No. 19-563

In the Supreme Court of the United States

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

PATRICK J. COLLINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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QUESTIONS PRESENTED

During the financial crisis in 2008, the Director of the Federal Housing Finance Agency (FHFA) exercised his authority under a federal statute to appoint FHFA as conservator of Fannie Mae and Freddie Mac. FHFA, as conservator, negotiated agreements with the Department of the Treasury under which Treasury committed to investing billions of dollars in the enterprises in return for compensation consisting, in part, of dividends tied to the amount invested. In 2012, after numerous quarters in which the enterprises' dividend obligations exceeded their total earnings—causing the enterprises to draw additional capital from Treasury just to pay dividends to Treasury—FHFA and Treasury negotiated the Third Amendment to their agreements. The Third Amendment replaced the fixed dividends with variable quarterly dividends tied to the enterprises' net worth. The questions presented are:

1. Whether the statute's succession clause—which vests in FHFA, as conservator, the shareholders' "rights * * * with respect to the [enterprises] and the[ir] assets," including the right to bring derivative suits on behalf of the enterprises, 12 U.S.C. 4617(b)(2)(A)(i)—precludes shareholders from challenging FHFA's adoption of the Third Amendment.

2. Whether the statute's anti-injunction clause—which prohibits courts from taking any action that would "restrain or affect the exercise of powers or functions of the Agency as a conservator," 12 U.S.C. 4617(f)—precludes judicial invalidation of the Third Amendment.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-147a) is reported at 938 F.3d 553. The opinion of the court of appeals panel (Pet. App. 150a-253a) is reported at 896 F.3d 640. The memorandum and order of the district court (Pet. App. 254a-267a) are reported at 254 F. Supp. 3d 841.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2019. The petition for a writ of certiorari was filed on October 25, 2019. The petition for a writ of certiorari was granted on July 9, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-91a.

STATEMENT

A. Factual Background

This case comes to the Court on a motion to dismiss the complaint. Pet. App. 6a. We therefore assume the truth of the well-pleaded allegations in the complaint and rely on the "sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss"—namely, "the complaint," "documents incorporated into the complaint by reference," and "matters of which a court may take judicial notice." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

1. Congress created the Federal National Mortgage Association (Fannie Mae) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970. J.A. 44. These enterprises are publicly traded companies with private shareholders, but they operate under congressional charters, serve "public missions," and are "important to providing housing in the United States and the health of the Nation's economy." 12 U.S.C. 4501(2). In particular, they provide liquidity and stability to the national mortgage market. J.A. 25. They accomplish those objectives primarily by buying home loans from private lenders, pooling some of those loans into mortgage-backed securities, and selling the securities to private investors. J.A. 44. By buying loans from lenders, the enterprises provide the lenders with additional funds that the lenders can then use to make additional loans; and by bundling loans into securities backed by the enterprises' credit guarantees, the enterprises attract investors who might not otherwise have invested in mortgages—thereby expanding the pool of funds available for housing loans.

In 2008, the enterprises suffered overwhelming losses because of a decline in home prices and an increase in defaults on home loans. J.A. 45. The enterprises lost more in 2008 ($108 billion) than they had earned in the previous 37 years combined ($95 billion). Pet. App. 6a-7a. At the time, the enterprises' mortgage portfolios were worth approximately $5 trillion, or nearly half the national mortgage market. *Id.* at 6a.

2. Recognizing that the failure of Fannie Mae and Freddie Mac would have had catastrophic effects for the national housing market and the economy, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act or Act), Pub. L. No. 110-289, 122 Stat. 2654 (12 U.S.C. 4501 *et seq.*). Through the Recovery Act, Congress created the Federal Housing Finance Agency (FHFA or Agency) to regulate the enterprises. 12 U.S.C. 4511. FHFA is headed by a single Director, appointed by the President with the advice and consent of the Senate. 12 U.S.C. 4512(a) and (b)(1). The Director serves a five-year term, but the President may remove him sooner "for cause." 12 U.S.C. 4512(b)(2). If the office of Director becomes vacant, the President may designate one of three FHFA Deputy Directors to serve as Acting Director. 12 U.S.C. 4512(f).

The Recovery Act provides that the Director may, at his "discretion," appoint FHFA as "conservator or receiver" for the enterprises "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. 4617(a)(2). As conservator, FHFA obtains broad powers concerning the enterprises. 12 U.S.C. 4617(b).

Most importantly, FHFA "may, as conservator, take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [enterprises] and preserve and conserve the assets and property of the [enterprises]." 12 U.S.C. 4617(b)(2)(D). The Act grants FHFA a broad range of tools with which it can accomplish that mission. For example, under the Act's succession clause, FHFA "immediately succeed[s]" to "all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises] and the[ir] assets." 12 U.S.C. 4617(b)(2)(A)(i). Under additional provisions, FHFA also may "take over the assets of and operate" the enterprises, "conduct all business" of the enterprises, and "transfer or sell any asset or liability" of the enterprises. 12 U.S.C. 4617(b)(2)(B)(i) and (G). And in exercising all of those powers, FHFA may act "in the best interests of the [enterprises] or the Agency." 12 U.S.C. 4617(b)(2)(J)(ii).

The Recovery Act also grants FHFA broad powers over the enterprises when appointed as receiver to liquidate their assets. 12 U.S.C. 4617(b)(2)(E). But the Act imposes on FHFA various procedural requirements in the liquidation process. 12 U.S.C. 4617(b)(3)-(9).

The Recovery Act separately grants the Department of the Treasury "temporary" authority to "purchase any obligations and other securities issued by" the enterprises and to "exercise any rights received in connection with such purchases"—but the terms of the purchase must "protect the taxpayer" and "provide stability to the financial markets." 12 U.S.C. 1455(*l*)(1)(A), (2)(A), and (D), 1719(g)(1)(A)-(B) (capitalization and emphasis omitted). That authorization "made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 600 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018).

Finally, the Recovery Act limits judicial review of FHFA's actions. It provides that the enterprises may sue "for an order requiring the Agency to remove itself as conservator or receiver" only if they challenge the initial appointment "within 30 days of such appointment." 12 U.S.C. 4617(a)(5)(A). Once the appointment can no longer be challenged, the Act's succession clause vests in FHFA itself both the enterprises' rights to bring suit and the shareholders' rights to sue on behalf of the enterprises. 12 U.S.C. 4617(b)(2)(A). The Act further provides that, "[e]xcept as provided in [Section 4617] 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." 12 U.S.C. 4617(f).

3. On September 6, 2008, FHFA appointed itself as conservator of both Fannie Mae and Freddie Mac. J.A. 27. One day later, FHFA, as conservator, entered into agreements with Treasury under which Treasury committed to infuse up to $100 billion into each enterprise. J.A. 53-62. For that massive support, the agreements provided that Treasury would receive various forms of compensation—including preferred stock, dividends in return for the capital actually invested, periodic fees in return for the outstanding capital commitment, warrants to purchase nearly 80% of the enterprises' common stock, and priority over other stockholders in recouping Treasury's investment if the enterprises were later liquidated. J.A. 56-61. Critically, the size of the dividends each enterprise owed was tied to the amount

of capital Treasury had invested in the enterprise; it did not vary with the enterprise's profits. J.A. 57.

Treasury's initial commitment to provide up to $100 billion to each enterprise soon proved inadequate. In May 2009, FHFA and Treasury amended the agreements to increase Treasury's commitment to $200 billion for each enterprise. J.A. 62. Then, in December 2009, FHFA and Treasury again amended the agreements. *Ibid.* The amendment permitted unlimited draws through the end of 2012 without regard to the cap on the available commitment; after 2012, the cap on the remaining commitment would be reinstated. *Ibid.*

Between 2009 and 2011, the dividends that the enterprises owed to Treasury repeatedly exceeded their quarterly earnings by billions of dollars. JA. 71, 74. The enterprises drew more money from Treasury just to pay Treasury's dividends. J.A. 66. Under the governing dividend formula, however, drawing more money from Treasury meant increasing the size of future dividends. J.A. 57. And because the size of Treasury's capital commitment was scheduled to become fixed at the end of 2012, continuing that cycle—drawing more money to pay dividends, in turn increasing the future dividends—would have reduced the remaining commitment available. By early 2012, the dividends that the enterprises collectively owed Treasury had reached around $19 billion per year. J.A. 71, 74. Further, although Treasury had refrained from collecting commitment fees in 2011 and 2012 under a clause permitting waiver "based on adverse conditions in the United States mortgage market," J.A. 220, it retained the right to collect those potentially sizable fees in the future, J.A. 86.

In August 2012, Treasury and FHFA (led at the time by Acting Director Edward DeMarco) amended the purchase agreements a third time. J.A. 36, 76-78. The Third Amendment replaced the previous fixed dividend (tied to the size of Treasury's investment) with a variable dividend (tied to the enterprises' net worth). J.A. 83. Under the new formula, Treasury's dividend each quarter would equal the amount, if any, by which the enterprises' net worth exceeded a specified capital reserve. *Ibid.* Setting aside the capital reserve, "[i]n simple terms, the Third Amendment requires Fannie and Freddie to pay quarterly to Treasury a dividend equal to their net worth—however much or little that might be. Through that new dividend formula, Fannie and Freddie would never again [draw more money from Treasury] just to make their quarterly dividend payments, thereby precluding any dividend-driven downward debt spiral. But neither would Fannie or Freddie be able to accrue capital in good quarters." *Perry Capital*, 864 F.3d at 602. The Amendment also suspended the periodic commitment fees that potentially would be owed to Treasury going forward. J.A. 86.

B. Proceedings Below

1. In October 2016, over four years after Treasury and FHFA agreed to the Third Amendment, three individual shareholders (petitioners in No. 19-422, respondents in No. 19-563) challenged the Amendment in federal district court. Pet. App. 164a; see J.A. 24-119. The shareholders raised three statutory claims: that FHFA had exceeded its authority under 12 U.S.C. 4617(f) as conservator, that Treasury had exceeded its authority under 12 U.S.C. 1455(*l*) and 1719(g) to buy securities, and that Treasury had acted arbitrarily and capriciously in violation of the Administrative Procedure Act

(APA), 5 U.S.C. 701 *et seq.* The shareholders also claimed that the Recovery Act's provision making FHFA's single Director removable only for cause violates Article II of the Constitution.

