Nos. 14-5243, 14-5254, 14-5260, 14-5262

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

PERRY CAPITAL LLC, et al.,

Plaintiffs-Appellants,

v.

JACOB J. LEW,
in his official capacity as Secretary of the Treasury, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF BETTER MARKETS, INC. AS AMICUS CURIAE IN SUPPORT OF THE DEFENDANTS-APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), Better Markets states as follows:

(A) Parties, Intervenors, and *Amici*

All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for the Treasury Department.

Better Markets is a nonprofit organization that promotes the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including public advocacy, regulatory comment, litigation, and independent research.

Better Markets has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

(B) Consent

All parties have consented to the filing of this brief, with the exception of the Class Plaintiffs. Counsel for the Class Plaintiffs has not responded to the requests for consent made by counsel for Better Markets.

(C) Rulings Under Review

References to the rulings at issue appear in the Brief for the Treasury Department.

(D) Related Cases

Counsel is aware of no related cases within the meaning of D.C. Cir. R. 28(a)(1)(c). Cases involving similar issues and parties, pending in other courts, are listed in the Brief for the Treasury Department.

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

Statutes

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GLOSSARY

Class Pls. Br.	Brief of Class Plaintiffs
Fannie Mae	Federal National Mortgage Association
FHFA	Federal Housing Finance Agency
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act of 1989
Freddie Mac	Federal Home Loan Mortgage Corporation
GSEs	Government-Sponsored Enterprises—*i.e.*, Fannie Mae and Freddie Mac
HERA	Housing and Economic Recovery Act of 2008
Inst'l Pls. Br.	Brief of Institutional Plaintiffs
Third Amendment	Third Amendment to the Preferred Stock Purchase Agreements
Treasury Dep't Br.	Brief of the Treasury Department

INTRODUCTION

In 2008, a sustained pattern of reckless and illegal behavior by banks and other large financial institutions precipitated the worst financial crisis since the Great Crash of 1929, and the worst economy since the Great Depression. It wiped out $20 trillion of gross domestic product and caused incalculable human suffering, as millions of Americans lost their jobs, homes, and savings.[1] The government had to devote trillions of dollars in expenditures, backstops, and guarantees to rescue those institutions and to stabilize the U.S. and global economies.

It was during these tumultuous times that the government bailed out mortgage-finance giants Fannie Mae and Freddie Mac ("GSEs"), rescuing them from certain bankruptcy by placing them in conservatorship and providing them with hundreds of billions of dollars of life-saving capital.

Against this backdrop, the shareholders of Fannie Mae and Freddie Mac now want to second-guess the government's decisions, roll back measures taken to protect the public, and, in effect, restore the pre-crisis status quo, where the GSEs' profits flowed to shareholders but losses were foisted upon the taxpayers.

The shareholders' claims here have no merit under the law or basic principles

[1] *See* Better Markets, *The Cost of the Crisis: $20 Trillion and Counting* (July 2015), *available at* http://www.bettermarkets.com/costofthecrisis.

of fairness. Their legal theories run headlong into the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, a statute, forged in the crucible of the crisis, that grants the government extraordinarily broad authority to operate **or** wind down Fannie Mae and Freddie Mac as appropriate. HERA plainly insulates FHFA from shareholder lawsuits and requests for injunctive relief that could interfere with the complex and challenging task of salvaging the two largest mortgage financing institutions in history.

The appellants' effort to cast themselves and the GSEs as innocent victims of governmental predations is also meritless. It ignores the overwhelmingly beneficial and equitable results of the rescue. FHFA and Treasury (1) saved the GSEs from inevitable bankruptcy; (2) rehabilitated the GSEs and returned them to profitability; (3) broke the vicious cycle of mandatory dividend payments that threatened to erode the GSEs' still-fragile condition; (4) maintained the GSEs' important role in the housing-finance market; (5) salvaged some shareholder value; (6) paid creditors in full; and (7) returned to taxpayers the money pulled from their pockets to save the GSEs from collapse.

The appellants' arguments also ignore the paramount right of taxpayers to be protected ahead of investors who willingly gambled on the fate of the GSEs—in some cases with full knowledge of the GSEs' precarious condition. Further, they

ignore the GSEs' own irresponsible business practices that helped bring them to the brink of insolvency. And finally, the appellants' claims take no account of the government's critically important but unfinished effort to reform the mortgage-lending market and the GSEs' role in it so that taxpayers no longer have to guarantee the losses of those profit-making enterprises.

If the appellants succeed, the shareholders will lay claim to the GSEs' profits but the taxpayers will have to return money that is rightfully theirs. Worse, while profits would again flow to the GSEs, the taxpayers would be forced to continue serving as the guarantors of the GSEs' fortunes. Those fortunes swing up and down to this day, as Freddie Mac just reported a $475 million loss for the third quarter of this year.

Such an outcome would not only contravene the clear language and intent of applicable federal law, but also increase moral hazard, constrain the government's future ability to act appropriately during periods of crisis without being second-guessed, and inequitably favor the shareholders of the GSEs over the interests of the U.S. taxpayers. This Court should reject the appellants' claims and avoid these adverse consequences.

IDENTITY AND INTEREST OF BETTER MARKETS[2]

Better Markets, Inc. ("Better Markets") is a nonprofit organization that promotes the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including public advocacy, regulatory comment, litigation, and independent research. One of Better Markets' core objectives is the establishment of a regulatory and legal framework that is capable of preventing another crisis like the one that the financial sector inflicted on the nation in 2008. It also seeks to prevent taxpayers from having to pay for the rescue of failed financial institutions.

Better Markets has an interest in this case for three primary reasons. First, a ruling in favor of appellants would burden taxpayers by rescinding billions of dollars in repayments they rightfully received from the GSEs, and by restoring a deeply inequitable and risky pre-crisis status quo where the GSEs' profits flow to its shareholders but the substantial financial risks associated with their operation fall to the taxpayers.

Second, such a ruling will undermine the government's ability, when

[2] Amicus states that no party or party's counsel authored this brief in whole or in part. Further, no party, party's counsel, or any person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief.

confronted with new and unforeseen exigencies in our financial markets, to act decisively through legislation and regulatory action, without fear of opportunistic claimants later challenging their actions. It would discourage the dramatic steps sometimes necessary to avert disaster, and it would undermine confidence in the government's actions, potentially prolonging or exacerbating financial crises.

Finally, a ruling in favor of appellants will intensify the problem of moral hazard, increasing the likelihood of more financial crises. If Fannie Mae's and Freddie Mac's shareholders prevail, the message will be clear: Even financial institutions that engage in reckless behavior stand to receive—along with their shareholders—not only a generous taxpayer-funded bailout, but also the opportunity to later bite the hand that fed them by challenging the terms of their rescue and seeking once again to unfairly burden the U.S. taxpayers.

BACKGROUND

Before the financial crisis of 2008, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Company ("Freddie Mac") "owned or guaranteed over $5 trillion of residential mortgage assets, representing nearly half the U.S. mortgage market." Treasury Dep't Br. 1. As government-sponsored enterprises, or "GSEs," they pursued dual public and private missions: support the mortgage market and maximize returns for shareholders.

At the beginning of the financial crisis in 2008, the GSEs were on the verge of a spectacular implosion driven by the collapse of the housing market, massive fraud by the largest Wall Street banks in the sale of subprime loans and mortgage-backed securities, and the GSEs' own failure to hold sufficient capital.

By the summer of 2008, the financial condition of the GSEs continued to deteriorate, while the broader financial marketplace was approaching freefall. In March, Bear Stearns spiraled from apparent health to near-insolvency in a mere seventy-two hours, precipitating an unprecedented, mammoth federal bailout. In July, Fannie Mae confronted a brutal liquidity crunch. No longer able to raise cash by borrowing against its own securities, Fannie Mae watched helplessly as its stock price plummeted to $7.07 a share.[3] On July 30, as concerns about the financial condition of the GSEs and the systemic impact of their collapse mounted, Congress passed HERA.

HERA immediately enhanced oversight of the GSEs by creating the Federal Housing Finance Agency ("FHFA") as their primary regulator. It also gave the Treasury Department authority to extend secured lines of credit to the GSEs, purchase their mortgage securities, and inject capital into the enterprises. Finally, it

[3] Just a year earlier, it traded at $65.51. *See* Yahoo! Finance, FNMA Historical prices, *available at* http://finance.yahoo.com/echarts?s=FNMA+Interactive#.

granted FHFA the discretion to place them into either conservatorship or receivership. The latter power included the ability to liquidate the entities completely, without shareholder approval.

Shortly thereafter, Treasury officials determined that neither of the GSEs had adequate funds to weather the crisis, and further concluded that even a prodigious one-time infusion of government funds would not restore investor confidence.[4] It was clear that there was no private-sector solution.

On September 6, 2008, believing that the GSEs' collapse would trigger a catastrophic daisy chain of failures among major financial institutions—virtually all of which held immense reserves of bonds and preferred shares issued by the GSEs—FHFA exercised its authority under HERA to place the GSEs into conservatorship. The government provided emergency financing to the GSEs in exchange for preferred shares entitled to ten percent of the amount of taxpayer funds they received from Treasury.

