

Title XII – Enhanced Resolution Authority

Section by Section Analysis

This title provides a mechanism for emergency resolution of failing or failed systemically significant financial companies. Exercise of the authority is subject to checks and balances, as it requires three agencies to agree that its use is necessary. It is substantively similar to: (1) the resolution authority of both the Federal Deposit Insurance Corporation (“FDIC”) under the Federal Deposit Insurance Act (“FDIA”) (12 U.S.C. § 1821) and the Federal Housing Finance Agency under the Housing and Economic Recovery Act of 2008 (“HERA”) (12 U.S.C. § 4617); and (2) the systemic risk exception to the least cost resolution requirement contained in the FDIA (12 U.S.C. § 1823(c)(4)(G)).

Section 1201. Short Title

This Act may be cited as the “Resolution Authority for Large, Interconnected Financial Companies Act of 2009”.

Section 1202. Definitions

This section defines various terms. Notably, this section defines the term “covered bank holding company” as any bank holding company or Tier 1 financial holding company designated by the Board of Governors of the Federal Reserve System (“Board”), or any subsidiary of either (other than an insured depository institution, an insurance company, or any broker or dealer registered with the Securities and Exchange Commission (“SEC”) and which is a member of the Securities Investor Protection Corporation¹), for which a determination has been made pursuant to section 1203 of this Act. This section also defines the term “Appropriate Federal Regulatory Agency” as the FDIC or the SEC.

Section 1203. Systemic Risk Determination

This section describes the “trigger” process that authorizes: (1) the Secretary of the Treasury (“Secretary”) to appoint a conservator or receiver for a large, interconnected bank holding company, and (2) the FDIC to provide emergency financial assistance to a large, interconnected bank holding company. Specifically, the Board of Governors of the Federal Reserve System and the board or commission of the Appropriate Federal Regulatory Agency must each, by a two-thirds vote of its members then serving, provide a written recommendation to the Secretary that describes the effects that the failure of the bank holding company would have on economic conditions or financial stability in the United States and the nature and extent of assistance or actions that should be provided or taken. Upon receiving such recommendations, the Secretary (in consultation with the President) will make a written determination on whether: (1) the company is in default or in danger of default; (2) the failure of the company and its resolution under otherwise applicable law would have serious adverse effects on financial stability or economic conditions in the United States; and (3) any actions or assistance under section 1204 would avoid or mitigate such adverse effects. In making a

¹ The carve out for certain subsidiaries is because such subsidiaries are covered under existing resolution authorities, for example, the FDIC in the case of an insured depository institution subsidiary.

determination, the Secretary will take into consideration the cost to the taxpayer, the effects on the financial system or economic conditions, and the potential increase in the risk of moral hazard on the part of shareholders, counterparties, and creditors of the covered bank holding company.

After making a determination, the Secretary will submit a report to Congress within 30 days, and the Government Accountability Office will review and report on the Secretary's determination.

Section 1204. Resolution; Assistance

This section authorizes the FDIC—after a section 1203 determination has been made and with the approval of the Secretary—to take one or more emergency actions with respect to the covered bank holding company or a covered subsidiary. These emergency actions include providing financial assistance to the covered bank holding company or subsidiary in the form of direct loans, loan guarantees, and purchases of debt, equity, or assets; and selling or transferring all or any of such acquired assets, liabilities, obligations, equity interests, or securities. The Secretary may appoint the FDIC or SEC as conservator or receiver following a section 1203 determination.

Section 1205. Judicial Review

This section provides that if the Secretary appoints the FDIC or SEC as conservator or receiver pursuant to section 1204, the covered bank holding company has 30 calendar days to challenge the appointment in federal district court.

Section 1206. Directors not Liable for Acquiescing in Appointment of Conservator or Receiver

This section exempts the board of directors of a covered bank holding company from liability to the company's shareholders or creditors for acquiescing or consenting in good faith to appointment of a receiver or conservator under section 1204 or an acquisition, combination, or transfer of assets or liabilities under section 1209.

Section 1207. Termination and Exclusion of Other Actions

This section provides that conservatorship or receivership under section 1204 for a covered bank holding company shall terminate and prevent any other bankruptcy or insolvency proceeding under federal or state law.

Section 1208. Rulemaking

This section authorizes the FDIC, SEC, and the Secretary to jointly prescribe such rules or regulations as they consider necessary or appropriate to implement the provisions of this section.

Section 1209. Powers and Duties of Appropriate Federal Regulatory Agency

Subsection (a). Powers and Authorities.

The FDIC or SEC's powers and duties as conservator or receiver are substantively similar to those for a conservator or receiver under the FDIA and HERA. For example, the

FDIC or SEC will, as conservator or receiver for a covered bank holding company, take over the assets of and operate the company with all the powers of shareholders, directors, and officers. The FDIC or SEC will also, as receiver, have authority to determine and pay claims.

Subsection (b). Priority of Expenses and Unsecured Claims. The priority of expenses and unsecured claims is substantively similar to the FDIA (12 U.S.C. § 1821(d)(11)), except that specific language is added giving the United States a second priority position after administrative expenses.