2. The district court granted FHFA's and Treasury's motions to dismiss the statutory claims, granted FHFA's motion for summary judgment on the constitutional claim, and denied the shareholders' cross-motion for summary judgment on the constitutional claim. Pet. App. 254a-267a. The court first held that the "adoption of the Third Amendment falls within FHFA's statutory conservatorship powers." *Id.* at 262a (citation omitted). The court then rejected the shareholders' constitutional claims, reasoning that "a 'for cause' removal provision" complies with the Constitution even where the provision protects "a single director" rather than "a multimember board." *Id.* at 266a.

3. A fractured panel of the court of appeals affirmed in part and reversed in part. Pet. App. 150a-253a. In a per curiam opinion, the court first affirmed the district court's dismissal of the shareholders' statutory claims. *Id.* at 167a. The court of appeals explained that "the D.C., Sixth, and Seventh Circuits ha[d] all rejected" statutory challenges to the Third Amendment, and it adopted "the same well-reasoned basis common to those courts' opinions." *Ibid.* Turning to the constitutional claim, the court concluded that the Recovery Act violated the Constitution by making FHFA's single Director removable only for cause, but that the proper remedy for that violation was to declare unconstitutional and sever the statutory provision addressing removal, not to invalidate the Amendment. *Id.* at 167a-216a.

Judge Haynes joined the panel's opinion in full. Pet. App. 150a n.1. Chief Judge Stewart joined the panel's statutory holding, but dissented from its constitutional holding. *Id.* at 217a-221a. Judge Willett joined the panel's constitutional holding, but dissented from its statutory holding. *Id.* at 222a-253a.

4. The court of appeals, rehearing the case en banc, affirmed in part and reversed in part. Pet. App. 1a-147a. A majority of the en banc court reversed the dismissal of the statutory claim against FHFA, while affirming the dismissal of the statutory claims against Treasury. *Id.* at 18a-51a. A different majority held that FHFA's structure violated the Constitution. *Id.* at 52a-64a, 65a n.1. A third majority held that the appropriate remedy for the constitutional violation was to declare unconstitutional and sever the removal provision, but not to invalidate the Third Amendment. *Id.* at 65a-72a.

a. In an opinion by Judge Willett for nine of the 16 judges, the court of appeals addressed the shareholders' statutory claims. Pet. App. 18a-51a. The court reversed the dismissal of the shareholders' statutory claim against FHFA, remanding the case so that the district court could determine "if fact issues require trial or if summary judgment should be granted." *Id.* at 51a. But the court of appeals affirmed the dismissal of the shareholders' statutory claims against Treasury. *Id.* at 32a-33a.

The court of appeals first rejected the government's contention that the Recovery Act's anti-injunction clause (12 U.S.C. 4617(f)) forecloses the shareholders' statutory claims. Pet. App. 18a-25a. The court reasoned that the clause "distinguishes improperly exercising a power (not restrainable) from exercising one that was never authorized (restrainable)." *Id.* at 19a. The court thus ruled that "whether the anti-injunction provision bars relief * * * depends entirely on whether the [Third Amendment] exceeded FHFA's statutory conservatorship powers." *Id.* at 25a.

Turning to that question, the court of appeals held that the shareholders "stated a plausible claim that the Third Amendment exceeded statutory authority." Pet. App. 46a. The court reasoned that FHFA, as conservator, had the authority to preserve and conserve the enterprises' assets, but that only a receiver, not a conservator, had the authority to "liquidate" those assets. *Id.* at 37a; see *id.* at 33a-45a. Relying on the shareholders' allegations, the court concluded that, in adopting the Amendment, FHFA improperly "abandoned rehabilitation in favor of 'winding down'" the enterprises. *Id.* at 46a-47a. The court emphasized that the Amendment grants Treasury "a right to the [enterprises'] net worth in perpetuity" and that the shareholders' complaint included allegations suggesting (in the court's view) that FHFA designed the Amendment with the intent "to deprive Fannie and Freddie of all their capital." *Id.* at 47a, 50a (brackets and citation omitted).

The court of appeals also rejected the government's argument that the shareholders' statutory claims were independently foreclosed by the Recovery Act's succession clause (12 U.S.C. 4617(b)(2)(A)(i)). See Pet. App. 25a-33a. The court acknowledged that the succession clause prohibits shareholders from bringing derivative claims on behalf of the enterprises while the enterprises remain in conservatorship. *Id.* at 26a. The court concluded, however, that the clause did not preclude the shareholders from bringing direct claims on their own behalf against FHFA, and that the shareholders' challenge to the Third Amendment was a direct claim, not a derivative one. *Id.* at 27a-32a. The court reasoned that FHFA's acts had allegedly injured the shareholders as "residual claimants of [the enterprises'] value" and that the shareholders had brought their claims under the APA. *Id.* at 29a.

In contrast, the court of appeals affirmed the district court's dismissal of the shareholders' claims that the Third Amendment exceeded Treasury's authority and was otherwise arbitrary and capricious. Pet. App. 32a-33a. The court concluded that the shareholders were outside the zone of interests protected by the statutory provisions they invoked and that their APA claims based on those provisions were accordingly barred. *Ibid.*

Judge Haynes, writing for the remaining seven judges, dissented from the court of appeals' reversal of the dismissal of the statutory claim against FHFA. Pet. App. 108a-113a. The dissenters agreed with the "five other circuits" that had rejected statutory challenges to the Third Amendment. *Id.* at 108a. Given the Recovery Act's "extensive" grant of authority, the dissenters concluded that FHFA "acted within its statutory powers when it adopted" the Amendment, and that the anti-injunction clause accordingly barred the shareholders' statutory claims. *Ibid.*

b. In an opinion by Judge Willett, writing for the same nine judges who reversed the dismissal of the statutory claim against FHFA, the court of appeals held that the shareholders were entitled to summary judgment on the merits of their constitutional claim challenging FHFA's structure. Pet. App. 52a-64a.

The court of appeals first concluded that the shareholders had standing to challenge FHFA's structure, reasoning that the shareholders had suffered an injury in fact (FHFA's "pumping large profits to Treasury instead of restoring the [enterprises'] capital structure") that was "traceable to the removal protection" and that was redressable by "vacatur" of the Third Amendment. Pet. App. 53a-54a. The court also concluded that the succession clause did not bar the constitutional challenge, reasoning that the clause did not speak with the clarity needed to foreclose judicial review of a constitutional claim. *Id.* at 55a-56a.

Turning to the merits, the court of appeals held that the Act's "for-cause removal protection infringes Article II." Pet. App. 56a. The court acknowledged that this Court had upheld a for-cause removal provision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), but concluded that the "exception" to the President's removal power recognized in that case "applie[s] only to multi-member bodies of experts," not to FHFA's single Director. Pet. App. 56a.

Judges Southwick, Haynes, and Graves concurred in that judgment. Pet. App. 65a n.1. In a joint opinion concurring in part and dissenting in part, Judges Oldham and Ho explained that the constitutional holding accorded with the Constitution's original meaning and with precedent. *Id.* at 76a-107a. Judge Higginson, writing for four judges, dissented from the constitutional holding on the merits. *Id.* at 114a-127a. Judge Costa, writing for two judges, dissented from the constitutional holding on the additional ground that the shareholders lacked standing to challenge the constitutionality of FHFA's structure. *Id.* at 128a-139a.

c. In an opinion by Judge Haynes for a different majority of nine judges, the court of appeals held that the appropriate remedy for the constitutional violation was to declare unconstitutional and sever the provision governing the removal of FHFA's Director, but not to invalidate the Third Amendment. Pet. App. 65a-72a.

The court of appeals emphasized that "the President had adequate oversight" of the adoption of the Third Amendment: the Secretary of the Treasury "was subject to at will removal by the President," meaning that the President "had plenary authority to stop the adoption of the [Amendment]" if he wanted to do so. Pet. App. 69a. The court concluded: "This is thus a unique situation where we need not speculate about whether appropriate presidential oversight would have stopped the [Amendment]. We know that the President, acting through the Secretary of the Treasury, could have stopped it but did not." *Id.* at 69a-70a.

The court of appeals also observed that, although the shareholders sought invalidation of the Third Amendment, they did not seek invalidation of any other parts of the agreements. Pet. App. 67a. That, the court explained, was "because the rest of the deal [wa]s a pretty good one for them: who would not want a virtually unlimited line of credit from Treasury?" *Ibid.* The court concluded that the shareholders were not entitled to "pick and choose among remedies based on their preferences," unwinding the parts of the agreements that they dislike but not the parts that they prefer. *Ibid.*

Judge Willett, writing for seven judges, dissented from that remedial holding. Pet. App. 140a-147a. Judges Oldham and Ho, in a joint opinion concurring in part and dissenting in part, asserted that the court of appeals' remedial holding violated the Constitution. *Id.* at 101a-107a.

SUMMARY OF ARGUMENT

After the 2008 financial crisis, FHFA and Treasury negotiated an agreement under which Treasury would provide capital to Fannie Mae and Freddie Mac. In the Third Amendment, FHFA and Treasury renegotiated the formula for calculating the dividends and fees owed to Treasury for that capital investment and commitment. The shareholders claim that the Amendment violates the Recovery Act, but two separate provisions of the Act foreclose that challenge: the succession clause and the anti-injunction clause.

I. The succession clause provides that FHFA, as conservator or receiver, succeeds to "all rights, titles, powers, and privileges" of the enterprises, their directors and officers, and their shareholders. 12 U.S.C. 4617(b)(2)(A). One of the traditional rights of a corporate shareholder is the right, in certain circumstances, to bring a derivative suit—*i.e.*, a suit on behalf of and for the benefit of the corporation. It is clear and undisputed that the succession clause generally eliminates the shareholders' right to bring derivative suits during a conservatorship.

Under well-established principles of the law of corporations, a suit is derivative if the corporation suffered the alleged harm and would receive the recovery. The shareholders' challenge to the Third Amendment satisfies that test. The complaint alleges, at bottom, that the Amendment harms *the enterprises* by requiring them to turn over their net worth. And the relief sought in the complaint—the invalidation of the Amendment's dividend provision and the effective return of sums the enterprises have already paid—might put more money in *the enterprises'* coffers, but would not directly add any money to the shareholders' personal bank accounts.

The challenge to the Amendment is thus derivative, and the succession clause bars it.