The stock purchase agreements had to be amended twice as the GSEs required

[4] *See* Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* (Jan. 2011), at 318–20, *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

additional capital infusions to avoid collapse and bankruptcy, and Treasury ultimately provided more than $188 billion to the GSEs, although its commitment and risk was, in effect, unlimited. From January 1, 2008 through the third quarter of 2010, the GSEs lost $229 billion. For comparison, Lehman Brothers' balance sheet was about one-fifth the size of Fannie Mae's in 2008. The ramifications from Lehman's bankruptcy would have paled in comparison to the fallout if the GSEs had been allowed to fail.

In August of 2012, FHFA and Treasury ratified a third amendment ("Third Amendment") to the initial stock-purchase agreements that grants to Treasury a dividend equivalent to the total quarterly profits of the GSEs. At the time, Treasury noted that the Third Amendment would further a number of important objectives, including:

- ensuring that the GSEs' earnings would appropriately compensate taxpayers in return for their investments;
- ending the circular practice of advancing funds to the GSEs and then receiving those funds as dividends; and
- supporting the continued flow of mortgage credit.[5]

[5] Press Release, U.S. Dep't of the Treasury, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac ("Treasury

These interventions left the GSEs' creditors untouched, effectively paying them 100 cents on the dollar. It also salvaged some value for the shareholders, who would have been wiped out absent the government rescue. Among those shareholders was a group of hedge funds, including some of the appellants, who bought Fannie Mae and Freddie Mac stock for pennies per share—**after** the companies were placed in conservatorship—presumably betting on the government's recapitalization of the GSEs.

The housing markets had stabilized at the time of the Third Amendment, and the GSEs became profitable again in 2012. The GSEs posted profits in excess of $100 billion in 2013, giving rise to suggestions that the firms should be released from conservatorship. However, in 2014, the pendulum swung in the opposite direction, as the net earnings of both GSEs fell by more than 80%. In the third quarter of 2015, Freddie Mac actually posted a $475 million dollar loss, prompting FHFA director to observe that the GSEs had become "increasingly susceptible to the possibility of quarterly losses that could result in draws going forward."[6]

Press Release") (Aug. 17, 2012), *available at* https://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx.

[6] Steve Goldstein, *Fannie, Freddie May Need to Tap Treasury, FHFA Director Says*, MarketWatch (Nov. 3, 2015, 10:04 AM), http://www.marketwatch.com/story/fannie-freddie-may-need-to-tap-treasury-fhfa-director-says-2015-11-03.

SUMMARY OF ARGUMENT

This Court should affirm all aspects of the district court's decision. HERA bars the appellants' shareholder derivative claims because the statute clearly transfers the right to bring such claims to the FHFA. And HERA's broad anti-injunction provision operates as an insurmountable bar against appellants' claims for equitable relief. These conclusions follow from HERA's plain language, its underlying purposes, and the decisions of this and other courts.

As to motive and fairness, this Court should reject appellants' attempt to cast themselves and the GSEs as innocent victims of governmental predations. This inaccurate portrayal ignores the GSEs' own irresponsible conduct that contributed to their insolvency. Moreover, it ignores the fundamentally beneficial and equitable outcomes that the government was able to achieve. The government rescued and stabilized the GSEs, preserved their role in supporting the U.S. housing market, and afforded policymakers the time to fashion a comprehensive solution to the challenging problem of GSE reform. Further, the government repaid all creditors in full and reimbursed taxpayers for the outlays that saved the GSEs from collapse. Innocent taxpayers who never sought to invest in the GSEs deserve those payments far more than shareholders who assumed the risk of an equity stake in the GSEs, especially where those shareholders invested after the GSEs were placed in

conservatorship.

On legal and equitable grounds, all of the appellants' claims should be rejected.

ARGUMENT

I. The district court correctly ruled that HERA unambiguously bars the appellants' shareholder derivative claims and requests for equitable relief.

The district court correctly rejected the claims for relief in this case based on the plain language of HERA, its urgent policy objectives, and applicable case law. The district court was especially attentive to the extraordinary breadth of HERA and the dire circumstances in which Congress acted to protect our financial system and our economy from total collapse. This Court should also find guidance in the unique origins of HERA as it applies the language of the statute and assesses Congressional intent.

A. Congress intended FHFA to exercise broad and unfettered power over the GSEs to quickly and effectively address the unfolding crisis in the mortgage market.

The district court correctly observed that HERA is "a statute of exceptional scope that gave immense discretion to FHFA as a conservator." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014). A review of the statute confirms the point. In section after section, HERA confers broad powers and discretion on the

newly created FHFA. Even outside the context of a conservatorship, it empowers the FHFA director to prohibit executive compensation, to preapprove any financial products offered by the GSEs, to control the assessment of guarantee fees by the GSEs, and to exercise broad "incidental powers." *See* 12 U.S.C. §§ 4513, 4518, 4541, 4547, 4561.

The district court also properly weighed the looming meltdown in the mortgage market and dire threats to the broader economy that Congress was intent on addressing through HERA: "Given the systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile economy, among other housing-related perils, Congress enacted" HERA. *Perry Capital*, 70 F. Supp. 3d at 215.

Accordingly, HERA's overall content and structure, and the vitally important purpose it was urgently adopted to serve, confirm the plain reading of the statute by the district court: Congress meant exactly what it said when it transferred shareholder rights to the FHFA acting as conservator and when it insulated the agency from lawsuits that interfere with the exercise of that authority.

B. HERA bars shareholder derivative claims.

HERA precludes all shareholder derivative claims because it transfers the right to bring such claims to FHFA. This reading of the statute follows from its plain language, its underlying purposes, and the decisions of this and other courts.

HERA provides in relevant part that the FHFA—

> shall, as conservator or receiver, and by operation of law, immediately succeed to (i) **all** rights, titles, powers, and privileges of the regulated entity, and **of any stockholder**, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity.

12 U.S.C. § 4617(b)(2)(A)(i) (emphases added). This language clearly effects an automatic, immediate, and plenary transfer of rights to FHFA, including any right that a shareholder may have to bring a derivative action.

This Court has read HERA to precisely this end. In *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012), the Court held that HERA "plainly transfers shareholders' ability to bring derivative suits—a 'right[], title[], power[], [or] privilege[]'—to FHFA." The Fourth Circuit has also held that "the plain meaning of [HERA] is that **all** rights previously held by Freddie Mac's stockholders, including the right to sue derivatively, now belong **exclusively** to the [Federal Housing Finance] Agency." *La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188, 191 (4th Cir. 2011) (per curiam) (emphases added). A number of federal district courts have reached the same conclusion. *See In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790 (E.D. Va. 2009); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009); *In re Fannie Mae Secs. v. Raines*, 629 F. Supp. 2d 1, 3 (D.D.C. 2009).

Moreover, courts applying HERA's predecessor statute, the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, have arrived at the same conclusion, based upon virtually identical language. *See* 12 U.S.C. § 1821 (d)(2)(A) (FDIC "shall, as conservator or receiver, and by operation of law, succeed to . . . all rights, titles, powers, and privileges . . . of any stockholder"). In fact, it appears that every circuit that has examined this provision of FIRREA has concluded that the statutory language bars derivative actions. *See Lubin v. Skow*, 382 F. App'x 866, 871 (11th Cir. 2010) (per curiam); *Pareto v. FDIC*, 139 F.3d 696, 700–01 (9th Cir. 1998).

1. The explicit exception in HERA allowing shareholders to participate in the liquidation process confirms this reading of the law.

Appellants attempt to circumvent this body of authority by noting that, under HERA, stockholders retain the right to future distributions and the right to participate in a statutory claims process for the GSEs' residual assets. *See* Class Pls. Br. 24 (*citing* 12 U.S.C. § 4617(b)(2)(K)(i)).

But there is no meaningful nexus between the right to claim residual assets upon liquidation and the very different right to bring derivative actions with respect to an ongoing concern. Congress very logically could have—and did—allow one but not the other. Moreover, the existence of other carefully delineated exceptions to the

blanket assignment of shareholder rights suggests that Congress would have also included an express derivative-claims exception in the statute if it had intended one to exist.

2. The ban on derivative actions serves the purposes of HERA.

The district court rightly observed that it would be "odd" if "a statute like HERA…house[d] an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." *Perry Capital*, 70 F. Supp. 3d at 231. In insisting that this Court nonetheless carve out an exception to HERA's bar against derivative lawsuits, appellants claim that the district court did not appreciate the significance of the "unique and manifest conflict of interest that arises when a Government agency acting as conservator or receiver for a financial institution is asked *to sue the Government* for conduct that it (or a closely-connected agency) was responsible for creating." Class Pls. Br. 29. As a result, appellants argue, "allowing an exception based on such an **unusual circumstance** does not create an 'end-run'" around HERA. *Id.* (emphasis added).

This is illogical. The very premise of the derivative-suit mechanism is that the officers and directors of a corporate entity may be reluctant to hold themselves accountable. *See Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991). By removing the authority to sue from the GSEs' shareholders and transferring it to FHFA,

Congress knew full well that it was precluding such suits by shareholders, **even if** FHFA were conflicted about bringing certain claims to redress alleged injuries to the GSEs.[7] What appellants call an "unusual circumstance" is the exact circumstance in which HERA precludes shareholder derivative lawsuits. HERA's plain language unqualifiedly removes shareholders' ability to bring derivative claims **precisely when** FHFA is acting as conservator or receiver.

