)(2)(B), 103 Stat. at 304 (to be codified at 12 U.S.C. § 1464(t)(2)(B)).

81. *See id.* § 301(5)(t)(9)(C), 103 Stat. at 310 (to be codified at 12 U.S.C. § 1464(t)(9)(C)).

82. *See Regulation of Savings Associations, supra* note 24, at 1052.

83. *Id.*

84. *See id.*

85. *See id.*

86. FIRREA, *supra* note 1, § 301(5)(t)(2)(C), 103 Stat. at 304 (to be codified at 12 U.S.C. § 1464(t)(2)(C)).

87. *See id.* § 301(5)(t)(6)(A)(i), 103 Stat. at 307 (to be codified at 12 U.S.C. § 1464(t)(6)(A)(i)).

(iii) specifies the types and levels of activities in which the savings association will engage;

(iv) requires any increase in assets to be accompanied by an increase in tangible capital not less in percentage amount than the leverage limit then applicable;

(v) requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and

(vi) is acceptable to the director.<sup>88</sup>

The DOTS will consider any material non-compliance with the plan to be an unsafe and unsound practice.<sup>89</sup> Beginning January 1, 1991, the DOTS will prohibit asset growth in non-complying thrifts<sup>90</sup> with some exceptions.<sup>91</sup> Further, the DOTS will require savings associations that are not in compliance with the Act's "capital standards to comply with a capital directive issued by the Director."<sup>92</sup> This directive curtails the thrift's ability to pay dividends and suspend outlays for compensation.<sup>93</sup>

#### D. Office of Thrift Supervision<sup>94</sup>

FIRREA also amends the Home Owner's Loan Act of 1933<sup>95</sup> by supplanting the Federal Home Loan Bank Board ("Bank Board") with the newly created OTS.<sup>96</sup> The OTS is subject to the oversight of the Secretary of the Treasury<sup>97</sup> and "is headed by a director who is the primary federal regulator of both federal and state-chartered savings associations."<sup>98</sup>

Congress authorized the DOTS to prescribe regulations and issue orders that are necessary to carry out FIRREA and all other laws within his jurisdiction.<sup>99</sup> In general, it is the DOTS role to "provide for the examination, safe and sound operation, and regulation of savings

88. *Id.* § (5)(t)(6)(A)(ii)(I)-(VI), 103 Stat. at 307 (to be codified at 12 U.S.C. § 1464(t)(6)(A)(ii)(I)-(II)).

89. *See id.* § (5)(t)(6)(E), 103 Stat. at 308 (to be codified at 12 U.S.C. § 1464(t)(6)(E)).

90. *See id.* § 301(5)(t)(7)(B), 103 Stat. at 308 (to be codified at 12 U.S.C. § 1464(t)(7)(B)).

91. These exceptions are listed at *id.* at § 301(5)(t)(7)(C), 103 Stat. at 308-09 (to be codified at 12 U.S.C. § 1464(t)(7)(C)).

92. *Id.* § 301(5)(t)(6)(B)(ii), 103 Stat. at 307 (to be codified at 12 U.S.C. § 1464(t)(6)(B)(ii)).

93. *See id.*

94. *See Note, The Office of Thrift Supervision*, in *Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration*, 59 *Fordham L. Rev.* S363 (1991).

95. Ch. 64, 48 Stat. 128 (1933) (codified as amended 12 U.S.C. §§ 1461-1468 (1988)).

96. *See FIRREA, supra note 1*, § 301(3)(e)(1), 103 Stat. at 278 (to be codified at 12 U.S.C. § 1462a(e)(1)).

97. *See id.* § 301(3)(b)(1), 103 Stat. at 278 (to be codified at 12 U.S.C. § 1462a(b)(1)).

98. *Regulation of Savings Associations, supra note 24*, at 1025, (footnotes omitted).