The court of appeals erred in holding that the succession clause does not bar the shareholders' claim simply because the shareholders have invoked the APA cause of action. The APA's right of review neither displaces separate limitations on review nor transforms the claim asserted here from derivative to direct. The shareholders also may not invoke a "conflict of interest" exception to the succession clause. The text contains no such exception, and the context refutes it.

II. The anti-injunction clause provides that, subject to exceptions not at issue here, "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." 12 U.S.C. 4617(f). FHFA exercises broad powers and functions as conservator. The Recovery Act empowers the conservator to take actions that "may be" "necessary" to put the enterprises "in a sound and solvent condition" and "appropriate" to "preserve and conserve the[ir] assets and property." 12 U.S.C. 4617(b)(2)(D). In taking such actions, the conservator may use a wide range of tools, including transferring or selling the enterprises' assets. 12 U.S.C. 4617(b)(2)(A), (B), and (G). And the conservator may exercise all of those powers to serve the interests of the enterprises or of FHFA itself—including the public interests they both serve—rather than focusing on the shareholders' interest in receiving profits. 12 U.S.C. 4617(b)(2)(J).

The Third Amendment falls well within those statutory powers. At the time of the Amendment, the enterprises collectively owed an annual dividend to Treasury of roughly $19 billion. The conservator had paid that dividend in the past by drawing on Treasury's commitment of capital to the enterprises, but that practice in turn increased the future amount of the dividend. And Treasury's capital commitment would soon have become capped, creating a possibility that the ever-increasing dividend would have consumed the remainder of the commitment backstopping the enterprises' vital operations. In the Amendment, FHFA and Treasury converted the fixed dividend tied to the amount of capital that Treasury had invested to a variable dividend tied to the net worth of the enterprises, and also suspended the periodic fee for the outstanding capital commitment. The new formula eliminated any need for the enterprises to draw on Treasury's commitment in order to pay their dividends, and it was permissible for the conservator to conclude that the Amendment may have been appropriate to preserve and conserve the commitment and necessary to put the enterprises in a sound and solvent condition. As the Amendment thus falls within FHFA's broad powers as conservator, the anti-injunction clause bars the shareholders' challenge to it.

In reaching the contrary conclusion, the court of appeals broke from the five other courts of appeals that have considered the question. The court did so only by imposing a series of atextual constraints on FHFA's powers under the Recovery Act. FHFA's power as conservator to adopt the Third Amendment was not foreclosed either by the Act's separate authorization for a receiver to liquidate the enterprises or by any common-law limits on conservators. Nor was it legally material whether or not FHFA acted with proper motives or the Amendment has (so far) harmed the enterprises more than it has benefited them and the public.

ARGUMENT

After the 2008 financial crisis, FHFA entered into agreements with Treasury under which Treasury provided hundreds of billions of dollars to rescue Fannie Mae and Freddie Mac, in return for an annual dividend tied to the amount of Treasury's investment. By 2012, the enterprises' collective dividend had reached $19 billion per year, the enterprises had repeatedly drawn money from Treasury's capital commitment simply to pay their dividends to Treasury, and the commitment was about to become capped. In the Third Amendment, FHFA and Treasury renegotiated the agreements' terms, converting the fixed dividend to a variable dividend tied to the amount of the enterprises' net worth and suspending the periodic commitment fee. That modification ensured that the enterprises' need to pay dividends would no longer cause them to draw on the vital capital commitment.

Roughly four years after the Third Amendment, three individual shareholders brought this suit, claiming that the Amendment improperly dissipated the enterprises' assets and thus exceeded FHFA's powers as conservator. That claim fails for two independent reasons. First, the Recovery Act's succession clause precludes shareholders from bringing derivative suits during a conservatorship, and the shareholders' suit is a paradigmatic example of a derivative suit, as it claims an improper diminution of corporate assets and seeks a restoration of those assets to the corporations. Second, the Act's anti-injunction clause precludes shareholders from challenging FHFA's exercise of its statutory powers as conservator, and FHFA's renegotiation of the dividend formula and commitment fee falls well within those powers.

I. THE SUCCESSION CLAUSE BARS THE SHAREHOLDERS' CHALLENGE TO THE THIRD AMENDMENT

The succession clause provides:

> The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to * * * 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). As shown below, the clause vests in FHFA itself the shareholders' right to sue for injuries to the enterprises, and thus divests the shareholders of any right to bring their statutory claim. The shareholders may not evade the succession clause by invoking the APA cause of action or by asserting an unwritten "conflict of interest" exception.

A. The Shareholders' Challenge To The Third Amendment Falls Within The Scope Of The Succession Clause

The parties and the court of appeals all recognize that the succession clause precludes shareholders from bringing derivative claims on behalf of the enterprises during a conservatorship. A claim is derivative if it rests on an allegation of harm to the corporation and the relief sought would flow to the corporation. The shareholders' statutory challenge to the Third Amendment is plainly derivative under that test, and the succession clause accordingly bars it.

1. The succession clause precludes shareholders from bringing derivative claims during a conservatorship

The succession clause transfers the "rights, titles, powers, and privileges" of the corporation, its directors, and its shareholders to the conservator. 12 U.S.C.

4617(b)(2)(A)(i). Identifying those "rights, titles, powers, and privileges" requires looking to background rules of the law of corporations.*

a. One of the traditional rights of a corporation is the right to sue. In general, "the proper party to bring a suit on behalf of a corporation is the corporation itself, acting through its directors or a majority of its shareholders." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 542 (1984). Under a doctrine known as the "shareholder standing rule," an individual shareholder has no right to "initiat[e] actions to enforce the rights of the corporation." *Franchise Tax Board* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990).

An exception to the shareholder-standing rule, known as the shareholder derivative suit, enables "a single stockholder" to "sue in the corporation's right" where the directors and officers have "refused to pursue a remedy." *Koster* v. *(American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 522 (1947). "The cause of action which such a plaintiff brings before the

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* Federal law governs "the rights and obligations of federally chartered institutions." 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4515 (update Apr. 2020). In resolving such federal issues, federal courts should "look to state law" for guidance, rather than "'fashion an entire body of federal corporate law out of whole cloth.'" *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 98-99 (1991) (citation omitted). Fannie Mae and Freddie Mac have, in accordance with federal regulations, chosen Delaware and Virginia law, respectively, to govern their corporate affairs, to the extent such law is not inconsistent with federal law. *Roberts* v. *FHFA*, 889 F.3d 397, 408-409 (7th Cir. 2018); 12 C.F.R. 1239.3(b). In this case, however, choice-of-law questions about whether to apply federal law or state law, or about which State's law to apply, are ultimately immaterial; the relevant principles of corporation law are both well-established and widely accepted.

court is not his own but the corporation's. It is the real party in interest and he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual." *Id.* at 522-523 (footnote omitted).

b. Against that backdrop, the succession clause provides that FHFA, as conservator, succeeds to "all rights, titles, powers, and privileges" of (1) "the regulated entity," (2) its "officer[s]" and "director[s]," and (3) its "stockholder[s]," "with respect to the regulated entity and [its] assets." 12 U.S.C. 4617(b)(2)(A)(i). That means the conservator succeeds to, among other things, the corporation's right to litigate its claims. See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) (interpreting similarly worded clause in an earlier receivership statute). The conservator also succeeds to the directors' general powers to manage corporate litigation. Finally, and most relevant here, the conservator succeeds to the shareholders' power to bring derivative suits on behalf of the corporation.

Indeed, it is undisputed here that the succession clause generally bars shareholders from bringing derivative suits during a conservatorship. The court of appeals accepted that "FHFA succeeded to derivative claims." Pet. App. 26a. The shareholders, too, admit that the "Succession Clause applies * * * to certain derivative claims." Shareholders C.A. Supp. Br. 47 (emphasis omitted). The parties instead dispute only whether the shareholders' claims are derivative and, if so, whether they are implicitly exempt from the general bar on derivative suits.

2. A claim is derivative if the corporation suffered the alleged harm and would receive the recovery

The hornbook test of whether a shareholder's suit is derivative or direct turns on two questions: (1) "who suffered the alleged harm" and (2) "who would receive the benefit of any recovery." 12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 5911, at 572 (rev. 2017). If the corporation suffered the harm and would receive the recovery, the suit is derivative; if the shareholder suffered the harm and would receive the recovery, the suit is direct. *Id.* § 5911, at 558-563.

That two-part test accords with this Court's cases, which indicate that a suit's derivative character depends on whether the shareholder has "suffered direct injuries," *Alcan*, 493 U.S. at 336-337, and whether "[t]he relief asked is on behalf of the corporation, not the individual shareholder," *Davenport* v. *Dows*, 85 U.S. (18 Wall.) 626, 627 (1874). Notably, given the salience here of Delaware and Virginia law (p. 19 n.*, *supra*), the test has been adopted by the Supreme Court of Delaware and is consistent with the decisions of the Supreme Court of Virginia. See *El Paso Pipeline GP Co.* v. *Brinckerhoff*, 152 A.3d 1248, 1260 (Del. 2016); *Tooley* v. *Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *Little* v. *Cooke*, 652 S.E.2d 129, 136 (Va. 2007); *Simmons* v. *Miller*, 544 S.E.2d 666, 674 (Va. 2001). The test also comports with the law of many other States. See Fletcher § 5911. In parallel challenges to the Third Amendment, federal courts of appeals have used the test to determine whether the succession clause bars suits brought by the enterprises' shareholders. *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 600 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018); *Roberts* v. *FHFA*, 889 F.3d 397, 409 (7th Cir. 2018). And the court of appeals here did not propose any alternative test.

Under the two-part test, a variety of suits qualify as derivative. For example, claims involving "improper" corporate transactions, "waste of corporate assets," or "impairment or destruction of the business of the corporation" all belong to the corporation rather than to the shareholder. Fletcher § 5923, at 628-629. In such cases, the corporation suffers the harm, and the corporation would receive any recovery. *Ibid.*

In contrast, a suit is direct only if the shareholder claims a "direct injury" that is "independent of any alleged injury to the corporation" and if "the recovery or other relief flows directly" to him rather than to the corporation. *Tooley*, 845 A.2d at 1036, 1039. Examples of direct claims include claims that the corporation has "depriv[ed] [particular] shareholders of their right to vote," "wrongful[ly] refus[ed] to issue a certificate of stock" to a shareholder, or has denied a shareholder his right "to obtain inspection of corporate books or records." Fletcher § 5915, at 604-607. In such cases, the shareholder suffers a harm as an individual separate and apart from any harm to the corporation, and the shareholder would directly receive any recovery. Importantly, however, "diminution in the value of corporate stock resulting from some depreciation or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder." Fletcher § 5913, at 600.