The reason for this bar is clear: Any conservator with the authority to take extraordinary measures aimed at salvaging a sprawling, insolvent institution may have to take actions that some shareholders might claim are damaging to their self-interest and the interests of the institution. But Congress appropriately concluded that, under the circumstances facing FHFA, such shareholder claims would interfere with the agency's ability to accomplish its larger public interest mission. The district court recognized the point, highlighting "congressional intent to decrease restrictions

[7] As a factual matter, FHFA and Treasury did nothing in this case that would give rise to the type of conflict of interest that appellants hypostasize. First, there was nothing improper or collusive about the relationship between FHFA and Treasury and no conflict of interest sprang from that interaction. *See Perry Capital*, 70 F. Supp. 3d at 232–34. Second, as demonstrated throughout the district court's opinion and the appellees' briefs, FHFA has acted fully within the ambit of its broad statutory authority throughout the conservatorship. Finally, as argued below, FHFA's actions—including the Third Amendment—were neither unreasonable nor inequitable.

governing the emergency scenario during which FHFA would need to conserve the viability of the GSEs." *Perry Capital*, 70 F. Supp. 3d at 230–31 n.30.

3. Appellants' argument lacks authoritative support in the case law.

Appellants further argue that "there are numerous courts holding" that HERA does not bar shareholders from bringing derivative claims when FHFA has a "manifest conflict of interest." Class Pls. Br. 24. But appellants fail to produce **any** case holding that there is a conflict-of-interest exception to HERA's bar against derivative claims. Instead, they present cases from outside this Circuit that involve the FDIC, FIRREA, and the receivership context. As demonstrated in FHFA's brief, the primary cases appellants rely on in their conflict-of-interest analysis, *First Hartford Corp. Pension Plan & Trust v. United States*, 194. F.3d 1279, 1295–96 (Fed. Cir. 1999), and *Delta Savings Bank v. United States*, 265 F.3d 1017, 1021–23 (9th Cir. 2001), are inapposite here, and wrongly decided in any event. *See* FHFA Br. 49–52.

Additionally, a number of predecessor cases to *First Hartford* and *Delta Savings Bank* that appellants cite suffer from a fatal defect, as they invoke a now-defunct common-law rule in defiance of FIRREA's plain language, which provides that federal receivers and conservators succeed to all rights of shareholders. *See*

Class Pls. Br. 26 (*citing Branch v. FDIC*, 825 F. Supp. 384, 404 (D. Mass. 1993); *Suess v. United States*, 33 Fed. Cl. 89, 94–95 (1995); *Slattery v. United States*, 35 Fed. Cl. 180, 183–84 (1996)).

Before FIRREA was enacted, the rule in this Circuit and elsewhere was that shareholders of a corporation under federal conservatorship or receivership could maintain a derivative suit if the conservator or receiver did not pursue such an action. *See, e.g.*, *Womble v. Dixon*, 752 F.2d 80, 82–83 (4th Cir. 1984). In FIRREA, however, Congress amended 12 U.S.C. § 1821 to make explicit that federal receivers and conservators succeed to the rights, titles, powers, and privileges of "**stockholders**," in addition to others, 12 U.S.C. § 1821(d)(2)(A)(i) (emphasis added)—thus transferring and extinguishing the shareholders' right to bring derivative claims.

Nevertheless, a few courts interpreting FIRREA have refused to follow this clear statutory command. *See Branch*, 825 F. Supp. at 404; *Suess*, 33 Fed. Cl. at 94–95, *Slattery*, 33 Fed. Cl. 89, 94–95. Appellants expressly characterize each of these cases as holding that: "FIRREA does not alter the settled rule that shareholders of failed national banks may assert derivative claims." Class Pls. Br. at 26. But these holdings are untenable in light of Congress's targeted amendment in FIRREA and

the resulting language transferring "all rights, titles, powers and privileges" of stockholders to federal conservators and receivers.

C. HERA blocks the equitable relief that appellants seek.

The district court correctly held that the plain language of HERA's broad anti-injunction provision operates as a bar against equitable relief. *Perry Capital*, 70 F. Supp. 3d at 220. HERA flatly declares that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or receiver." 12 U.S.C. § 4617(f). In the face of this language, the Appellants' sole hope for relief is to argue not that FHFA and Treasury abused the powers they had, but that they acted in **excess** of their statutory powers. Inst'l Pls. Br. 32-60;

But FHFA and Treasury acted fully within the boundaries of their expansive statutory authority. The Appellants' quarrel really is with the judgments that FHFA and Treasury made under their authority, and that is precisely what Congress immunized from attack through claims for equitable relief.

1. FHFA did not exceed its powers in the way it chose to conserve the GSEs' assets.

Appellants contend that the Third Amendment, pursuant to which the GSEs' profits (such as they are) flow back to the taxpayers, contravenes FHFA's

obligations as conservator to "preserve and conserve" the assets of the GSEs. Inst'l Pls. Br. 33. This argument is wrong for two reasons.

First, HERA does not impose any duty upon HERA to "preserve and conserve" the GSEs' assets. The statute lists that activity, along with many others, among the powers that the conservator "**may**" exercise, and in this context it scrupulously avoids use of the mandatory "shall." 12 U.S.C. § 4617(b)(2)(D) (emphasis added).

Second, the Third Amendment was fully consistent with the goal of preserving and conserving the assets and property of the GSEs. As amply explained in the appellees' briefs, it was necessary to interrupt the destructive cycle of mandatory dividend payments that the GSEs could not afford, followed by more draws against Treasury's commitment to make those payments, followed by the correspondingly higher dividend-payment obligations that represented a further drain on the GSEs' assets.

2. Appellants' narrow reading of HERA ignores an array of powers that Congress intended FHFA to use in combination, including the power to transfer any assets.

Appellants' argument cannot be reconciled with the grant of explicit authority to FHFA to "to **transfer or sell** any asset or liability" of the GSEs. 12 U.S.C. § 4617(b)(2)(G) (emphasis added). In light of this grant, it is impossible to read HERA

as forcing FHFA to preserve and conserve assets above all else. Congress clearly intended that FHFA can "transfer or sell" assets while simultaneously acting to "preserve and conserve" assets. Such a reading is consistent with the time-honored canon that statutes must be considered as a whole, with a view to reconciling their separate parts in order to render a reasonable overall interpretation. *See Massachusetts v. Morash*, 490 U.S. 107, 115 (1989).

Appellants challenge this view, characterizing FHFA's position as "an assertion of boundless authority to transfer assets" and insisting "[t]hat is not, and cannot be, the law." Inst'l Pls. Br. 42–43. This is incorrect.

As noted above, HERA's plain language actually does give FHFA the authority "to transfer or sell **any** asset or liability of the regulated entity . . . without **any** approval, assignment, or consent with respect to such transfer or sale." 12 U.S.C. § 4617(b)(2)(G) (emphasis added). And FHFA has never claimed "boundless authority to transfer assets"—only the authority to transfer assets in conjunction with other measures it adopts to preserve and conserve the GSEs' assets. Essentially, appellants urge the court to adopt a reading of the statute that comprehends the "preserve and conserve assets" provision of HERA as invalidating the "conservator may transfer or sell any asset" provision. This is not a reasonable interpretation of the statute.

3. HERA gives FHFA the broad authority to choose among divergent goals, and to draw upon a wide range of powers as necessary to accomplish those goals.

HERA makes clear that FHFA has the authority to pursue divergent goals; it is not duty-bound to pursue any particular one to the exclusion of others. For example, the statute provides that FHFA may be "appointed conservator or receiver for the purpose of **reorganizing, rehabilitating, or winding up** the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2) (emphasis added). Here, FHFA appropriately chose a course aimed at achieving a combination of objectives. It rescued and stabilized the GSEs so they could continue to function, while winding them down and preparing for a final resolution in accordance with a broader plan for reforming the housing-finance market. To this end, it drew upon both the authority to conserve assets and the authority to transfer or sell assets.[8]

[8] Appellants also complain that FHFA has failed to "rehabilitate [the GSEs] to **normal business operations**" in accordance with HERA. Inst'l Pls. Br. 33 (emphasis added). As a threshold point, HERA contains no obligation or even reference to rehabilitation of the GSEs to "normal business operations." Further, FHFA unquestionably has "rehabilitated" the GSEs, notwithstanding the benefits to Treasury under the Third Amendment. When the GSEs went into conservatorship, they were on the verge of collapse and certain bankruptcy. But now they are back from the brink—continuing to operate and having regained profitability at times.

Appellants have failed to show that FHFA exceeded its broad authority under HERA.

II. FHFA acted reasonably to achieve appropriate goals, and the Third Amendment was not unfair to the GSEs or its shareholders.

Appellants attempt to cast themselves and the GSEs as innocent victims of the FHFA's allegedly predatory decision to adopt the Third Amendment and transfer the GSEs' net profits to Treasury. This misleading narrative ascribes improper motives to the government and suggests that the Third Amendment was inherently unfair. For example, the brief of the institutional plaintiffs is infused with disparaging characterizations of the government's conduct: that it "robbed" shareholders, Inst'l Pls. Br. 2, and that it turned the GSEs into "cash cows for Treasury," *id.* at 17.

The district court correctly observed that questions of "motive" are not relevant to the substantive legal issues presented in this case. *Perry Capital*, 70 F. Supp. 3d at 226. While this is true, the appellants' depiction is distorted and factually unsupported. And by sanitizing the GSEs' actions that led them to the brink of collapse while demonizing the government's rescue efforts, the appellants threaten a significant harm. Their attempt to cast the GSEs as victim and the government as villain is dangerous revisionist history. A clear-eyed understanding of the past

financial crisis is essential if we are to complete the reform process, defend against its repeal, and prevent a future crisis.