99. *See id.*

associations."<sup>100</sup>

Specifically, the Director's responsibilities include making an annual report to Congress, as well as appointing and compensating all employees of the OTS.<sup>101</sup> Further, the Director is imbued with all authority originally vested in the Bank Board or its chairman that was not expressly delegated to another agency or subject to repeal.<sup>102</sup>

### E. Improved Enforcement Powers

FIRREA expands the enforcement powers and increases both civil and criminal penalties for institutions and individuals who violate the Act or an order of an authorized agency.<sup>103</sup> The strengthened sanctions are designed to "give a clear signal to those who would violate federal banking laws that such conduct would not be tolerated."<sup>104</sup> Regulators have estimated that fraud or insider trading accounted for as much as forty percent of all failed savings associations.<sup>105</sup>

The Act sets forth an expansive definition of "persons participating in the conduct of the affairs"<sup>106</sup> of a financial institution. Such "persons" include "(a) employees, agents, consultants and shareholders, (b) parties proposing a change in control, (c) independent contractors,<sup>107</sup> such as appraisers, attorneys and accountants (who are not otherwise employees or insiders covered within category (a)), and (d) such other persons as the agencies may prescribe by regulations."<sup>108</sup> This language significantly broadens the civil enforcement powers of regulatory agencies by expanding the number of potentially liable persons.

100. FIRREA, *supra* note 1, § 301(4)(a)(1), 103 Stat. at 280 (to be codified at 12 U.S.C. § 1463(a)(1)).

101. *See id.* § 301(3)(f),(g)(1), 103 Stat. at 278 (to be codified at 12 U.S.C. § 1462a(f),(g)(1)).

102. *See id.* § 301(3)(e)(1)-(2), 103 Stat. at 278-279 (to be codified at 12 U.S.C. § 1462a).

103. *See House Report, supra* note 4, at 311, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 107.

104. *See id.*

105. *See id.* at 300, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 96. *But cf. Green, After The Fall: The Criminal Law Enforcement Response to the S&L Crisis*, in *Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration*, 59 *Fordham L. Rev.* S155, S162 (1991).

106. *Id.* at 391-392, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 187-188.

107. Institution-affiliated independent contractor means "any independent contractor (including any attorney, appraiser or accountant) who knowingly or recklessly participates in —

(A) any violation of any law or regulation;

(B) any breach of fiduciary duty; or

(C) any unsafe or unsound practice,

which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on the insured credit union." FIRREA, *supra* note 1, § 901(a)(3), 103 Stat. at 446 (to be codified at 12 U.S.C. § 1786(r)(3)).

108. *House Report, supra* note 4, at 391-392, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 187-188.

### 1. Cease and Desist Orders

FIRREA further amends the Federal Deposit Insurance Act ("FDIA")<sup>109</sup> with regard to cease-and-desist orders. First, the Act "clarifies the agencies' authority to issue an order requiring persons and institutions to take affirmative action to correct certain conditions."<sup>110</sup> Furthermore, the authority to issue a cease and desist order under FIRREA includes the ability to place limits on activities and functions of insured thrifts or any affiliates.<sup>111</sup>

Moreover, FIRREA expands FDIA's provisions for temporary cease and desist orders. A temporary cease and desist order is the appropriate remedy when an insured institution's books and records are so incomplete or inaccurate that the financial condition of that institution cannot be determined through normal supervisory procedures.<sup>112</sup> The temporary order may require either termination of the activity causing the omission or inaccuracy, or affirmative action to restore the books to a complete and accurate state.<sup>113</sup>

### 2. Suspension and Removal

The FDIA<sup>114</sup> and the Federal Credit Union Act<sup>115</sup> follow different standards for removal actions, depending on when the indiscretion occurred.<sup>116</sup> FIRREA combines the two and makes legal grounds for removal and suspension the same, irrespective of the timing of the misconduct.<sup>117</sup> The appropriate banking regulatory agency must show (i) that an institution-affiliated party has violated any law or regulation, a final cease and desist order, a written condition imposed by an appropriate federal banking agency, or any written agreement between the institution and the federal banking agency,<sup>118</sup> or (ii) participated in any unsafe or unsound practice with any insured savings association or business institution or<sup>119</sup> (iii) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty."<sup>120</sup>

109. 12 U.S.C. § 1818 (1988).