3. The shareholders' challenge to the Third Amendment is a derivative claim

a. The challenge to the Third Amendment satisfies the first part of the test for a derivative claim: it rests on an allegation of harm to (and through) the corporation. The opening paragraph of the shareholders' complaint captures the gravamen of the claim: in the Third

Amendment, FHFA and Treasury "forc[ed] these publicly-traded, shareholder-owned *Companies* to turn over *their* entire net worth." J.A. 25 (emphasis altered). That is an allegation of harm to the corporation, not to the shareholders as individuals.

The remaining allegations reinforce that understanding. To list only a few examples:

- "The effect of the Net Worth Sweep is thus to force the Companies to operate in perpetuity on the brink of insolvency." J.A. 84.
- "[T]he Companies' inability to build capital reserves under the Net Worth Sweep [i]s a 'serious risk' that erodes investor confidence in the Companies." *Ibid.*
- "Forcing the Companies to [comply with the sweep] has deleterious effects on their borrowing costs, which is a major expense for both Companies." J.A. 85.
- "FHFA is operating the Companies in an inherently unsafe and unsound manner and hindering the ability of the Companies to restore their financial health so that they can be returned to normal business operations." J.A. 103-104.

To the extent that the complaint alleges harms to the shareholders—for instance, the reduction in the value of their shares and the depletion of corporate assets from which they could be paid dividends, J.A. 115—those harms are simply the incidental byproducts of the alleged harm to the corporation. They fail the requirement that "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039; see Fletcher § 5913, at 595-596 ("[S]hareholders cannot sue in their own names and on their own behalf to recover for a loss resulting from depreciation of the value of their stock as a result of an injury to the corporation.").

b. Relatedly, the challenge to the Third Amendment satisfies the second part of the test for a derivative action: any recovery would flow to the corporations, not to the three individual shareholders. The complaint seeks injunctions forbidding FHFA and Treasury from enforcing the Third Amendment's dividend provision, a declaration that the provision is unlawful, and vacatur of the provision. J.A. 117-118. The complaint also seeks an injunction directing Treasury "to return to Fannie and Freddie all dividend payments" made under the Amendment. J.A. 118. The shareholders have proposed effectuating the latter remedy through certain "accounting entries on the books of Treasury and the Companies." Shareholders C.A. Supp. Br. 29.

All of those requested remedies flow to the corporations rather than the shareholders. In particular, any relief enjoining, declaring invalid, or vacating the dividend provision would at most enable *the corporations* to avoid paying dividends to Treasury. So too, any relief requiring Treasury to return past dividend payments might put more money in *the corporations'* coffers, or require accounting entries in *the corporations'* books. But such relief would not directly save the shareholders any money, nor add money to the shareholders' individual bank accounts, nor require any entries in the shareholders' personal books.

In sum, the three individual shareholders allege harm to (and through) the corporations and seek relief that would flow to the corporations. That makes their challenge to the Third Amendment derivative. Indeed, although the shareholders allege that the Amendment caused an unusual degree of harm to the enterprises, the kind of claim they raise—namely, that the enterprises' assets have been improperly diminished and should be restored—is quintessentially derivative. See Fletcher § 5924, at 647-648 ("[A]n action based on a claim of waste of corporate assets is properly asserted derivatively, and cannot be brought as an individual action."). Accordingly, the succession clause precludes this suit.

B. The APA Does Not Convert The Shareholders' Suit Into A Direct Claim

The court of appeals held this claim is direct, not derivative, because the shareholders have proceeded under the APA. Pet. App. 27a-32a. The court reasoned that the APA itself grants a direct claim to any shareholder who satisfies the "zone of interests" test for bringing suit under the APA, and that the shareholders here fall within the zone of interests protected by the Recovery Act's limitations on FHFA's powers as conservator. *Id.* at 28a. That reasoning is mistaken. Even assuming that a contract adopted by the conservator qualifies as "agency action" reviewable under the APA, 5 U.S.C. 702, the shareholders' invocation of the APA has no effect on the derivative character of their suit. The court's conclusion that the APA transforms the shareholders' suit from derivative to direct contradicts the APA's text, conflicts with this Court's precedents, and leads to untenable results.

1. Under the traditional test for distinguishing direct from derivative claims, the shareholders' reliance on the APA makes no difference to the character of their suit. As discussed, the issue whether a share-

holder's suit is derivative or direct turns on "who suffered the alleged harm" and "who would receive the benefit of any recovery." Fletcher § 5911, at 572 (emphasis added). The shareholders' claim that the Third Amendment exceeds FHFA's conservatorship powers neither rests on any direct injury to the shareholders nor seeks any recovery that would flow directly to the shareholders. See pp. 22-25, *supra*. The shareholders' invocation of the APA cause of action as the method of enforcing the Recovery Act's alleged limitations does not change that conclusion.

Indeed, the APA itself refutes any suggestion that its cause of action overrides the traditional test for distinguishing derivative from direct actions or converts the shareholders' claim from a prohibited derivative suit into a permissible direct suit. The APA grants a right of review to, and waives the sovereign immunity of the United States for, a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. This Court has held that a person is "adversely affected or aggrieved" within the meaning of the APA only if his asserted interest is "arguably within the zone of interests to be protected or regulated" by the statute allegedly violated. *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 395-396 (1987) (citation omitted). On top of that limitation, though, the final sentence of the APA right-of-review provision makes clear that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702.

Accordingly, as this Court has explained, although the APA grants a right of review and waives sovereign immunity, it "d[oes] not affect any other limitation on judicial review that would otherwise apply." *Darby* v. *Cisneros*, 509 U.S. 137, 153 (1993). Any limitation that is otherwise "required by statute or by agency rule" "continues to exist under the APA." *Ibid.*

Here, the restrictions imposed by the Recovery Act's succession clause constitute "other limitations on judicial review." 5 U.S.C. 702. They also constitute "other appropriate legal or equitable ground[s]" for dismissing the suit or denying relief. *Ibid.* Under the APA's plain terms, "[n]othing" in the statute even "affects"—much less supersedes—the succession clause. *Ibid.*

2. This Court and other courts have construed other statutes that grant a similar right of review not to alter the operation of background restrictions on shareholder suits. Like the APA, such statutes do not authorize shareholders to sue when unlawful action against their corporation causes the value of their shares to go down.

For example, a longstanding civil-rights statute protects the equal right of "[a]ll persons" to make and enforce contracts without regard to race, 42 U.S.C. 1981(a), and this Court has recognized an implied right of action through which "aggrieved individuals" may enforce that prohibition, *Jett* v. *Dallas Independent School District*, 491 U.S. 701, 731-732 (1989) (citation omitted). Yet the Court has unanimously held that the statute does not entitle a shareholder to sue over discrimination in connection with the corporation's contracts, noting that such a result would contradict the "fundamental" principle of corporation law that a shareholder has "no rights" under "the corporation's contracts." *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 477 (2006). So too, the Racketeer Influenced and Corrupt Organizations Act (RICO) allows suit by "[a]ny person injured in his business or property by reason of a violation." 18 U.S.C. 1964(c). Yet the courts of appeals have "uniform[ly]" held that "corporate shareholders do not have standing to sue under the civil RICO statute for alleged injuries to the corporation." *Bixler* v. *Foster*, 596 F.3d 751, 758 (10th Cir. 2010). Likewise, the APA's right-of-review provision must be understood to retain background rules about restrictions on shareholder suits, not to displace those limits and to grant individual shareholders a right to sue over corporate injuries.

3. Finally, the court of appeals' contrary theory leads to untenable consequences. It would mean that a person who owns a single share in a corporation could bring an APA claim challenging agency action that injures the corporation, even if the action causes no injury to the shareholder beyond an indirect, contingent reduction in the value of his share, and even if the corporation's directors and officers decide that a suit would not advance the corporation's interests. For example, a shareholder might invoke the APA to challenge the levying of a regulatory fee on the corporation, the denial of a subsidy to the corporation, or the imposition of an asset divestment order on the corporation—all regardless of whether the corporation's directors and officers believe that a suit would be warranted. There is no sound reason to read the APA to produce those implausible results.

The court of appeals suggested that the APA's zone-of-interests requirement would prevent those consequences, Pet. App. 31a-32a, but it is far from evident why that would be so. A plaintiff satisfies that requirement if the interest he asserts is "arguably within the zone of interests to be protected or regulated by the statute." *Clarke*, 479 U.S. at 396 (citation omitted). The court identified no reason why, if the corporation's direct economic interests fall within that zone, the shareholders' derivative interests somehow fall outside that same zone in the hypothetical suits just discussed, while falling within that zone in this case. Cf. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706-707 (2014) ("When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights" of the "human beings" who own and use the corporations.). The zone-of-interests test thus does not clearly cabin the range of suits that shareholders could bring under the APA seeking redress for harms to their corporations. It is instead the shareholder-standing rule that performs this function.

C. There Is No "Conflict Of Interest" Exception To The Succession Clause

The shareholders alternatively argued below that, even if their claim is properly characterized as derivative, the succession clause does not apply because FHFA as conservator would face a conflict of interest in deciding whether the enterprises should challenge FHFA's past actions as conservator. Shareholders C.A. Br. 52-53. The court of appeals, however, did not rely on that argument, and for good reason because it has no basis in the statutory text or context. See *Roberts*, 889 F.3d at 409-410; *Perry Capital*, 864 F.3d at 625.

1. The succession clause states categorically that FHFA, as conservator, "immediately succeed[s]" to "*all* rights, titles, powers, and privileges * * * of *any* stockholder * * * with respect to the [enterprises] and the[ir] assets." 12 U.S.C. 4617(b)(2)(A)(i) (emphasis added). Such broad and unqualified language leaves no room for an implied limitation or exception where

FHFA as conservator allegedly has a conflict of interest. See *United States* v. *Gonzales*, 520 U.S. 1, 5, 10 (1997); *Baltimore National Bank* v. *State Tax Commission*, 297 U.S. 209, 212 (1936).

Indeed, when Congress meant to create an exception to the succession clause, it said so explicitly. Another provision of the Recovery Act authorizes the enterprises themselves to challenge FHFA's appointment as conservator or receiver within 30 days of the appointment. 12 U.S.C. 4617(a)(5)(A). The inclusion of an "express exception" generally precludes the recognition of additional "implicit" exceptions. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018).