The appellants' version of history omits a host of facts showing that from every perspective, the government's actions not only complied with the letter and spirit of HERA but also resulted in fundamentally fair and appropriate outcomes. Faced with a profoundly difficult task, FHFA managed to rescue and stabilize the GSEs, preserve their role in supporting the housing market, and afford policymakers the time and opportunity to decide how best to reconfigure the mortgage-lending market so that it becomes more stable and more fair to other market participants—a challenging aspect of financial reform that is still underway.

FHFA succeeded in accomplishing these objectives while at the same time minimizing the collateral damage: Taxpayers have been repaid in full, including at least some compensation for the extraordinary risks foisted upon them during the bailouts; other creditors have been made 100% whole; and, thanks to the government's infusion of almost $200 billion in funding, shareholders have retained some value in their equity in the GSEs.

A. The GSEs' risky conduct contributed to their own near-collapse.

The GSEs' plight in 2008 was driven by a number of factors, including the calamitous downturn in the housing market, the historic frauds perpetrated by Wall

Street firms in their sale of subprime mortgages and mortgage-backed securities, and lack of meaningful oversight in the derivatives markets. But the GSEs' own "fundamental structural flaws and poor decision-making" were also contributing causes. *See* U.S. Department of the Treasury and U.S. Department of Housing and Urban Development, Reforming America's Housing Finance Market 8 ("Reform Report") (Feb. 2011), *available at* https://www.treasury.gov/initiatives/Documents/Reforming%20America's%20Housing%20Finance%20Market.pdf. In broad strokes, the Reform Report observes that "Fannie Mae and Freddie Mac were allowed to behave like government-backed hedge funds, managing large investment portfolios for the profit of their shareholders with the risk ultimately falling largely on taxpayers." *Id.* at 13. And the report chronicles how the GSEs "pursued riskier business practices" as the GSEs' market share declined sharply from 2003 to 2006. *Id.* at 7.

The GSEs' troubles were not confined to risky business decisions alone. For example, the Office of Federal Housing Enterprise Oversight concluded that Fannie Mae deliberately manipulated accounting statements to reach earnings targets, overstating reported income and capital by an estimated $10.6 billion from 1998 to

2004.[9] These accounting frauds resulted in hundreds of millions of dollars in settlements and penalties. Yet significant accounting and internal-control deficiencies persisted within the GSEs through at least 2010.[10]

The GSEs also operated with razor-thin layers of capital. In the year 2000, the GSEs held or guaranteed more than $2 trillion of mortgages, backed by only $35.7 billion in shareholder equity. By the end of December 2007, Fannie Mae reported that it had $44 billion of capital to absorb potential losses on $879 billion of assets and $2.2 trillion of guarantees on mortgage-backed securities. The GSEs' combined leverage ratio stood at 75-to-1.[11] Their assets were overwhelmingly concentrated in home mortgages and derivative financial instruments whose value was pegged to those mortgages.

The result of all these structural and behavioral flaws in the GSEs was their inevitable bankruptcy, at least without a government rescue by FHFA under HERA.

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[9] *See* Office of Federal Housing Enterprise Oversight, *Report of the Special Examination of Fannie Mae* (May 2006), *available at* http://online.wsj.com/public/resources/documents/ofheo20060523.pdf.

[10] *See* Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* (Jan. 2011) at 212-14, *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

[11] *Id.* at 300-09.

As the district court found, in September 2008, the GSEs were at "the brink of collapse." *Perry Capital*, 70 F. Supp. 3d at 227.

B. FHFA responded appropriately and fairly, not only in the early stages of the bailout but also thereafter.

Responding to the dire circumstances facing the GSEs and the entire economy in mid-2008, FHFA proceeded to exercise its broad powers quickly but in a measured fashion, choosing to place the GSEs in conservatorship for the purpose of stabilizing them, shoring up the national housing market, and protecting and preserving their assets.

FHFA faced extraordinary challenges. The stakes were incalculably high, as the collapse of the GSEs posed a dramatic risk of systemic failure in the U.S. financial markets and the broader economy. *See Perry Capital*, 70 F. Supp. 3d at 216. Moreover, no private-sector support was available. The GSEs had exhausted unsuccessful efforts to "raise capital in the private markets," *id.* (internal quotation marks omitted) and in fact, "Treasury represented the only feasible entity—public or private—capable of injecting sufficient liquidity into and serving as a backstop for the GSEs within the short timeframe necessary to preserve their existence in September of 2008," *id*. at 232. FHFA nevertheless succeeded in negotiating bailout terms with Treasury that stabilized the GSEs. As the district court found, they have,

"under FHFA's authority, progressed from insolvency to profitability." *Id.* at 228 n.21. And they continue to serve the mortgage-lending markets. *See id.* at 228. Moreover, all of the GSEs' creditors have been paid in full.

With respect to the Third Amendment at the center of this case, it served multiple legitimate purposes. As explained in the Treasury Press Release, its objective first and foremost was to "benefit taxpayers for their investment in those firms." The Third Amendment allowed the government to recoup the taxpayers' entire direct investment in the GSEs. And although it was not intended to increase the effective rate of return on the taxpayers' funding, it resulted in the recovery of an additional amount—an amount that still does not reflect the inestimable value of the government's rescue, given the deplorable financial condition of the GSEs, the enormous risk of their ultimate collapse, and the lack of any alternative funding sources.

Finally, the Third Amendment serves another key purpose. It maintains the status quo so that policymakers have the time and opportunity to devise a long-term solution to GSE reform. The Reform Report identifies the underlying need for a fundamental change in the role of the GSEs:

> Fannie Mae and Freddie Mac's congressional charters require them to promote market stability and access to mortgage credit. But their private shareholder structure, coupled with a weak oversight regime,

> encouraged management to take on excessive risk in order to retain market share and maximize profits, jeopardizing their ability to support the mortgage market and leaving taxpayers to bear major losses. Their pursuit of profit leading up to the financial crisis caused them to fail when their broader public mandate to support the market was needed most.

Reform Report at 8.

The federal government clearly regards this irreconcilable conflict within the GSE framework as a major reason why fundamental reform of these institutions is essential. And as explained in the Reform Report, the government further believes that these reforms must be undertaken carefully, "on a responsible timeline," so as "not to undermine economic recovery." *Id.* at 11–12. All of this in turn validates the need for the ongoing FHFA conservatorship, as a mechanism for sustaining the mortgage lending markets until an appropriate policy solution is fully implemented in the public interest. Returning the GSEs to their former role in the marketplace, and ceding all profits back to them while leaving the risk of loss with taxpayers, would inevitably entrench the GSEs once again, making reform that much more difficult.

The district court's opinion reflects this view:

> There surely can be a fluid progression from conservatorship to receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation. FHFA can lawfully take steps to maintain operational

> soundness and solvency, conserving the assets of the GSEs, until it decides that the time is right for liquidation.

Perry Capital, 70 F. Supp. 3d at 228–29 n.20.

In short, the fact that the GSEs achieved some measure of stability for a period—inconsistently, it turns out—does not suddenly constrict FHFA's broad authority under HERA. FHFA may maintain the conservatorship pending resolution of the larger question of exactly when and how to reform the mortgage market to sustain available credit while restoring long-term stability and solving the problem of moral hazard. In any case, these are legitimate and important policy questions and concerns. They are a far cry from the sort of avaricious plot to fatten the U.S. Treasury at the expense of shareholders, a tale spun by appellants without any factual basis.

C. The shareholders assumed the risk of investing in the GSEs, and they have no equitable basis for complaining about the Third Amendment.

From a statutory standpoint, of course, FHFA's duty is nowhere defined in terms of protecting shareholders' profits. On the contrary, HERA's treatment of shareholders is best characterized by the provisions transferring all of their rights to FHFA once it assumes the role of conservator. From an equitable standpoint, as

between unwitting taxpayers and profit-seeking shareholders, the former deserve the government's solicitude far more than the latter.[12]

The undeniable fact is that the bailout arranged by FHFA with Treasury prevented the total collapse of the GSEs, and salvaged some value for each shareholder. As the district court stated, the GSE shares "very much remain[] a tradeable equity." *Perry Capital*, 70 F. Supp. 3d at 241.

In addition, the U.S. and its taxpayers never willingly chose to invest in or lend to the GSEs. In sharp contrast, the shareholders elected to put their money at risk, betting on reaping the rewards of their equity stake in the GSEs. And in many cases they undoubtedly did extract profits from their investments in the GSEs.

Finally, the case for shareholder sympathy is especially weak where, as here, their bets were placed on heavily regulated entities like the GSEs. The case is even weaker as to any shareholders—including the hedge-fund appellants—who invested with knowledge of the GSEs' distressed condition and the government's bailout.

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[12] In fact, Congress established explicit protections for taxpayers in HERA. In a section entitled "Protection of taxpayers against liability," it stated that the new law "may not be construed as **obligating** the Federal Government, either directly or indirectly, to provide any funds to" the GSEs. 12 U.S.C. § 4503 (emphasis added). Moreover, Treasury's authority to invest in the GSEs is conditioned on the structuring of such payments to "protect the public interest." 12 U.S.C. § 1719(g)(1)(B)–(C).