110. House Report, *supra* note 4, at 392, reprinted in 1989 U.S. Code Cong. & Admin. News at 188.

111. See FIRREA, *supra* note 1, § 902(a)(1)(C)(7), 103 Stat. at 451 (to be codified at 12 U.S.C. § 1818(b)(7)).

112. See *id.* § 902(a)(2)(B)(3)(A), 103 Stat. at 451 (to be codified at 12 U.S.C. § 1818(c)(3)(A)).

113. See *id.* § 902(a)(2)(B)(3)(A)(i)-(ii), 103 Stat. at 451 (to be codified at 12 U.S.C. § 1818(c)(3)(A)(i)-(ii)).

114. 12 U.S.C. § 1811 (1988).

115. 12 U.S.C. § 1751 (1988).

116. See House Report, *supra* note 4, at 392, reprinted in 1989 U.S. Code Cong. & Admin. News at 188.

117. See *id.* at 392, reprinted in 1989 U.S. Code Cong. & Admin. News at 188.

118. See FIRREA, *supra* note 1, § 903(a)(1)(i)(I)-(IV), 103 Stat. at 453 (to be codified at 12 U.S.C. § 1818(e)(1)).

119. See *id.*

120. *Id.*

Further, the agency must show that, by reason of such activity described above, (i) the depository institution has suffered or is likely to suffer a financial loss or some other harm, or (ii) the depositors have been or could be prejudiced, or (iii) the violating party has received some benefit from such impropriety, which involves personal dishonesty or demonstrates willful disregard for the safety or soundness of such institution.<sup>121</sup> Once all of the above requirements have been satisfied, the agency may serve upon the violating party a written notice of the agency's intention either to remove that party from office, or to prevent such party from further participating in the activities of any insured depository institution.<sup>122</sup>

### 3. Civil Money Penalties

The Act also amends the FDIA so that civil money penalties are no longer limited to violations of cease-and-desist orders.<sup>123</sup> FIRREA now allows for civil money penalties to be assessed against any depository institution that violates any law or regulation, final or temporary order, written condition imposed by an appropriate Federal banking agency, or written agreement between such institution and such agency.<sup>124</sup> Further, civil money penalties are raised from \$100 or \$1000 to \$5000 per day during the time of the violation.<sup>125</sup> The Act also raises the maximum civil penalties to \$1 million for individuals and the lesser of \$1 million or 1% of an institution's total assets.<sup>126</sup>

### 4. Criminal Penalties

The Act strengthens criminal sanctions by raising the maximum penalty from a fine of not more than \$5000 and/or 1 year imprisonment,<sup>127</sup> to a fine of not more than \$100,000 per day or 1 year imprisonment or both for misdemeanors.<sup>128</sup> These penalties attach to knowing violations of the Act's provisions, or violations of regulatory orders issued by appropriate regulatory agencies under the Act.<sup>129</sup> FIRREA makes it a felony intentionally to deceive, defraud or derive significant profits from

121. *See id.* § 903(a)(1)(B)(C), 103 Stat. at 453 (to be codified at 12 U.S.C. § 1818(e)(1)).

122. *See id.* § 903(a)(1), 103 Stat. at 453 (to be codified at 12 U.S.C. § 1818(e)(1)).

123. House Report, *supra* note 4, at 393, reprinted in 1989 U.S. Code Cong & Admin. News at 189.

124. *See* FIRREA, *supra* note 1, § 907(a)(2)(A)(i)-(iv), 103 Stat. at 462 (to be codified at 12 U.S.C. § 1818(i)(2)).