Surrounding statutory language further undermines a conflict-of-interest exception. The Recovery Act expressly provides that FHFA may exercise its conservatorship powers "in the best interests of the regulated entity *or the Agency*." 12 U.S.C. 4617(b)(2)(J)(ii) (emphasis added). It would turn the statute on its head to treat the possibility that FHFA might invoke its statutory authority to consider its own interests as a reason to impose unwritten limits on the succession clause's vesting of rights in FHFA. Further, the Recovery Act's anti-injunction provision bars certain suits "[e]xcept as provided in this section *or at the request of the Director*." 12 U.S.C. 4617(f) (emphasis added). The emphasized phrase confirms that Congress saw nothing untoward about allowing FHFA, as conservator, to decide whether particular claims against FHFA may proceed.

In addition, a conflict-of-interest exception to a bar on derivative suits would make little sense, because the derivative suit is itself a conflict-of-interest exception to the general rules of corporate litigation. Although the power to manage corporate litigation ordinarily belongs to the corporation's directors, the primary reason for allowing derivative suits in certain circumstances is to deny directors who "perpetrated the wrongs" the ability also to "obstruct any remedy." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 548 (1949). Given that the succession clause bars derivative suits *despite* their conflict-avoiding function, it would be incongruous to create an exception to the succession clause *because* FHFA is alleged to have a conflict. See *Perry Capital LLC* v. *Lew*, 70 F. Supp. 3d 208, 230-231 (D.D.C. 2014), aff'd in part and remanded in part, 864 F.3d 591 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018).

2. The shareholders emphasized below that two courts of appeals had read a succession provision in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1811 *et seq.*—a receivership statute on which the Recovery Act was modeled—to allow derivative suits where the receiver suffered from a conflict of interest. Shareholders C.A. Br. 53 (citing *Delta Savings Bank* v. *United States*, 265 F.3d 1017, 1024 (9th Cir. 2001), cert. denied, 534 U.S. 1082 (2002); *First Hartford Corp. Pension Plan & Trust* v. *United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999)). As the D.C. Circuit observed, however, neither of those courts squared such an exception with the statutory text. See *Perry Capital*, 864 F.3d at 625; see also *Roberts*, 889 F.3d at 409. And this Court "ha[s] no warrant to ignore clear statutory language on the ground that other courts have done so." *Milner* v. *Department of the Navy*, 562 U.S. 562, 576 (2011).

The shareholders insist that Congress nonetheless "must be presumed to have adopted" the gloss added by those courts when it "reenacted substantially the same language" in the Recovery Act. Shareholders C.A. Br.

53. But as a general matter, Congress's failure to overturn an intermediate court's erroneous interpretation of a statute does not demonstrate that Congress meant to ratify that error—much less that Congress meant this Court to extend that error to additional statutes. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 186 (1994). This Court has explained, moreover, that Congress can be presumed to have adopted a gloss added by lower courts only where the lower courts' decisions are so numerous, uniform, and longstanding that they have "settled the meaning" of the relevant statutory language. *Lightfoot* v. *Cendant Mortgage Corp.*, 137 S. Ct. 553, 563 (2017); see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 325 (2012). The shareholders rely on only two appellate court decisions here, making it particularly implausible that those decisions "so clearly 'settle the meaning of the existing statutory provision' in FIRREA that [a court] must conclude the Congress intended *sub silentio* to incorporate those rulings into the Recovery Act.'" *Perry Capital*, 864 F.3d at 625 (brackets and citation omitted). Accordingly, this Court should adhere to the succession clause's plain text and hold that it precludes the shareholders' statutory claim.

II. THE ANTI-INJUNCTION CLAUSE ALSO BARS THE SHAREHOLDERS' CHALLENGE TO THE THIRD AMENDMENT

The Recovery Act's anti-injunction clause provides:

> 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.

12 U.S.C. 4617(f) (emphasis omitted). The court of appeals correctly recognized that, at a minimum, this provision precludes injunctive relief where the conservator is "exercising a function or power" that is "authorized by [the] statute," even if the conservator is doing so "improperly" or "unlawfully." Pet. App. 21a. As shown below, the Third Amendment falls well within the broad powers that the Recovery Act granted FHFA as conservator of the enterprises. The court reached the contrary conclusion only by imposing various atextual limitations on those unusually sweeping authorities.

A. The Anti-Injunction Clause Bars The Shareholders' Claim Because The Claim Challenges The Exercise Of Conservatorship Powers Granted By The Recovery Act

In the Third Amendment, FHFA renegotiated the dividends and fees owed to Treasury for its capital investment and commitment. That modification, which safeguarded the remaining commitment, fell well within FHFA's power as conservator to take actions that may be appropriate to preserve and conserve the enterprises' assets and necessary to put the enterprises in a sound and solvent financial condition. As every court of appeals to consider the issue apart from the court below has held, the anti-injunction clause therefore bars the shareholders' statutory claims. *Jacobs* v. *FHFA*, 908

F.3d 884, 890 (3d Cir. 2018); *Saxton* v. *FHFA*, 901 F.3d 954, 959 (8th Cir. 2018); *Roberts*, 889 F.3d at 402; *Robinson* v. *FHFA*, 876 F.3d 220, 232 (6th Cir. 2017); *Perry Capital*, 864 F.3d at 606.

1. Congress granted the conservator broad powers

a. The Recovery Act 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). The Act further provides that FHFA "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." 12 U.S.C. 4617(b)(2)(D). By empowering the conservator to take actions that "may be" necessary and appropriate—rather than actions that "are" necessary and appropriate—Congress made plain that the conservator enjoys broad "managerial judgment" to make "hard operational calls" about "the necessity and fiscal wisdom" of particular measures, especially in light of "ever-changing market conditions." *Perry Capital*, 864 F.3d at 607-608, 613.

The Recovery Act also makes plain that FHFA may deploy a wide range of tools in performing those conservatorship functions. Most importantly, the conservator may step into the shoes of the enterprises and use the powers of the enterprises themselves. The succession clause, as already discussed, provides that FHFA succeeds to "*all* rights, titles, powers, and privileges of the [enterprises], and of any stockholder, officer, or director * * * with respect to the [enterprises]." 12 U.S.C. 4617(b)(2)(A)(i) (emphasis added). Further, FHFA may "operate the [enterprises] with *all* the powers of the shareholders, the directors, and the officers of the [enterprises] and conduct *all* the business of the [enterprises]." 12 U.S.C. 4617(b)(2)(B)(i) (emphasis added).

In particular, the Recovery Act empowers the FHFA to control and dispose of the enterprises' assets in the course of performing its functions as conservator. FHFA succeeds to all rights and powers, not just of the enterprises themselves, but also "of any stockholder, officer, or director * * * with respect to * * * the assets of the [enterprises]." 12 U.S.C. 4617(b)(2)(A)(i). FHFA may "take over the assets of and operate the [enterprises] * * * and conduct all [their] business." 12 U.S.C. 4617(b)(2)(B)(i). And FHFA may "transfer or sell any asset or liability of the [enterprises] in default," and "may do so without any approval, assignment, or consent with respect to such transfer or sale." 12 U.S.C. 4617(b)(2)(G); see 12 U.S.C. 4502(8)(A) (providing that an enterprise is in "default" if, among other things, it is under a conservatorship).

b. The conservator's authority is especially broad because, in exercising the powers just discussed, the conservator may consider the interests of the public at large in the ongoing operation of the enterprises, rather than prioritizing the interests of the enterprises' private shareholders. That conclusion follows from the text in three ways.

First, Fannie Mae and Freddie Mac hold congressional charters and exist to serve the public interest. Congress has specifically declared that they "have important public missions," that their "continued ability * * * to accomplish their public missions is important to providing housing in the United States and the health of the Nation's economy," and that they "have an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families in a manner consistent with their overall public purposes." 12 U.S.C. 4501(1), (2), and (7). The conservator's "reorganiz[ation]" and "rehabilit[ation]" of the enterprises, 12 U.S.C. 4617(a)(2), may therefore properly focus on restoring the enterprises' prospective ability to perform their public functions, rather than on restoring their ability to deliver past profits to their shareholders. See *Saxton*, 901 F.3d at 961 (Stras, J., concurring).

Second, the Recovery Act specifically empowers the conservator to take any authorized action "which the Agency determines is in the best interests of the [enterprises] or the Agency." 12 U.S.C. 4617(b)(2)(J)(ii). As noted, the enterprises' interests include furthering their public mission. Likewise, FHFA's own interests "reflect the interests of * * * the public" it serves. *Jacobs*, 908 F.3d at 893; cf. *Nken* v. *Holder*, 556 U.S. 418, 435 (2009) (noting that the government's interests "merge" with "the public interest"). And by empowering the conservator to take any authorized action "which *[it] determines* is in the best interests of the [enterprises] *or* the Agency," 12 U.S.C. 4617(b)(2)(J)(ii) (emphasis added), the Act grants the conservator the power and discretion to "decid[e] whose interests to pursue" in performing its functions. *Saxton*, 901 F.3d at 963 (Stras, J., concurring). In contrast, the Act omits "shareholders" from the list of "best interests" to be considered. *Jacobs*, 908 F.3d at 893; cf. 12 U.S.C. 1821(c)(13)(B)(ii) (parallel provision of FIRREA that similarly omits shareholders, but specifically includes "depositors," in the list of entities whose interests the receiver is to consider).

Third, the Recovery Act allows Treasury to invest money in the enterprises only on terms that "provide stability to the financial markets," "prevent disruptions in the availability of mortgage finance," and "protect the taxpayer." 12 U.S.C. 1455(*l*)(1)(B), 1719(g)(1)(B). The Act also directs Treasury to consider particular steps—such as "limitations on the payment of dividends"—in order to "protect the taxpayers." 12 U.S.C. 1455(*l*)(1)(C)(vi), 1719(g)(1)(C)(vi). Those provisions provide further evidence that Congress prioritized the public interest over the shareholders' interests. See *Perry Capital*, 864 F.3d at 600.

2. FHFA as conservator exercised its broad statutory powers in agreeing to the Third Amendment

a. In assessing whether the Third Amendment falls within FHFA's conservatorship powers, it is important to consider the factual background concerning the enterprises' financial situation at the time FHFA acted. The critical points are acknowledged in the complaint.