In the context of its regulatory-takings analysis, the district court aptly summarized the risks investors are presumed to know:

> For decades—and at the time each of the class plaintiffs purchased their GSE stock—the GSEs have been under the watchful eye of regulatory agencies and subject to conservatorship or receivership largely at the government's discretion. . . . [T]he plaintiff shareholders could not have "developed a historically rooted expectation of compensation" for any possible seizures that occurred during FHFA's conservatorship. . . . In fact a number of class plaintiffs purchased their shares mere months before or shortly after FHFA exercised its statutory authority to place the GSEs into conservatorship. There can be no doubt that the plaintiff shareholders understood the risks intrinsic to investments in entities as closely regulated as the GSEs, and, as such, have not now been deprived of any *reasonable* investment-backed expectations.

Perry Capital, 70 F. Supp. 3d at 245 (citations omitted).

The district court further explained that an actionable government interference with property rights is less likely to be found where the "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (internal quotation marks omitted).

That is precisely the context in this case, and it dispels appellants' claim that FHFA's handling of the GSE rescue was, at any point, fundamentally unfair to the appellant shareholders.

CONCLUSION

The judgment of the district court should be affirmed as to all claims.

Respectfully submitted,

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Dated: December 28, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, undersigned counsel hereby certifies that this brief complies with the type-volume limitation because it contains 6,917 words, excluding those parts exempted by Rule 32(a)(7)(B)(iii), as computed by Microsoft Word 2013, the word processing system used to prepare this brief. The undersigned also certifies that this brief complies with the format, type-face, and type-style requirements of Rules 32(a)(4)-(6) of the Federal Rules of Appellate Procedure because it was prepared using 14-point Times New Roman typeface, is double-spaced (except for quotations exceeding two lines, headings, and footnotes), and is proportionally spaced.

Dated: December 28, 2015

/s/ Dennis M. Kelleher
Dennis M. Kelleher

CERTIFICATE PURSUANT TO CIRCUIT RULE 29(d)

Undersigned counsel is aware of no other amici filing a brief in support of the defendants-appellees in this case. Therefore, a single, separate brief from Better Markets is necessary and appropriate.

Dated: December 28, 2015

/s/ Dennis M. Kelleher
Dennis M. Kelleher

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December 2015, a true and correct copy of the foregoing Brief of Better Markets as *Amicus Curiae* in Support of the Defendants-Appellees was filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the Court's CM/ECF system. Counsel for all parties and amici are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: December 28, 2015

/s/ Dennis M. Kelleher
Dennis M. Kelleher

ADDENDUM OF STATUTES AND REGULATIONS

Table of Contents

12 U.S.C. § 1821(d)(2)(A)

(d) Powers and duties of Corporation as conservator or receiver.

(1) Rulemaking authority of Corporation. The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers.

(A) Successor to institution. The Corporation shall, as conservator or receiver, and by operation of law, succeed to--

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

12 U.S.C. § 4513

(a) Duties.

(1) Principal duties. The principal duties of the Director shall be--

(A) to oversee the prudential operations of each regulated entity; and

(B) to ensure that--

(i) each regulated entity operates in a safe and sound manner, including maintenance of adequate capital and internal controls;

(ii) the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets (including activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities);

(iii) each regulated entity complies with this title and the rules, regulations, guidelines, and orders issued under this title and the authorizing statutes;

(iv) each regulated entity carries out its statutory mission only through activities that are authorized under and consistent with this title and the authorizing statutes; and

(v) the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest.

(2) Scope of authority. The authority of the Director shall include the authority--

(A) to review and, if warranted based on the principal duties described in paragraph (1), reject any acquisition or transfer of a controlling interest in a regulated entity; and

(B) to exercise such incidental powers as may be necessary or appropriate to fulfill the duties and responsibilities of the Director in the supervision and regulation of each regulated entity.

(3) Coordination with the Chairman of the Board of Governors of the Federal Reserve System.

(A) Consultation. The Director shall consult with, and consider the views of, the Chairman of the Board of Governors of the Federal Reserve System, with respect to the risks posed by the regulated entities to the financial system, prior to issuing any proposed or final regulations, orders, and guidelines with respect to the exercise of the additional authority provided in this Act regarding prudential management and operations standards, safe and sound operations of, and capital requirements and portfolio standards applicable to the regulated entities (as such term is defined in section 1303 [*12 USCS § 4502*]). The

Director also shall consult with the Chairman regarding any decision to place a regulated entity into conservatorship or receivership.

(B) Information sharing. To facilitate the consultative process, the Director shall share information with the Board of Governors of the Federal Reserve System on a regular, periodic basis as determined by the Director and the Board regarding the capital, asset and liabilities, financial condition, and risk management practices of the regulated entities as well as any information related to financial market stability.

(C) Termination of consultation requirement. The requirement of the Director to consult with the Board of Governors of the Federal Reserve System under this paragraph shall expire at the conclusion of December 31, 2009.

(b) Delegation of authority. The Director may delegate to officers and employees of the Agency any of the functions, powers, or duties of the Director, as the Director considers appropriate.

(c) Litigation authority.

(1) In general. In enforcing any provision of this title, any regulation or order prescribed under this title, or any other provision of law, rule, regulation, or order, or in any other action, suit, or proceeding to which the Director is a party or in which the Director is interested, and in the administration of conservatorships and receiverships, the Director may act in the Director's own name and through the Director's own attorneys.

(2) Subject to suit. Except as otherwise provided by law, the Director shall be subject to suit (other than suits on claims for money damages) by a regulated entity with respect to any matter under this title or any other applicable provision of law, rule, order, or regulation under this title, in the United States district court for the judicial district in which the regulated entity has its principal place of business, or in the United States District Court for the District of Columbia, and the Director may be served with process in the manner prescribed by the Federal Rules of Civil Procedure.

(d) [Not enacted]

(e) Recognition of distinctions between the enterprises and the Federal Home Loan Banks. Prior to promulgating any regulation or taking any other formal or informal agency action of general applicability and future effect relating to the Federal Home Loan Banks (other than any regulation, advisory document, or examination guidance of the Federal Housing Finance Board that the Director reissues after the authority of the Director over the Federal Home Loan Banks takes effect), including the issuance of an advisory document or examination guidance, the Director shall consider the differences between the Federal Home Loan Banks and the enterprises with respect to--

(1) the Banks'--

(A) cooperative ownership structure;

(B) [the] mission of providing liquidity to members;

(C) affordable housing and community development mission;

(D) capital structure; and

(E) joint and several liability; and

(2) any other differences that the Director considers appropriate.

12 U.S.C. § 4518

(a) In general. The Director shall prohibit the regulated entities from providing compensation to any executive officer of the regulated entity that is not reasonable and comparable with compensation for employment in other similar businesses (including other publicly held financial institutions or major financial services companies) involving similar duties and responsibilities.

(b) Factors. In making any determination under subsection (a), the Director may take into consideration any factors the Director considers relevant, including any wrongdoing on the part of the executive officer, and such wrongdoing shall include any fraudulent act or omission, breach of trust or fiduciary duty, violation of law, rule, regulation, order, or written agreement, and insider abuse with respect to the regulated entity. The approval of an agreement or contract pursuant to section 309(d)(3)(B) of the Federal National Mortgage Association Charter Act (*12 U.S.C. 1723a(d)(3)(B)*) or section 303(h)(2) of the Federal Home Loan Mortgage Corporation Act (*12 U.S.C. 1452(h)(2)*) shall not preclude the Director from making any subsequent determination under subsection (a).

(c) Withholding of compensation. In carrying out subsection (a), the Director may require a regulated entity to withhold any payment, transfer, or disbursement of compensation to an executive officer, or to place such compensation in an escrow account, during the review of the reasonableness and comparability of compensation.

(d) Prohibition of setting compensation. In carrying out subsection (a), the Director may not prescribe or set a specific level or range of compensation.

(e) Authority to regulate or prohibit certain forms of benefits to affiliated parties.

(1) Golden parachutes and indemnification payments. The Director may prohibit or limit, by regulation or order, any golden parachute payment or indemnification payment.

(2) Factors to be taken into account. The Director shall prescribe, by regulation, the factors to be considered by the Director in taking any action pursuant to paragraph (1), which may include such factors as--

(A) whether there is a reasonable basis to believe that the affiliated party has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the regulated entity that has had a material effect on the financial condition of the regulated entity;

(B) whether there is a reasonable basis to believe that the affiliated party is substantially responsible for the insolvency of the regulated entity, the appointment of a conservator or receiver for the regulated entity, or the troubled condition of the regulated entity (as defined in regulations prescribed by the Director);

(C) whether there is a reasonable basis to believe that the affiliated party has materially violated any applicable provision of Federal or State law or regulation that has had a material effect on the financial condition of the regulated entity;

(D) whether the affiliated party was in a position of managerial or fiduciary responsibility; and

(E) the length of time that the party was affiliated with the regulated entity, and the degree to which--

(i) the payment reasonably reflects compensation earned over the period of employment; and

(ii) the compensation involved represents a reasonable payment for services rendered.

(3) Certain payments prohibited. No regulated entity may prepay the salary or any liability or legal expense of any affiliated party if such payment is made--

(A) in contemplation of the insolvency of such regulated entity, or after the commission of an act of insolvency; and

(B) with a view to, or having the result of--

(i) preventing the proper application of the assets of the regulated entity to creditors; or

(ii) preferring one creditor over another.

(4) Golden parachute payment defined.