Subsection (c). Provisions Relating to Contracts Entered Into Before Appointment of Conservator or Receiver. This subsection authorizes the FDIC or SEC to repudiate and enforce contracts and deal with the financial company's derivatives book in a manner substantively similar to the authority of the FDIC under the FDIA (12 U.S.C. § 1821(c)).

Subsection (d). Valuation of Claims in Default. This subsection establishes the FDIC or SEC's maximum liability for claims and authorizes the FDIC or SEC, as receiver and with the Secretary's approval, to make additional payments to claimants if necessary to minimize losses or mitigate serious adverse effects on the United States economy. This subsection is substantively similar to the FDIA (12 U.S.C. § 1821(i)).

Subsection (e). Limitation on Court Action. This subsection generally precludes a court from granting injunctive relief against the FDIC or SEC when it is exercising its powers as conservator or receiver. This subsection is substantively similar to the FDIA (12 U.S.C. § 1821(j)).

Subsection (f). Liability of Directors and Officers. This subsection provides that directors and officers of a covered bank holding company may be held personally liable for monetary damages for gross negligence in actions brought by or on behalf of the Appropriate Federal Regulatory Agency. It is substantively similar to the FDIA (12 U.S.C. § 1821(k)).

Subsection (g). Damages. This subsection provides that recoverable damages in claims brought against directors, officers, or employees of a covered bank holding company for improper investment or use of company assets include principal losses and appropriate interest. It is substantively similar to the FDIA (12 U.S.C. § 1821(l)).

Subsection (h). Bridge Bank Holding Companies. This subsection authorizes the FDIC or SEC, as receiver, to establish one or more bridge bank holding companies. This subsection is substantively similar to both the HERA (12 U.S.C. § 4617(i)) and the FDIA (12 U.S.C. § 1821(n)).

Subsection (i). Sharing Records. This subsection requires the primary financial regulator of a covered bank holding company (if any) to make available to the FDIC or SEC, as conservator or receiver, all supervisory records. This subsection is substantively similar to the FDIA (12 U.S.C. § 1821(o)).

Subsection (j). Expedited Procedures for Certain Claims. This subsection expedites federal courts' consideration of cases brought by the FDIC or SEC against a covered bank holding company's directors, officers, employees, or agents. It is substantively similar to the FDIA (12 U.S.C. § 1821(q)).

Subsection (k). Foreign Investigations. This subsection authorizes the FDIC or SEC, as conservator or receiver, to request assistance from and provide assistance to any foreign banking authority. It is substantively similar to the FDIA (12 U.S.C. § 1821(r)).

Subsection (l). Prohibition on Entering Secrecy Agreements and Protective Orders. This subsection prohibits the FDIC or SEC from entering into any agreement that prohibits it from disclosing the terms of any settlement of any action brought by the FDIC or SEC as conservator or receiver of a covered bank holding company. It is substantively similar to the FDIA (12 U.S.C. § 1821(s)).

Subsection (m). Liquidation of Certain Covered Bank Holding Companies or Bridge Bank Holding Companies. This subsection provides that the FDIC or SEC, as receiver, in liquidating any covered bank holding company that is either a futures commission merchant or a broker that is not a member of SIPC, will apply the applicable liquidation provisions of the bankruptcy code pertaining to "stockbrokers" and "commodity brokers" (as such terms are defined in 11 U.S.C. § 101).

Subsection (n). Bank Holding Company Fund. This subsection creates a fund that will be available to the FDIC or SEC as conservator or receiver for a covered bank holding company. The fund will also be available to the FDIC to provide emergency financial assistance. The fund will be capitalized by the FDIC, which is authorized to borrow amounts from the Secretary.

Subsection (o). Risk-Based Assessments. This subsection requires the FDIC to recover amounts expended under this title that have not otherwise been recouped through one or more risk-based assessments on bank holding companies based on their total liabilities, with the FDIC required to assess each bank holding company whose consolidated liabilities exceed \$10 billion. This subsection also provides a baseline and considerations for the FDIC to use in calculating risk-based assessments, including categories and concentrations of assets and liabilities, leverage, size, complexity, risk profile, interconnectedness to the financial system, threat posed to the stability of the financial system, and any other considerations that the FDIC deems appropriate.

Subsection (p). No Federal Status. This subsection clarifies that a covered bank holding company that receives assistance, is placed into conservatorship or receivership, or both under section 1204 is not an agency or instrumentality of the United States, and that directors, officers, or employees of the covered bank holding company are not officers or employees of the United States. This subsection is substantively similar to the FDIA provision relating to bridge banks (12 U.S.C. § 1821(n)(6)).

Section 1210. Clarification of Prohibition Regarding Concealment of Assets from Conservator, Receiver, or Liquidating Agent

This section makes a conforming change to a provision of the criminal code relating to concealment of assets from the FDIC or SEC acting as conservator or receiver.

Section 1211. Miscellaneous Provisions

This section makes conforming changes to the bankruptcy code by excluding from the definition of the term “debtor” those bank holding companies covered by a determination of the Secretary under section 1203 of this Act. This section also makes conforming changes to the netting provisions contained in the Federal Deposit Insurance Corporation Improvement Act of 1991 by expanding the exceptions to include section 1209(c) of this Act and section 1367 of the HERA (12 U.S.C. § 4617(d)).