By 2012, the enterprises owed Treasury roughly *$19 billion* per year in dividends based on the amount of capital Treasury had invested (plus potential fees for the outstanding capital commitment). J.A. 57, 71, 74. From 2009 to 2011, the quarterly dividends that the enterprises owed had repeatedly exceeded their quarterly earnings by billions of dollars. J.A. 71, 74. During those years, the enterprises drew on Treasury's commitment of capital simply to satisfy their dividend obligations to Treasury. J.A. 66. But under the Second Amendment, the amount of Treasury's capital commitment would have been capped at the end of 2012. J.A. 62. As a result, if the enterprises had continued the practice of drawing on Treasury's commitment to pay Treasury's dividends, the dividend payments alone could eventually have consumed the commitment, leaving the enterprises unable to use the commitment for its intended purpose of backstopping their ordinary operations.

Moreover, the enterprises faced the possibility that their dividend obligations would increase even beyond the $19 billion figure. Because the old formula tied Treasury's dividend to the amount of money Treasury had invested, drawing on Treasury's capital commitment to pay the dividend increased the size of the dividend going forward. J.A. 57. The enterprises thus faced a vicious cycle: drawing money from Treasury to pay existing dividends, in turn increasing the size of future dividends, resulting in the drawing of even more money from Treasury to pay those dividends, in turn increasing the size of those dividends still more—and after 2012, reducing Treasury's remaining capital commitment in the process.

In those circumstances, FHFA as conservator and Treasury renegotiated the enterprises' dividend obligations and commitment fee in the Third Amendment. The Amendment "replaced Treasury's fixed dividend with a variable dividend" and "eliminated Treasury's right to an annual commitment fee." *Roberts*, 889 F.3d at 401. Under the amended dividend formula, the enterprises would owe no dividends at all in quarters when they lacked sufficient net worth, but when they did have sufficient net worth, the dividend would be equal to the full amount of the net worth minus a capital buffer. *Perry Capital*, 864 F.3d at 602. Because the dividend would never exceed the enterprises' net worth, the Amendment "eliminated the risk that cash-dividend payments would consume the * * * financial lifeline" provided by Treasury. *Roberts*, 889 F.3d at 404. But the negotiated price for eliminating that risk was paying Treasury a quarterly dividend equal to the enterprises' net worth (minus a buffer) when they were profitable.

In some quarters, the new dividend formula has cost the enterprises more than the old formula; in other quarters, it has cost the enterprises less. The result for any given quarter depends on whether the enterprises' net worth beyond the capital buffer is greater or less than each enterprise's quarterly share of the $19 billion (and growing) dividend that the enterprises previously would have owed plus any commitment fee. For example, in 2015, the enterprises collectively paid Treasury only $15.8 billion. See *Perry Capital*, 864 F.3d at 602.

b. Given that undisputed factual background, the Third Amendment fell well within FHFA's broad powers under the Recovery Act as the enterprises' conservator. "Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks." *Perry Capital*, 864 F.3d at 607.

In particular, the Third Amendment fell within the conservator's power to "take such action as may be—(i) necessary to put the [enterprises] in a sound and solvent condition; and (ii) appropriate to * * * preserve and conserve the assets and property of the [enterprises]." 12 U.S.C. 4617(b)(2)(D). The enterprises' "assets and property" included Treasury's capital commitment. See *Jacobs*, 908 F.3d at 890. The Amendment helped "preserve and conserve" that asset, by eliminating the risk that the enterprises' dividend payments would consume it. See *Roberts*, 889 F.3d at 404-405. The Amendment also helped put the enterprises in a "sound and solvent condition"—by ensuring that the enterprises would never again owe more in dividends than they could afford to pay from their net worth and thereby safeguarding Treasury's capital commitment. See *id.* at 405; *Saxton*, 901 F.3d at 962 (Stras, J., concurring). More to the point, it was permissible for FHFA to conclude that the Amendment "may be" necessary and appropriate to achieve these objectives; under the Recovery Act's plain terms, no more was required.

In addition, the particular mechanism that the Third Amendment used to preserve and conserve assets and to promote soundness and solvency—namely, renegotiating dividend payments and commitment fees—was the exercise of a power Congress granted the conservator. As noted, the Recovery Act allows the conservator to step into the shoes of the enterprises and to engage in the kinds of activities that the enterprises could themselves undertake. 12 U.S.C. 4617(b)(2)(A)(i), (B)(i), and (iii). The range of activities that a corporation could undertake, in turn, includes renegotiating contracts and promising dividends to investors. See *Jacobs*, 908 F.3d at 890. FHFA, standing in the enterprises' shoes, was permitted to use those same authorities to fulfill its functions as conservator. What is more, the Recovery Act specifically empowers the conservator to "transfer or sell any asset or liability" of the enterprises "without any approval, assignment, or consent." 12 U.S.C. 4617(b)(2)(G). Through the Third Amendment, the conservator effectively sold Treasury one of the enterprises' "asset[s]" (namely, its potential net worth in future quarters) in consideration for eliminating some of the enterprises' existing "liabilit[ies]" (namely, the dividends and fees they owed to Treasury under the Second Amendment). *Ibid.*

c. The Third Amendment reflected a permissible balancing of competing interests. To start, the Amendment protected the interests of the enterprises themselves. As discussed, the Amendment ensured that the enterprises would never again owe dividends that *exceed* their net worth—thus eliminating the possibility of "[c]rushing dividend payments" in bad quarters. *Saxton*, 901 F.3d at 962 (Stras, J., concurring). And it thereby "eliminated the risk that cash-dividend payments would consume the * * * financial lifeline" provided by Treasury's capital commitment. *Roberts*, 889 F.3d at 404.

Correspondingly, the Third Amendment protected the interests of the public in the enterprises' performance of their public missions. By safeguarding the enterprises, the Amendment assured "the public" that "Fannie and Freddie can continue to stabilize the housing market" even during future "downturns." *Jacobs*, 908 F.3d at 894.

In addition, the Third Amendment accommodated Treasury's statutory obligation to "protect the taxpayer" when investing in the enterprises. 12 U.S.C. 1455(*l*)(1)(B)(iii), 1719(g)(1)(B). Under the amended dividend formula, the taxpayers took on a new risk: Treasury would receive no dividends at all in quarters when the enterprises lost money, would receive smaller dividends when either enterprise earned less than its quarterly share of $19 billion, and gave up the right to commitment fees. In return for that risk to taxpayers, Treasury could receive more in dividends in good quarters than it would have received under the old formula.

To be sure, the conservator's actions involved making tradeoffs. From the enterprises' perspective, although the Third Amendment provided downside protection in bad quarters from crushing dividend payments and commitment fees, it also eliminated the upside potential in good quarters to accrue capital. Relatedly, although the new formula might cost the enterprises less than the old formula in some quarters, it might cost the enterprises more in other quarters. In fact, the complaint alleges, in hindsight, that the total dividends under the new formula have exceeded the dividends that would have been owed under the old formula. J.A. 39. Meanwhile, from the shareholders' perspective, "[t]he most serious negative consequence * * * is that they can no longer share in Fannie's and Freddie's successes. Instead, both entities must pay out all excess capital on a quarterly basis to the Department of the Treasury, eliminating the possibility of shareholder dividends." *Saxton*, 901 F.3d at 962 (Stras, J., concurring).

Those consequences are undoubtedly significant, but in the final analysis, they do "not negate the [Third Amendment's] asset-preserving-and-conserving effects or take this action outside the broad discretion accorded to the FHFA under the Housing and Economic Recovery Act." *Saxton*, 901 F.3d at 963 (Stras, J., concurring). "Picking among different ways of preserving and conserving assets, deciding whose interests to pursue while doing so, and determining the best way to do so are all choices that the Housing and Economic Recovery Act clearly assigns to the FHFA, not courts." *Ibid.*

B. The Court Of Appeals Erroneously Imposed Several Atextual Limits On FHFA's Conservatorship Powers

1. The Recovery Act's provisions on receivership do not preclude the Third Amendment

The court of appeals observed that the Recovery Act distinguishes between FHFA's powers as conservator and its powers as receiver, and concluded that the Third Amendment "exceeded the conservator's powers and is the type of transaction reserved for a receiver." Pet. App. 47a. The court erred in imposing limits on FHFA's conservatorship powers based on flawed inferences from FHFA's receivership powers.

The Recovery Act makes some powers available to both a conservator and a receiver, some only to a conservator, and some only to a receiver. 12 U.S.C. 4617(b). The powers on which FHFA relied here belong to the first two of those categories. The power to take actions that "may be" necessary to put the enterprises in a "sound and solvent condition" and appropriate to "preserve and conserve" their assets belongs to FHFA "as conservator." 12 U.S.C. 4617(b)(2)(D); see 12 U.S.C. 4617(b)(2)(B)(iv) (also granting receiver the power to "preserve and conserve assets"). And the powers to assume the "rights, titles, powers, and privileges" of the enterprises, and to "transfer or sell any asset or liability," belongs to FHFA "as conservator or receiver." 12 U.S.C. 4617(b)(2)(A) and (G). FHFA has not invoked any power that belongs to receivers alone.

The court of appeals emphasized that only a receiver, not a conservator, has the power to "place the regulated entity in liquidation." Pet. App. 11a (quoting 12 U.S.C. 4617(b)(2)(E)). The Third Amendment, however, is not a liquidation. "[L]iquidation," in this context, is the "process of converting assets into cash." *Black's Law Dictionary* 1117 (11th ed. 2019). The Third Amendment did not dissolve the enterprises and convert their assets into cash. As the D.C. Circuit observed, "[t]he proof * * * is in the pudding." *Perry Capital*, 864 F.3d at 610. Eight years on from the Amendment, the enterprises continue to operate. They continue to purchase millions of mortgages, continue to issue trillions of dollars in mortgage-backed securities, and continue to perform their important public functions of providing liquidity and stability to the housing market. *Id.* at 610-611. Far from having been liquidated, the enterprises remain going concerns to this day. The Amendment also contains a provision maintaining Treasury's senior liquidation preference—a right to be paid first *if* the enterprises are liquidated. Pet. App. 14a. That provision would make no sense if the Amendment had already liquidated the enterprises.