(A) In general. For purposes of this subsection, the term "golden parachute payment" means any payment (or any agreement to make any payment) in the nature of compensation by any regulated entity for the benefit of any affiliated party pursuant to an obligation of such regulated entity that--

(i) is contingent on the termination of such party's affiliation with the regulated entity; and

(ii) is received on or after the date on which--

(I) the regulated entity became insolvent;

(II) any conservator or receiver is appointed for such regulated entity; or

(III) the Director determines that the regulated entity is in a troubled condition (as defined in the regulations of the Director).

(B) Certain payments in contemplation of an event. Any payment which would be a golden parachute payment but for the fact that such payment was made before the date referred to in subparagraph (A)(ii) shall be treated as a golden parachute payment if the payment was made in contemplation of the occurrence of an event described in any subclause of such subparagraph.

(C) Certain payments not included. For purposes of this subsection, the term "golden parachute payment" shall not include--

(i) any payment made pursuant to a retirement plan which is qualified (or is intended to be qualified) under *section 401 of the Internal Revenue Code of 1986* [*26 USCS § 401*], or other nondiscriminatory benefit plan;

(ii) any payment made pursuant to a bona fide deferred compensation plan or arrangement which the Director determines, by regulation or order, to be permissible; or

(iii) any payment made by reason of the death or disability of an affiliated party.

(5) Other definitions. For purposes of this subsection, the following definitions shall apply:

(A) Indemnification payment. Subject to paragraph (6), the term "indemnification payment" means any payment (or any agreement to make any payment) by any regulated entity for the benefit of any person who is or was an affiliated party, to pay or reimburse such person for any liability or legal expense with regard to any administrative proceeding or civil action instituted by the Agency which results in a final order under which such person--

(i) is assessed a civil money penalty;

(ii) is removed or prohibited from participating in conduct of the affairs of the regulated entity; or

(iii) is required to take any affirmative action to correct certain conditions resulting from violations or practices, by order of the Director.

(B) Liability or legal expense. The term "liability or legal expense" means--

(i) any legal or other professional expense incurred in connection with any claim, proceeding, or action;

(ii) the amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(iii) the amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(C) Payment. The term "payment" includes--

(i) any direct or indirect transfer of any funds or any asset; and

(ii) any segregation of any funds or assets for the purpose of making, or pursuant to an agreement to make, any payment after the date on which such funds or assets are segregated, without regard to whether the obligation to make such payment is contingent on--

(I) the determination, after such date, of the liability for the payment of such amount; or

(II) the liquidation, after such date, of the amount of such payment.

(6) Certain commercial insurance coverage not treated as covered benefit payment. No provision of this subsection shall be construed as prohibiting any regulated entity from purchasing any commercial insurance policy or fidelity bond, except that, subject to any requirement described in paragraph (5)(A)(iii), such insurance policy or bond shall not cover any legal or liability expense of the regulated entity which is described in paragraph (5)(A).

12 U.S.C. § 4541

(a) In general. The Director shall require each enterprise to obtain the approval of the Director for any product of the enterprise before initially offering the product.

(b) Standard for approval. In considering any request for approval of a product pursuant to subsection (a), the Director shall make a determination that--

(1) in the case of a product of the Federal National Mortgage Association, the product is authorized under paragraph (2), (3), (4), or (5) of section 302(b) or section 304 of the Federal National Mortgage Association Charter Act (*12 U.S.C. 1717(b)*, *1719*);

(2) in the case of a product of the Federal Home Loan Mortgage Corporation, the product is authorized under paragraph (1), (4), or (5) of section 305(a) of the Federal Home Loan Mortgage Corporation Act (*12 U.S.C. 1454(a)*);

(3) the product is in the public interest; and

(4) the product is consistent with the safety and soundness of the enterprise or the mortgage finance system.

(c) Procedure for approval.

(1) Submission of request. An enterprise shall submit to the Director a written request for approval of a product that describes the product in such form as prescribed by order or regulation of the Director.

(2) Request for public comment. Immediately upon receipt of a request for approval of a product, as required under paragraph (1), the Director shall publish notice of such request and of the period for public comment pursuant to paragraph (3) regarding the product, and a description of the product proposed by the request. The Director shall give interested parties the opportunity to respond in writing to the proposed product.

(3) Public comment period. During the 30-day period beginning on the date of publication pursuant to paragraph (2) of a request for approval of a product, the Director shall receive public comments regarding the proposed product.

(4) Offering of product.

(A) In general. Not later than 30 days after the close of the public comment period described in paragraph (3), the Director shall approve or deny the product, specifying the grounds for such decision in writing.

(B) Failure to act. If the Director fails to act within the 30-day period described in subparagraph (A), then the enterprise may offer the product.

(C) Temporary approval. The Director may, subject to the rules of the Director, provide for temporary approval of the offering of a product without a public comment period, if the Director finds that the existence of exigent circumstances makes such delay contrary to the public interest.

(d) Conditional approval. If the Director approves the offering of any product by an enterprise, the Director may establish terms, conditions, or limitations with respect to such product with which the enterprise must comply in order to offer such product.

(e) Exclusions.

(1) In general. The requirements of subsections (a) through (d) do not apply with respect to--

(A) the automated loan underwriting system of an enterprise in existence as of the date of enactment of the Federal Housing Finance Regulatory Reform Act of 2008 [enacted July 30, 2008], including any upgrade to the technology, operating system, or software to operate the underwriting system;

(B) any modification to the mortgage terms and conditions or mortgage underwriting criteria relating to the mortgages that are purchased or guaranteed by an enterprise, provided that such modifications do not alter the underlying transaction so as to include services or financing, other than residential mortgage financing; or

(C) any other activity that is substantially similar, as determined by rule of the Director to--

(i) the activities described in subparagraphs (A) and (B); and

(ii) other activities that have been approved by the Director in accordance with this section.

(2) Expedited review.

(A) Enterprise notice. For any new activity that an enterprise considers not to be a product, the enterprise shall provide written notice to the Director of such activity, and may not commence such activity until the date of receipt of a notice under subparagraph (B) or the expiration of the period described in subparagraph (C). The Director shall establish, by regulation, the form and content of such written notice.

(B) Director determination. Not later than 15 days after the date of receipt of a notice under subparagraph (A), the Director shall determine whether such activity is a product subject to approval under this section. The Director shall, immediately upon so determining, notify the enterprise.

(C) Failure to act. If the Director fails to determine whether such activity is a product within the 15-day period described in subparagraph (B), the enterprise may commence the new activity in accordance with subparagraph (A).

(f) No limitation. Nothing in this section may be construed to restrict--

(1) the safety and soundness authority of the Director over all new and existing products or activities; or

(2) the authority of the Director to review all new and existing products or activities to determine that such products or activities are consistent with the statutory mission of an enterprise.

12 U.S.C. § 4547

(a) Definitions. For purposes of this section, the following definitions shall apply:

(1) Guarantee fee. The term "guarantee fee"--

(A) means a fee described in subsection (b); and

(B) includes--

(i) the guaranty fee charged by the Federal National Mortgage Association with respect to mortgage-backed securities; and

(ii) the management and guarantee fee charged by the Federal Home Loan Mortgage Corporation with respect to participation certificates.

(2) Average fees. The term "average fees" means the average contractual fee rate of single-family guaranty arrangements by an enterprise entered into during 2011, plus the recognition of any up-front cash payments over an estimated average life, expressed in terms of basis points. Such definition shall be interpreted in a manner consistent with the annual report on guarantee fees by the Federal Housing Finance Agency.

(b) Increase.

(1) In general.

(A) Phased increase required. Subject to subsection (c), the Director shall require each enterprise to charge a guarantee fee in connection with any guarantee of the timely payment of principal and interest on securities, notes, and other obligations based on or backed by mortgages on residential real properties designed principally for occupancy of from 1 to 4 families, consummated after the date of enactment of this section.

(B) Amount. The amount of the increase required under this section shall be determined by the Director to appropriately reflect the risk of loss, as well [as] the cost of capital allocated to similar assets held by other fully private regulated financial institutions, but such amount shall be not less than an average increase of 10 basis points for each origination year or book year above the average fees imposed in 2011 for such guarantees. The Director shall prohibit an enterprise from offsetting the cost of the fee to mortgage originators, borrowers, and investors by decreasing other charges, fees, or premiums, or in any other manner.

(2) Authority to limit offer of guarantee. The Director shall prohibit an enterprise from consummating any offer for a guarantee to a lender for mortgage-backed securities, if--

(A) the guarantee is inconsistent with the requirements of this section; or

(B) the risk of loss is allowed to increase, through lowering of the underwriting standards or other means, for the primary purpose of meeting the requirements of this section.

(3) Deposit in Treasury. Amounts received from fee increases imposed under this section shall be deposited directly into the United States Treasury, and shall be available only to the extent provided in subsequent appropriations Acts. The fees charged pursuant to this section shall not be considered a reimbursement to the Federal Government for the costs or subsidy provided to an enterprise.

(c) Phase-in.

(1) In general. The Director may provide for compliance with subsection (b) by allowing each enterprise to increase the guarantee fee charged by the enterprise gradually over the 2-year period beginning on the date of enactment of this section, in a manner sufficient to comply with this section. In determining a schedule for such increases, the Director shall--

(A) provide for uniform pricing among lenders;

(B) provide for adjustments in pricing based on risk levels; and

(C) take into consideration conditions in financial markets.

(2) Rule of construction. Nothing in this subsection shall be interpreted to undermine the minimum increase required by subsection (b).