125. *See* FIRREA, *supra* note 1, § 907(a)(2)(A), 103 Stat. at 462-463 (to be codified at 12 U.S.C. § 1818(i)(2)).

126. *See id.* § 907(i)(F)(iv)(I)(II)(aa)(bb), 103 Stat. at 474 (to be codified at 12 U.S.C. § 1972(2)(F)).

127. 12 U.S.C. § 1818(j) (1988).

128. *See* FIRREA, *supra* note 1, § 907(j)(a)(1)-(2), 103 Stat. at 475 (to be codified at 12 U.S.C. § 1818(j)).

129. *See id.* § 907, 103 Stat. at 475 (to be codified at 12 U.S.C. § 1847).

any knowing violation of the Act.<sup>130</sup> The corresponding penalty for such offense is a fine of not more than \$1 million per day and/or five years imprisonment.<sup>131</sup> FIRREA similarly imposes felony sanctions for knowingly violating, any order and participating in any manner in the affairs of a depository institution or the like as defined by the Act.<sup>132</sup>

#### F. Federal Deposit Insurance Corporation<sup>133</sup>

FIRREA overhauls the insurance system previously in place by replacing the Federal Savings and Loan Insurance Corporation ("FSLIC") with the Savings Associations Insurance Fund ("SAIF").<sup>134</sup> The newly constructed SAIF will insure all those institutions formerly covered by the FSLIC.<sup>135</sup> Similarly, FIRREA calls for the dissolution of the Permanent Insurance Fund ("PIF"). In its place will emerge the Bank Insurance Fund ("BIF"), which insures those banks previously insured by the PIF.<sup>136</sup> The newly formed funds will be "(1)maintained and administered by the Corporation; (2)maintained separately and not commingled; and (3)used by the Corporation to carry out its insurance purposes in the manner provided in this subsection."<sup>137</sup>

The Federal Deposit Insurance Corporation ("FDIC" or "Corporation"),<sup>138</sup> however, remains the insurer of deposits at banks and savings associations that are entitled to the benefits defined by the FDIA. While the FDIC is not the main federal regulator of thrifts,<sup>139</sup> FIRREA expands the authority of the Corporation to take enforcement action against thrifts.<sup>140</sup> The FDIC's Board of Directors may recommend that the DOTS take any authorized enforcement actions specified by the Act.<sup>141</sup> If the DOTS fails to follow the FDIC's recommendation within sixty days, the Board of Directors may authorize the Corporation to take the necessary corrective measures. Before any action is taken the Board

130. *See id.*

131. *Id.*

132. *See* FIRREA, *supra* note 1, § 908(a)(j), 103 Stat. at 477 (to be codified at 12 U.S.C. § 1818(j)).

133. *See* Note, *The FDIC's Enhanced Powers Over Savings Associations: Does FIRREA Make It "SAIF"?*, in Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S381 (1991); Note, *A Note to Congress and the FDIC: After FIRREA, Where's the BIF?*, in Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S411 (1991).

134. *See* FIRREA, *supra* note 1, § 211(6), 103 Stat. at 219 (to be codified at 12 U.S.C. § 1821(a)).

135. *See id.* §§ 401, 211(3), 103 Stat. at 354, 219 (to be codified at 12 U.S.C. § 1821(a)(4)-(7)).

136. *See id.* § 211(m)(6), 103 Stat. at 218-219 (to be codified at 12 U.S.C. § 1821(a)).

137. *Id.* § 211(4)(a)-(c), 103 Stat. at 218-219 (to be codified at 12 U.S.C. § 1821(a)).

138. *See* 12 U.S.C. § 1811 Federal Deposit Insurance Act.

139. *See Regulation of Savings Associations, supra* note 24, at 1026.