The court of appeals' ultimate objection thus was not that the Third Amendment itself liquidated the enterprises, but that it set the stage for a future liquidation—that it "abandoned rehabilitation" of the enterprises in favor of "'expedit[ing] the wind down of Fannie Mae and Freddie Mac'" at some later point. Pet. App. 46a (citation omitted). That objection is flawed both in premise and conclusion.

To begin, as its name confirms, the *Third Amendment* was not set in stone. Although it did not provide an end-date for the net-worth dividend and a return to capital accrual, that "wait-and-see view of the Companies' long-term financial condition," *Perry Capital*, 864 F.3d at 613, by no means put the enterprises on an irreversible path to liquidation. See Br. in Opp. 16 (discussing Treasury's plans for "permitting the Companies to rebuild capital and ultimately exit conservatorship"); cf. *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2410 (2018) (explaining that a measure may be temporary even if the government has not "prescribe[d] in advance a fixed end date").

Regardless, "winding up" the enterprises is an authorized purpose of FHFA as conservator no less than as receiver. The Recovery Act provides that FHFA may "be appointed conservator *or* receiver for the purpose of reorganizing, rehabilitating, *or winding up* the affairs of [the enterprises]." 12 U.S.C. 4617(a)(2) (emphases added). As this Court recently explained when interpreting a statutory provision with a similar grammatical structure, the "disjunctive word 'or'" shows that the provision covers "any combination" of the provision's "nouns" and "gerunds." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1141-1142 (2018). More generally, "sometimes conservatorship will involve managing the regulated entity in the lead up to the appointment of a liquidating receiver." *Perry Capital*, 864 F.3d at 609-610. "The authority accorded FHFA as a conservator to reorganize or rehabilitate the affairs of a regulated entity thus must include taking measures to prepare a company for a variety of financial scenarios, including possible liquidation." *Id.* at 610.

2. The common-law restrictions on conservatorships do not preclude the Third Amendment

The court of appeals asserted that, at common law, a conservator's power to "operate, rehabilitate, reorganize, and restore the health of the troubled institution" was intended to enable the institution to go back to making profits for its shareholders. Pet. App. 49a (citation omitted). The court believed that, in adopting the Third Amendment, FHFA violated that common-law conservatorship objective. *Id.* at 48a-49a. But the court's reliance on the common law was misplaced, because the Recovery Act departs from traditional conservatorship in important ways. *Perry Capital*, 864 F.3d at 613.

To begin, the ward in a traditional conservatorship is a purely private corporation, but Fannie Mae and Freddie Mac hold congressional charters and serve important public missions. 12 U.S.C. 4501(1), (2), and (7). A traditional conservator also is required to act solely in the interests of the ward, but FHFA "may, as conservator or receiver[,] * * * take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity *or the Agency*." 12 U.S.C. 4617(b)(2)(J)(ii) (emphasis added). And finally, "Congress in the Recovery Act gave FHFA the ability to obtain from Treasury capital infusions of unprecedented proportions"—an option that "bears no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake." *Perry Capital*, 864 F.3d at 613.

All of those features confirm that, in contrast to a private conservator, FHFA need not exercise its powers as conservator for the purpose of enabling the enterprises to make profits for their shareholders. FHFA may instead prioritize ensuring the enterprises' ongoing ability to serve their public missions. FHFA did just that here.

3. The shareholders' allegations about the purposes and effects of the Third Amendment do not invalidate the Amendment

The court of appeals also relied on the shareholders' allegations about the supposed invidious purposes and harmful effects of the Third Amendment. Pet. App. 46a, 49a-50a. In the present procedural posture, we assume (but do not admit) the truth of those allegations. Even so, they fail to take the Amendment outside the sweeping scope of FHFA's conservatorship powers.

To start, although the shareholders do not dispute that, as an objective matter, the Third Amendment eliminated the possibility of dividends that exceeded the enterprises' net worth and that caused the enterprises to draw down Treasury's capital commitment, they allege that none of those benefits was "the true reason for the Net Worth Sweep." J.A. 35. They maintain that the Amendment's real motive was to set the stage for a future liquidation—to ensure that the enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." J.A. 97 (citation omitted). Even setting aside whether that motive would be impermissible, see pp. 44-45, *supra*, no provision in the Recovery Act invalidates the objectively proper exercise of the conservatorship powers at issue here based solely on FHFA's alleged subjective motives. See *Perry Capital*, 864 F.3d at 612; *Robinson*, 876 F.3d at 229 n.7.

Notably, other provisions in the same section of the Recovery Act that are inapplicable here do refer to motive. See 12 U.S.C. 4617(a)(6) (shielding directors from liability for "consenting in good faith to the appointment of the Agency as conservator or receiver"); 12 U.S.C. 4617(b)(15)(C)(i)-(ii) (referring to transferees who receive the enterprises' property in "good faith"); 12 U.S.C. 4617(i)(12) (referring to entities that extend credit to the enterprises in "good faith"). The provisions on which the conservator has relied here, by contrast, contain no comparable language. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

The shareholders next allege that FHFA mischaracterized the necessity of the Third Amendment. According to the complaint, a variety of circumstances—such as a "strengthening housing market," "the improving quality of loans guaranteed by the Companies," and "the Companies' improved financial outlook"—made it unlikely that a "dividend obligation to Treasury could cause a death spiral." J.A. 34. Again, however, by empowering the conservator to take action that "may be" necessary and appropriate, 12 U.S.C. 4617(b)(2)(D), the Recovery Act precludes courts from second-guessing the conservator's predictive judgments about the actual necessity or appropriateness of a particular action.

The shareholders also allege that the Third Amendment harms the enterprises in various ways—for instance, by preventing the enterprises from building up capital. J.A. 83-84. Once again, though, those allegations show no more than that the decision to enter into the Amendment had costs as well as benefits. Nothing in the Recovery Act empowers a court to set aside the conservator's action on the basis of shareholder disagreement with the conservator's weighing of pros and cons or balancing of competing interests.

Last of all, the shareholders allege—with the benefit of hindsight, in a suit brought four years after the adoption of the Third Amendment—that the Amendment turned out to be a bad deal for the enterprises, because the enterprises have thus far paid more under the new formula than they would have owed under the old formula. J.A. 39. The shareholders overlook, however, that the enterprises got something in return for those additional payments: if the enterprises had instead lost money in the years after the Third Amendment, "Treasury would have [had] to forgo payment entirely," saving the enterprises $19 billion a year plus any commitment fee. *Perry Capital*, 864 F.3d at 612. Further, the shareholders focus on what has happened so far, but fail to take "a broader and longer-term view" of what might happen in the future. *Ibid.* If the enterprises incur losses in years to come, the new dividend formula will save the enterprises money, preserve Treasury's capital commitment for its intended purpose, and allow the enterprises to "continue to stabilize the housing market." *Jacobs*, 908 F.3d at 894. Courts have no authority under the Recovery Act to second-guess the conservator's business judgment on those points.

Accordingly, by holding that the Third Amendment could be invalidated based on the allegations above, the court of appeals itself authorized violation of the Recovery Act's anti-injunction clause, which prevents restraining "the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. 4617(f). "It is clear that the choice among suitable alternatives belongs to the FHFA, not to the shareholders and certainly not to the courts." *Saxton*, 901 F.3d at 962 (Stras, J., concurring).

CONCLUSION

This Court should reverse the judgment of the court of appeals reversing the district court's dismissal of the shareholders' claim that FHFA exceeded its statutory powers as conservator.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 12 U.S.C. 1455(*l*) provides:

Obligations and securities of the Corporation

(*l*) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

In addition to the authority under subsection (c) of this section, the Secretary of the Treasury is authorized to purchase any obligations and other securities issued by the Corporation under any section of this chapter, on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine. Nothing in this subsection requires the Corporation to issue obligations or securities to the Secretary without mutual agreement between the Secretary and the Corporation. Nothing in this subsection permits or authorizes the Secretary, without the agreement of the Corporation, to engage in open market purchases of the common securities of the Corporation.

(B) Emergency determination required

In connection with any use of this authority, the Secretary must determine that such actions are necessary to—

(i) provide stability to the financial markets;

(ii) prevent disruptions in the availability of mortgage finance; and

(iii) protect the taxpayer.

(C) Considerations

To protect the taxpayers, the Secretary of the Treasury shall take into consideration the following in connection with exercising the authority contained in this paragraph:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The Corporation's plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the Corporation fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the Corporation's status as a private shareholder-owned company.

(vi) Restrictions on the use of Corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

(D) Reports to Congress

Upon exercise of this authority, the Secretary shall report to the Committees on the Budget, Financial Services, and Ways and Means of the House of Representatives and the Committees on the Budget, Finance, and Banking, Housing, and Urban Affairs of the Senate as to the necessity for the purchase and the determinations made by the Secretary under subparagraph (B) and with respect to the considerations required under subparagraph (C), and the size, terms, and probability of repayment or fulfillment of other terms of such purchase.

(2) Rights; sale of obligations and securities

(A) Exercise of rights

The Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases.

(B) Sale of obligation and securities

The Secretary of the Treasury may, at any time, subject to the terms of the security or otherwise upon terms and conditions and at prices determined by the Secretary, sell any obligation or security acquired by the Secretary under this subsection.

(C) Deficit reduction

The Secretary of the Treasury shall deposit in the General Fund of the Treasury any amounts received by the Secretary from the sale of any obligation acquired by the Secretary under this subsection, where such amounts shall be—

(i) dedicated for the sole purpose of deficit reduction; and

(ii) prohibited from use as an offset for other spending increases or revenue reductions.

(D) Application of sunset to purchased obligations or securities

The authority of the Secretary of the Treasury to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased is not subject to the provisions of paragraph (4).

(3) Funding

For the purpose of the authorities granted in this subsection, the Secretary of the Treasury may use the proceeds of the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31 are extended to include such purchases and the exercise of any rights in connection with such purchases. Any funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise.

(4) Termination of authority

The authority under this subsection (*l*), with the exception of paragraphs (2) and (3) of this subsection, shall expire December 31, 2009.

(5) Authority of the Director with respect to executive compensation

The Director shall have the power to approve, disapprove, or modify the executive compensation of the Corporation, as defined under Regulation S-K, 17 C.F.R. 229.

3. 12 U.S.C. 1719(g) provides:

Secondary market operations

(g) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

In addition to the authority under subsection (c) of this section, the Secretary of the Treasury is authorized to purchase any obligations and other securities issued by the corporation under any section of this chapter, on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine. Nothing in this subsection requires the corporation to issue obligations or securities to the Secretary without mutual agreement between the Secretary and the corporation. Nothing in this subsection permits or authorizes the Secretary, without the agreement of the corporation, to engage in open market purchases of the common securities of the corporation.