(d) Information collection and annual analysis. The Director shall require each enterprise to provide to the Director, as part of its annual report submitted to Congress--

(1) a description of--

(A) changes made to up-front fees and annual fees as part of the guarantee fees negotiated with lenders;

(B) changes to the riskiness of the new borrowers compared to previous origination years or book years; and

(C) any adjustments required to improve for future origination years or book years, in order to be in complete compliance with subsection (b); and

(2) an assessment of how the changes in the guarantee fees described in paragraph (1) met the requirements of subsection (b).

(e) Enforcement.

(1) Required adjustments. Based on the information from subsection (d) and any other information the Director deems necessary, the Director shall require an enterprise to make adjustments in its guarantee fee in order to be in compliance with subsection (b).

(2) Noncompliance penalty. An enterprise that has been found to be out of compliance with subsection (b) for any 2 consecutive years shall be precluded from providing

any guarantee for a period, determined by rule of the Director, but in no case less than 1 year.

(3) Rule of construction. Nothing in this subsection shall be interpreted as preventing the Director from initiating and implementing an enforcement action against an enterprise, at a time the Director deems necessary, under other existing enforcement authority.

(f) Expiration. The provisions of this section shall expire on October 1, 2021.

12 U.S.C. § 4561

(a) In general. The Director shall, by regulation, establish effective for 2010 and each year thereafter, annual housing goals, with respect to the mortgage purchases by the enterprises, as follows:

(1) Single-family housing goals. Four single-family housing goals under section 1332 [*12 USCS § 4562*].

(2) Multifamily special affordable housing goal. One multifamily special affordable housing goal under section 1333 [*12 USCS § 4563*].

(b) Timing. The Director shall, by regulation, establish an annual deadline by which the Director shall establish the annual housing goals under this subpart [*12 USCS §§ 4561* et seq.] for each year, taking into consideration the need for the enterprises to reasonably and sufficiently plan their operations and activities in advance, including operations and activities necessary to meet such annual goals.

(c) Transition. The annual housing goals effective for 2008 pursuant to this subpart, as in effect before the enactment of the Federal Housing Finance Regulatory Reform Act of 2008 [enacted July 30, 2008], shall remain in effect for 2009, except that not later than the expiration of the 270-day period beginning on the date of the enactment of such Act, the Director shall review such goals applicable for 2009 to determine the feasibility of such goals given the market conditions current at such time and, after seeking public comment for a period not to exceed 30 days, may make appropriate adjustments consistent with such market conditions.

(d) Eliminating interest rate disparities.

(1) In general. Upon request by the Director, an enterprise shall provide to the Director, in a form determined by the Director, data the Director may review to determine whether there exist disparities in interest rates charged on mortgages to borrowers who are minorities as compared with comparable mortgages to borrowers of similar creditworthiness who are not minorities.

(2) Remedial actions upon preliminary finding. Upon a preliminary finding by the Director that a pattern of disparities in interest rates with respect to any lender or lenders exists pursuant to the data provided by an enterprise in paragraph (1), the Director shall--

(A) refer the preliminary finding to the appropriate regulatory or enforcement agency for further review; and

(B) require the enterprise to submit additional data with respect to any lender or lenders, as appropriate and to the extent practicable, to the Director who shall submit any such additional data to the regulatory or enforcement agency for appropriate action.

(3) Annual report to Congress. The Director shall submit to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate a report describing the actions taken, and being taken, by the Director to carry out this subsection. No such report shall identify any lender or lenders who have not been found to have engaged in discriminatory lending practices pursuant to a final adjudication on the record, and after opportunity for an administrative hearing, in accordance with subchapter II of chapter 5 of title 5, United States Code [*5 USCS §§ 551* et seq.].

(4) Protection of identity of individuals. In carrying out this subsection, the Director shall ensure that no property-related or financial information that would enable a borrower to be identified shall be made public.

12 U.S.C. § 4617

(a) Appointment of the Agency as conservator or receiver.

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

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

(3) Grounds for discretionary appointment of conservator or receiver. The grounds for appointing conservator or receiver for any regulated entity under paragraph (2) are as follows:

(A) Assets insufficient for obligations. The assets of the regulated entity are less than the obligations of the regulated entity to its creditors and others.

(B) Substantial dissipation. Substantial dissipation of assets or earnings due to--

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

(ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition. An unsafe or unsound condition to transact business.

(D) Cease and desist orders. Any willful violation of a cease and desist order that has become final.

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

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

(G) Losses. The regulated entity has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the regulated entity to become adequately capitalized (as defined in section 1364(a)(1) [*12 USCS § 4614(a)(1)*]).

(H) Violations of law. Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to--

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

(ii) weaken the condition of the regulated entity.

(I) Consent. The regulated entity, by resolution of its board of directors or its shareholders or members, consents to the appointment.

(J) Undercapitalization. The regulated entity is undercapitalized or significantly undercapitalized (as defined in section 1364(a)(3) [*12 USCS § 4614(a)(3)*]), and--

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

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

(I) section 1365(a)(1) [*12 USCS § 4615(a)(1)*] with respect to a regulated entity; or

(II) section 1366(a)(1) [*12 USCS § 4616(a)(1)*] with respect to a significantly undercapitalized regulated entity;

(iii) fails to submit a capital restoration plan acceptable to the Agency within the time prescribed under section 1369C [*12 USCS § 4622*]; or

(iv) materially fails to implement a capital restoration plan submitted and accepted under section 1369C [*12 USCS § 4622*].

(K) Critical undercapitalization. The regulated entity is critically undercapitalized, as defined in section 1364(a)(4) [*12 USCS § 4624(a)(4)*].

(L) Money laundering. The Attorney General notifies the Director in writing that the regulated entity has been found guilty of a criminal offense under section 1956 or 1957 of title 18, United States Code, or section 5322 or 5324 of title 31, United States Code.

(4) Mandatory receivership.

(A) In general. The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that--

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

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

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

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

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

(C) Determination not required if receivership already in place. Subparagraph (B) does not apply with respect to a regulated entity in any period during which the Agency serves as receiver for the regulated entity.

(D) Receivership terminates conservatorship. The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this title.

(5) Judicial review.

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

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

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

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

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

(1) Rulemaking authority of the Agency. The Agency may prescribe such regulations as the Agency determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers.

(A) Successor to regulated entity. The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to--

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

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

(B) Operate the regulated entity. The Agency may, as conservator or receiver--

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

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

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

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

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

(C) Functions of officers, directors, and shareholders of a regulated entity. The Agency may, by regulation or order, provide for the exercise of any function by any stockholder, director, or officer of any regulated entity for which the Agency has been named conservator or receiver.

(D) Powers as conservator. The Agency may, as conservator, take such action as may be--

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

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

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

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

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

(H) Payment of valid obligations. The Agency, as conservator or receiver, shall, to the extent of proceeds realized from the performance of contracts or sale of the assets of a regulated entity, pay all valid obligations of the regulated entity that

are due and payable at the time of the appointment of the Agency as conservator or receiver, in accordance with the prescriptions and limitations of this section.

(I) Subpoena authority.

(i) In general.

(I) Agency authority. The Agency may, as conservator or receiver, and for purposes of carrying out any power, authority, or duty with respect to a regulated entity (including determining any claim against the regulated entity and determining and realizing upon any asset of any person in the course of collecting money due the regulated entity), exercise any power established under section 1348 [*12 USCS § 4588*].

(II) Applicability of law. The provisions of section 1348 [*12 USCS § 4588*] shall apply with respect to the exercise of any power under this subparagraph, in the same manner as such provisions apply under that section.

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

(iii) Rule of construction. This subsection shall not be construed to limit any rights that the Agency, in any capacity, might otherwise have under section 1317 or 1379B [*12 USCS § 4517* or *4639*].

(J) Incidental powers. The Agency may, as conservator or receiver--

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

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

(K) Other provisions.

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

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

(3) Authority of receiver to determine claims.

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

(B) Notice requirements. The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall--

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

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

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

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

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

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

(5) Procedures for determination of claims.

(A) Determination period.

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

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

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

(I) on the books of the regulated entity;

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

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

(iv) Contents of notice of disallowance. If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain--

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

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

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

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

(D) Authority to disallow claims.

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

(ii) Payments to less than fully secured creditors. In the case of a claim of a creditor against a regulated entity which is secured by any property or other asset of such regulated entity, the receiver--

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

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

(iii) Exceptions. No provision of this paragraph shall apply with respect to--

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

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

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

(F) Legal effect of filing.

(i) Statute of limitation tolled. For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions. Subject to paragraph (10), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the date of the appointment of the receiver, subject to the determination of claims by the receiver.

(6) Provision for judicial determination of claims.

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

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

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

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

(7) Review of claims.

(A) Other review procedures.

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

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

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

(B) Consideration of incentives. The Agency shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims.

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

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

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

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

(i) determine--

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

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

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

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

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

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

(D) Statute of limitations. If an action described under subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed under subparagraph (B), the claim shall be deemed to be disallowed as

of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) Legal effect of filing.

(i) Statute of limitation tolled. For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions. Subject to paragraph (10), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action that was filed before the appointment of the receiver, subject to the determination of claims by the receiver.

(9) Payment of claims.

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

(i) allowed by the receiver;

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

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

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

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

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

(10) Suspension of legal actions.

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

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

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

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

(11) Additional rights and duties.