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

141. *See id.* § 912(t)(1), 103 Stat. at 482-483 (to be codified at 12 U.S.C. § 1818).

must determine whether: the thrift is unsafe or unsound, or whether by not taking action, the thrift will continue to utilize unsafe or unsound business practices.<sup>142</sup>

### G. Resolution Trust Corporation<sup>143</sup>

FIRREA also amends the Federal Home Loan Bank Act<sup>144</sup> to establish the Resolution Trust Corporation ("RTC")<sup>145</sup> under the exclusive management of the FDIC.<sup>146</sup> To develop a strategic plan to aid the RTC in meeting its goals,<sup>147</sup> FIRREA also establishes the Oversight Board, which consists of the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of Housing and Urban Development, and two independent members appointed by the President with the advice and consent of the Senate.<sup>148</sup> These offices will manage and resolve all cases involving depository institutions that were insured by the FSLIC before the enactment of FIRREA and for which a conservator or receiver had been appointed between January 1, 1989 and August 9, 1989 or will be appointed before August 9, 1992.<sup>149</sup> The RTC is also responsible for managing the Federal Asset Disposition Association and conducting its operations in a manner that maximizes the return from the sale or disposition of failed institutions.<sup>150</sup> At the same time, the RTC must make efforts to minimize the effect of these transactions on real estate and financial markets,<sup>151</sup> while making the most efficient use of federally acquired funds.<sup>152</sup> The RTC must balance the above-mentioned interests while minimizing losses<sup>153</sup> and preserving a market for low and moderate income individuals.<sup>154</sup>

### CONCLUSION

The demise of the S&L industry mandated sweeping legislative action.

142. See *id.* § 912(t)(2)(A)-(B), 103 Stat. at 483 (to be codified at 12 U.S.C. § 1818).

143. See Note, *The Resolution Trust Corporation: Waste Management and the S&L Crisis*, in Annual Survey of Financial Institutions and Regulation, *The S&L Crisis: Death and Transfiguration*, 59 Fordham L. Rev. S339 (1991).

144. 12 U.S.C. § 1421 et seq.

145. House Report, *supra* note 4, at 356, reprinted in 1989 U.S. Code Cong. & Admin. News at 152.

146. See FIRREA, *supra* note 1, § 501(b)(1)(C), 103 Stat. at 364 (to be codified at 12 U.S.C. § 1441(a)).

147. See *id.* § 501(a)(14)(A)-(B), 103 Stat. at 367 (to be codified at 12 U.S.C. § 1441(a)).

148. See *id.* § 501(a)(3)(A)(i)-(iv), 103 Stat. at 364 (to be codified at 12 U.S.C. § 1441(a)).

149. See *id.* § 501 (b)(3)(A), 103 Stat. at 369 (to be codified at 12 U.S.C. § 1441(a)).

150. *Id.* § 501 (b)(3)(C)(i), 103 Stat. at 369 (to be codified at 12 U.S.C. § 1441(a)).

151. *Id.* § 501(b)(3)(C)(ii), 103 Stat. at 369, (to be codified at 12 U.S.C. § 1441(a)).

152. *Id.* § 501 (b)(3)(C)(iii), 103 Stat. at 370 (to be codified at 12 U.S.C. § 1441(a)).

153. *Id.* § 501(b)(3)(C)(iv), 103 Stat. at 370 (to be codified at 12 U.S.C. § 1441(a)).

154. *Id.* § 501(b)(3)(C)(v), 103 Stat. at 370 (to be codified at 12 U.S.C. § 1441(a)).



As a result, FIRREA became law. The thrift industry must persevere if our American economy is to thrive. With that in mind, FIRREA attempts to rectify the flaws within the system and put the S&L industry back on course. This Note has highlighted FIRREA's effects and changes on the Office of Thrift Supervision, the Federal Deposit Insurance Company and the Resolution Trust Company. The following four notes will provide an in-depth analysis of these agencies, emphasizing the influences of recent developments on S&L's and commercial banks.

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