(B) Emergency determination required

In connection with any use of this authority, the Secretary must determine that such actions are necessary to—

(i) provide stability to the financial markets;

(ii) prevent disruptions in the availability of mortgage finance; and

(iii) protect the taxpayer.

(C) Considerations

To protect the taxpayers, the Secretary of the Treasury shall take into consideration the following in connection with exercising the authority contained in this paragraph:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The corporation's plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the corporation fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the corporation's status as a private shareholder-owned company.

(vi) Restrictions on the use of corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

(D) Reports to Congress

Upon exercise of this authority, the Secretary shall report to the Committees on the Budget, Financial Services, and Ways and Means of the House of Representatives and the Committees on the Budget, Finance, and Banking, Housing, and Urban Affairs of the Senate as to the necessity for the purchase and the determinations made by the Secretary under subparagraph (B) and with respect to the considerations required under subparagraph (C), and the size, terms, and probability of repayment or fulfillment of other terms of such purchase.

(2) Rights; sale of obligations and securities

(A) Exercise of rights

The Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases.

(B) Sale of obligation and securities

The Secretary of the Treasury may, at any time, subject to the terms of the security or otherwise upon terms and conditions and at prices determined by the Secretary, sell any obligation or security acquired by the Secretary under this subsection.

(C) Deficit reduction

The Secretary of the Treasury shall deposit in the General Fund of the Treasury any amounts received by the Secretary from the sale of any obligation acquired by the Secretary under this subsection, where such amounts shall be—

(i) dedicated for the sole purpose of deficit reduction; and

(ii) prohibited from use as an offset for other spending increases or revenue reductions.

(D) Application of sunset to purchased obligations or securities

The authority of the Secretary of the Treasury to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased is not subject to the provisions of paragraph (4).

(3) Funding

For the purpose of the authorities granted in this subsection, the Secretary of the Treasury may use the proceeds of the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31 are extended to include such purchases and the exercise of any rights in connection with such purchases. Any funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise.

(4) Termination of authority

The authority under this subsection (g), with the exception of paragraphs (2) and (3) of this subsection, shall expire December 31, 2009.

(5) Authority of the Director with respect to executive compensation

The Director shall have the power to approve, disapprove, or modify the executive compensation of the corporation, as defined under Regulation S-K, 17 C.F.R. 229.

4. 12 U.S.C. 4501 provides:

Congressional findings

The Congress finds that—

(1) the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (referred to in this section collectively as the "enterprises"), and the Federal Home Loan Banks (referred to in this section as the "Banks"), have important public missions that are reflected in the statutes and charter Acts establishing the Banks and the enterprises;

(2) because the continued ability of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation to accomplish their public missions is important to providing housing in the United States and the health of the Nation's economy, more effective Federal regulation is needed to reduce the risk of failure of the enterprises;

(3) considering the current operating procedures of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks, the enterprises and the Banks currently pose low financial risk of insolvency;

(4) neither the enterprises nor the Banks, nor any securities or obligations issued by the enterprises or the Banks, are backed by the full faith and credit of the United States;

(5) an entity regulating the Federal National Mortgage Association and the Federal Home Loan

Mortgage Corporation should have sufficient autonomy from the enterprises and special interest groups;

(6) an entity regulating such enterprises should have the authority to establish capital standards, require financial disclosure, prescribe adequate standards for books and records and other internal controls, conduct examinations when necessary, and enforce compliance with the standards and rules that it establishes;

(7) the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation have an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families in a manner consistent with their overall public purposes, while maintaining a strong financial condition and a reasonable economic return; and

(8) the Federal Home Loan Bank Act [12 U.S.C. 1421 et seq.] should be amended to emphasize that providing for financial safety and soundness of the Federal Home Loan Banks is the primary mission of the Federal Housing Finance Board.

5. 12 U.S.C. 4511 provides:

Establishment of the Federal Housing Finance Agency

(a) Establishment

There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government.

(b) General supervisory and regulatory authority

(1) In general

Each regulated entity shall, to the extent provided in this chapter, be subject to the supervision and regulation of the Agency.

(2) Authority over Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance

The Director shall have general regulatory authority over each regulated entity and the Office of Finance, and shall exercise such general regulatory authority, including such duties and authorities set forth under section 4513 of this title, to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out.

(c) Savings provision

The authority of the Director to take actions under subchapters II and III shall not in any way limit the general supervisory and regulatory authority granted to the Director under subsection (b).

6. 12 U.S.C. 4512 provides:

Director

(a) Establishment of position

There is established the position of the Director of the Agency, who shall be the head of the Agency.

(b) Appointment; term

(1) Appointment

The Director shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who are citizens of the United States, have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of capital markets, including the mortgage securities markets and housing finance.

(2) Term

The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President.

(3) Vacancy

A vacancy in the position of Director that occurs before the expiration of the term for which a Director was appointed shall be filled in the manner established under paragraph (1), and the Director appointed to fill such vacancy shall be appointed only for the remainder of such term.

(4) Service after end of term

An individual may serve as the Director after the expiration of the term for which appointed until a successor has been appointed.

(5) Transitional provision

Notwithstanding paragraphs (1) and (2), during the period beginning on the effective date of the Federal Housing Finance Regulatory Reform Act of 2008, and ending on the date on which the Director is appointed and confirmed, the person serving as the

Director of the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development on that effective date shall act for all purposes as, and with the full powers of, the Director.

(c) Deputy Director of the Division of Enterprise Regulation

(1) In general

The Agency shall have a Deputy Director of the Division of Enterprise Regulation, who shall be designated by the Director from among individuals who are citizens of the United States, have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of mortgage securities markets and housing finance.

(2) Functions

The Deputy Director of the Division of Enterprise Regulation shall have such functions, powers, and duties with respect to the oversight of the enterprises as the Director shall prescribe.

(d) Deputy Director of the Division of Federal Home Loan Bank Regulation

(1) In general

The Agency shall have a Deputy Director of the Division of Federal Home Loan Bank Regulation, who shall be designated by the Director from among individuals who are citizens of the United States, have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of the Federal Home Loan Bank System and housing finance.

(2) Functions

The Deputy Director of the Division of Federal Home Loan Bank Regulation shall have such functions, powers, and duties with respect to the oversight of the Federal Home Loan Banks as the Director shall prescribe.

(e) Deputy Director for Housing Mission and Goals

(1) In general

The Agency shall have a Deputy Director for Housing Mission and Goals, who shall be designated by the Director from among individuals who are citizens of the United States, and have a demonstrated understanding of the housing markets and housing finance.

(2) Functions

The Deputy Director for Housing Mission and Goals shall have such functions, powers, and duties with respect to the oversight of the housing mission and goals of the enterprises, and with respect to oversight of the housing finance and community and economic development mission of the Federal Home Loan Banks, as the Director shall prescribe.

(3) Considerations

In exercising such functions, powers, and duties, the Deputy Director for Housing Mission and Goals shall consider the differences between the enterprises and the Federal Home Loan Banks, including those described in section 4513(d) of this title.

(f) Acting Director

In the event of the death, resignation, sickness, or absence of the Director, the President shall designate either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, or the Deputy Director for Housing Mission and Goals, to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b).

(g) Limitations

The Director and each of the Deputy Directors may not—

(1) have any direct or indirect financial interest in any regulated entity or entity-affiliated party;

(2) hold any office, position, or employment in any regulated entity or entity-affiliated party; or

(3) have served as an executive officer or director of any regulated entity or entity-affiliated party at any time during the 3-year period preceding the date of appointment or designation of such individual as Director or Deputy Director, as applicable.

7. 12 U.S.C. 4617 provides:

Authority over critically undercapitalized regulated entities

(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 4614(a)(1) of this title).

(H) Violations of law

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

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

(ii) weaken the condition of the regulated entity.

(I) Consent

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

(J) Undercapitalization

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

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

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

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

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

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

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

(K) Critical undercapitalization

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

(L) Money laundering

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

(4) Mandatory receivership

(A) In general

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

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

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

(B) Periodic determination required for critically undercapitalized regulated entity

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

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

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

(C) Determination not required if receivership already in place

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

(D) Receivership terminates conservatorship

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

(5) Judicial review

(A) In general

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

(B) Review

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

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

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

(7) Agency not subject to any other Federal agency

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

(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 4588 of this title.

(II) Applicability of law

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

(ii) Subpoena

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

(iii) Rule of construction

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

(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.

(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 4402 through 4407 of this title.[1]

(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.

[1] See References in Text note below.

(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).[2]

(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

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[2] So in original. A second closing parenthesis probably should precede the period.

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 chapter (other than subsection (b)(9)(B) of this section), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

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

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

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

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

(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 4403 and 4404 of this title, no walkaway clause shall be enforceable in a qualified financial contract of a regulated entity in default.

(ii) Walkaway clause defined

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

(9) Transfer of qualified financial contracts

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

(A) transfer to 1 person—

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

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

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

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

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

(10) Notification of transfer

(A) In general

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

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

(ii) such transfer includes any qualified financial contract.

(B) Certain rights not enforceable

(i) Receivership

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

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

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

(ii) Conservatorship

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

(iii) Notice

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

(C) Business day defined

For purposes of this paragraph, the term "business day" means any day other than any Saturday, Sunday, or any day on which either the New York

Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) Disaffirmance or repudiation of qualified financial contracts

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

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

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

(ii) the regulated entity in default; or

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

(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 U.S.C. 27 to 27f], the securities laws (as that term is defined in section 78c(a)(47) of title 15), and the Commodity Exchange Act [7 U.S.C. 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 [12 U.S.C. 1716 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 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[3] [12 U.S.C. 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

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[3] See References in Text note below.

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 bank.

(5) Exempt tax status

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

(6) Winding up

(A) In general

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

(B) Extension

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

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

(i) In general

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

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

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

(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 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)[4] 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

[4] So in original. No. cl. (ii) has been enacted.

property of the limited-life regulated entity that is subject to a lien (other than mortgages that collateralize the mortgage-backed securities issued or guaranteed by an enterprise) only if—

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

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

(D) Burden of proof

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

(12) Effect on debts and liens

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

(j) Other Agency exemptions

(1) Applicability

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

(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.