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

(B) Rights and remedies of conservator or receiver. In the event of any appealable judgment, the Agency as conservator or receiver--

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

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

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

(D) Limitation on judicial review. Except as otherwise provided in this subsection, no court shall have jurisdiction over--

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

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

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

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

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

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

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

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

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

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

(II) the period applicable under State law; and

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

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

(II) the period applicable under State law.

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

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

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

(13) Revival of expired State causes of action.

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

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

(14) Accounting and recordkeeping requirements.

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

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

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

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

(15) Fraudulent transfers.

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

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

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

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

(C) Rights of transferee or obligee. The conservator or receiver may not recover under subparagraph (B) from--

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

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

(D) Rights under this paragraph. The rights under this paragraph of the conservator or receiver described under subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under title 11, United States Code.

(16) Attachment of assets and other injunctive relief. Subject to paragraph (17), any court of competent jurisdiction may, at the request of the conservator or receiver, issue an order in accordance with *rule 65 of the Federal Rules of Civil Procedure*, including an order placing the assets of any person designated by the conservator

or receiver under the control of the court, and appointing a trustee to hold such assets.

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

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

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

(B) No limitation of power. Nothing in this paragraph shall be construed to limit the power of the conservator or receiver to exercise any rights under contract or law, including to terminate, breach, cancel, or otherwise discontinue such agreement.

(19) General exceptions.

(A) Limitations. The rights of the conservator or receiver appointed under this section shall be subject to the limitations on the powers of a receiver under sections 402 through 407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (*12 U.S.C. 4402* through *4407*).

(B) Mortgages held in trust.

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

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

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

(c) Priority of expenses and unsecured claims.

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

(A) Administrative expenses of the receiver.

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

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

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

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

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

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

(3) Definition. As used in this subsection, the term "administrative expenses of the receiver" includes--

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

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

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

(1) Authority to repudiate contracts. In addition to any other rights a conservator or receiver may have, the conservator or receiver for any regulated entity may disaffirm or repudiate any contract or lease--

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

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

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

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

(3) Claims for damages for repudiation.

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

(i) limited to actual direct compensatory damages; and

(ii) determined as of--

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

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

(B) No liability for other damages. For purposes of subparagraph (A), the term "actual direct compensatory damages" shall not include--

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts. In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be--

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

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

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

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

(B) Payments of rent. Notwithstanding subparagraph (A), the lessor under a lease to which that subparagraph applies shall--

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

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

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

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

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

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

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

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

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

(B) Provisions applicable to lessee remaining in possession. If any lessee under a lease described under subparagraph (A) remains in possession of a leasehold interest under clause (ii) of subparagraph (A)--

(i) the lessee--

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

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

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

(6) Contracts for the sale of real property.

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

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

(ii) remain in possession of such real property.

(B) Provisions applicable to purchaser remaining in possession. If any purchaser of real property under any contract described under subparagraph (A) remains in possession of such property under clause (ii) of subparagraph (A)--

(i) the purchaser--

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

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

(ii) the conservator or receiver shall--

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

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

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

(C) Assignment and sale allowed.

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

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

(7) Service contracts.

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

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

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

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

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

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

(C) Acceptance of performance no bar to subsequent repudiation. The acceptance by the conservator or receiver of services referred to under subparagraph (B) in connection with a contract described in such subparagraph shall not affect the right of the conservator or receiver to repudiate such contract under this section at any time after such performance.

(8) Certain qualified financial contracts.

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

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

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

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

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

(C) Certain transfers not avoidable.

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

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

(D) Certain contracts and agreements defined. In this subsection the following definitions shall apply:

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

(ii) Securities contract. The term "securities contract"--

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

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

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

(IV) means the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including

any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(V) means any margin loan;

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

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

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

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

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

(iii) Commodity contract. The term "commodity contract" means--

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

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

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

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

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

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

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

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

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

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

(iv) Forward contract. The term "forward contract" means--

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

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

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

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

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

(v) Repurchase agreement. The term "repurchase agreement" (including a reverse repurchase agreement)--

(I) means an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage-related securities (as such term is defined in section 3 of the Securities Exchange Act of 1934 [*15 USCS § 78c*]), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined for purposes of this clause as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development, as determined by regulation or order adopted by the appropriate Federal banking authority), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

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

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

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

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

subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

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

(vi) Swap agreement. The term "swap agreement" means--

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

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

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

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

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

to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

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

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

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

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

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

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

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

(F) Clarification. No provision of law shall be construed as limiting the right or power of the Agency, or authorizing any court or agency to limit or delay in any manner, the right or power of the Agency to transfer any qualified financial

contract in accordance with paragraphs (9) and (10), or to disaffirm or repudiate any such contract in accordance with subsection (d)(1).

(G) Walkaway clauses not effective.

(i) In general. Notwithstanding the provisions of subparagraphs (A) and (E), and sections 403 and 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991 [*12 USCS §§ 4403* and *4404*], no walkaway clause shall be enforceable in a qualified financial contract of a regulated entity in default.

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

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

(A) transfer to 1 person--

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

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

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

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

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

(10) Notification of transfer.

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

receivership, or the business day following such transfer in the case of a conservatorship, if--

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

(ii) such transfer includes any qualified financial contract.

(B) Certain rights not enforceable.

(i) Receivership. A person who is a party to a qualified financial contract with a regulated entity may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(A) of this subsection or under section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991 [*12 USCS §§ 4403* and *4404*], solely by reason of or incidental to the appointment of a receiver for the regulated entity (or the insolvency or financial condition of the regulated entity for which the receiver has been appointed)--

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

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

(ii) Conservatorship. A person who is a party to a qualified financial contract with a regulated entity may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(E) of this subsection or under section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991 [*12 USCS §§ 4403* and *4404*], solely by reason of or incidental to the appointment of a conservator for the regulated entity (or the insolvency or financial condition of the regulated entity for which the conservator has been appointed).

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

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

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

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

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

(ii) the regulated entity in default; or

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

(12) Certain security interests not avoidable. No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any regulated entity, except where such an interest is taken in contemplation of the insolvency of the regulated entity, or with the intent to hinder, delay, or defraud the regulated entity or the creditors of such regulated entity.

(13) Authority to enforce contracts.

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

(B) Certain rights not affected. No provision of this paragraph may be construed as impairing or affecting any right of the conservator or receiver to enforce or recover under a liability insurance contract for an officer or director, or regulated entity bond under other applicable law.

(C) Consent requirement.

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

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

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

(ii) Exceptions. This subparagraph shall not--

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

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

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

(14) Savings clause. The meanings of terms used in this subsection are applicable for purposes of this subsection only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any similar terms under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000 [*7 USCS §§ 27* et seq.], the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 [*15 USCS § 78c(a)(47)*]), and the Commodity Exchange Act [*7 USCS §§ 1* et seq.].

(15) Exception for Federal Reserve and Federal Home Loan Banks. No provision of this subsection shall apply with respect to--

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

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

(e) Valuation of claims in default.

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

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

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

(g) Liability of directors and officers.

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

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

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

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

(3) No limitation. Nothing in this subsection shall impair or affect any right of the Agency under other applicable law.

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

(i) Limited-life regulated entities.

(1) Organization.

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

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

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

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

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

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

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

(2) Charter and establishment.

(A) Transfer of charter.

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

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

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

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

(I) succeed to the charter of the Federal Home Loan Mortgage Corporation, as set forth in the Federal Home Loan Mortgage Corporation [Charter] Act [*12 USCS §§ 1451* et seq.]; and

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

(B) Interests in and assets and obligations of regulated entity in default. Notwithstanding subparagraph (A) or any other provision of law--

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

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

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

(C) Limited-life regulated entity treated as being in default for certain purposes. A limited-life regulated entity shall be treated as a regulated entity in default at

such times and for such purposes as the Agency may, in its discretion, determine.

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

(E) Bylaws. The board of directors of a limited-life regulated entity shall adopt such bylaws as may be approved by the Agency.

(3) Capital stock.

(A) No agency requirement. The Agency is not required to pay capital stock into a limited-life regulated entity or to issue any capital stock on behalf of a limited-life regulated entity established under this subsection.

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

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

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

(6) Winding up.

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

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

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

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

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

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

(ii) Divestiture of remaining stock, if any.

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

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

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

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

(7) Transfer of assets and liabilities.

(A) In general.

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

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

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

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

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

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

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

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

(9) Powers of limited-life regulated entities.

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

(i) the Agency may--

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

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

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

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

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

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

(B) Stay of judicial action. Any judicial action to which a limited-life regulated entity becomes a party by virtue of its acquisition of any assets or assumption

of any liabilities of a regulated entity in default shall be stayed from further proceedings for a period of not longer than 45 days, at the request of the limited-life regulated entity. Such period may be modified upon the consent of all parties.

(10) No Federal status.

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

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

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

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

(11) Authority to obtain credit.

(A) In general. A limited-life regulated entity may obtain unsecured credit and issue unsecured debt.

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

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

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

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

(C) Limitations.

(i) In general. The Director, after notice and a hearing, may authorize the obtaining of credit or the issuance of debt by a limited-life regulated entity that is secured by a senior or equal lien on property of the limited-life regulated entity that is subject to a lien (other than mortgages that

collateralize the mortgage-backed securities issued or guaranteed by an enterprise) only if--

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

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

(ii) [Not enacted]

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

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

(j) Other Agency exemptions.

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

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

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

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

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