

GSE REFORM:

**A Comparison of Current Law, H.R. 3221 (as passed the House),
the Senate Banking Committee Approved Bill,
and Banking Law**

June 2, 2008

ACKNOWLEDGEMENT

This side-by-side draws in part on work by the Mortgage Bankers Association and by the law firm of Barnett Sivon, and Natter, P.C. However, the presentation in this side-by-side includes original research and does not necessarily represent the views of those organizations.

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|--|--|
| OVERVIEW | | | | |
| <p>Current law is weak in important aspects, involving funding of the regulator, lack of discretion with respect to capital standards, and limited enforcement tools. Shortcomings of the 1992 Act became apparent when OFHEO sought to respond to the failures of management and internal controls at Fannie Mae and Freddie Mac.</p> | <p>The Senate Committee bill, especially in the authority it provides to the regulator over capital, is far superior to current law. Some issues remain, including weak regulatory authority over GSE mission creep, no express authority of the regulator to address systemic risk posed by the GSEs and their portfolios, expansion of the conforming loan limits, and a flawed provision with respect to the regulator's authority to enforce orders in court.</p> | <p>Title III of H.R. 3221 is a superior version of H.R. 1461, which passed the House in the 109th Congress. Many technical shortcomings have been addressed; H.R. 3221 is technically quite polished. Some issues remain, including weak regulatory authority over GSE mission creep, no express authority of the regulator to address systemic risk posed by the GSEs and their portfolios, expansion of the conforming loan limits, and a flawed provision with respect to the regulator's authority to enforce orders in court.</p> | <p>Federal banking law remains the standard by which the safety and soundness provisions of the GSE bills should be measured. Both H.R. 3221 and especially the Senate committee bill make considerable strides, compared to current law, to conform important aspects to federal banking law; nonetheless, the authority and discretion granted to the federal bank regulators, on the basis of considerable experience with weaker provisions, remain superior to the powers of the new regulator under either GSE bill as currently drafted.</p> | <p>The capital provisions of the Senate Committee bill are far superior to language found in earlier GSE regulatory bills and are close to the authority available to the bank regulators.</p> |
| Significant Definitions | | | | |
| <p>Section 1303</p> <p>Except as provided by the Director, the term <u>affiliate</u> means any entity that controls, is controlled by, or is under common control with, an enterprise.</p> <p><u>Low-income</u> means (A) in the case of owner-occupied units, income not in excess of 80 percent of area median income; and (B) in the case of rental units, income not in excess of 80 percent of area median income, with adjustments for smaller and larger families, as determined by the Secretary.</p> | <p>Section 2</p> <p><u>Regulated Entity</u> – Regulated Entity means Fannie Mae, Freddie Mac, and any affiliate, and each Federal Home Loan Bank. Enterprise is defined in the 1992 Act as Fannie Mae, Freddie Mac, and their affiliates, and this definition does not change.</p> <p><u>Authorizing Statutes</u> – Fannie Mae and Freddie Mac charter acts and the FHLB Act. The bill permits the Director to take enforcement action against <u>entity-affiliated parties</u>. This means: officers, directors, employees, controlling stockholder, or agent for a regulated entity; shareholders, affiliates, consultants and joint venture partners that participate in the conduct of the regulated entity's affairs; independent contractors, including attorneys,</p> | <p>Section 302</p> <p><u>Regulated Entity</u> – Regulated Entity means Fannie Mae, Freddie Mac, and any affiliate, and each Federal Home Loan Bank. Enterprise is defined in the 1992 Act as Fannie Mae, Freddie Mac, and their affiliates, and this definition does not change.</p> <p><u>Authorizing Statutes</u> – Fannie Mae and Freddie Mac charter acts and the FHLB Act. The bill permits the Director to take enforcement action against a <u>regulated entity-affiliated party</u>. This means: directors, officers, employees, controlling stockholders, or agents for a regulated entity; shareholders, affiliates, consultants, contractors (who knowingly or recklessly participate in violations, etc.), and joint venture partners that participate in the conduct of the regulated entity's affairs;</p> | <p>Under the FDI Act, an “institution-affiliated party” includes any director, officer, employee, or controlling stockholder, or agent of a bank; any shareholder, consultant, joint venture partner or other person who participates in the conduct of the affairs of the bank; and certain independent contractors, such as attorneys, appraisers and accountants who meet the standards for inclusion. [12 USC § 1813(u)].</p> <p>“Violation” is defined to include causing, aiding, participating in or abetting. [12 USC § 1813(v)]</p> <p>The following definitions apply under the Community Reinvestment Act (CRA) regulations, e.g., 12 CFR § 345.12:</p> | <p>The Senate committee bill is preferable because it defines “violation” in a manner comparable to federal banking law.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|--|--|----------|
| <p><u>Moderate-income</u> means income not in excess of area median income, with adjustments by the Secretary for rental units, according to family size</p> | <p>appraisers, and accountants, who knowingly or recklessly participate in wrongdoing, any “not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity” (This could provide enforcement jurisdiction over the Fannie Mae and Freddie Mac foundations) , and the Federal Home Loan Bank Office of Finance.</p> <p><u>Violation</u> – “any action (alone or in combination with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.”</p> <p><u>Section 128</u></p> <p><u>Extremely Low Income</u> means a family income that is less than 30 percent of the area median income, with adjustments for family size in the case of rental units.</p> <p><u>Very Low-income</u> means a family income that is less than 50 percent of the area median income, except for purposes of the Housing Trust Fund and Capital Magnet Fund, when it means income between 30 and 50 percent of the area median income .</p> <p><u>Low income area</u> means a census tract or block numbering area in which the median income does not exceed 80 percent of the median income for the area in which such census tract or block numbering area is located, and, for the purposes of section 1332(a)(2), includes families having incomes not greater than 100 percent of the area median income who reside in minority census tracts.</p> | <p>any “not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity.” (This could provide enforcement jurisdiction over the Fannie Mae and Freddie Mac foundations.)</p> <p>Section 337</p> <p><u>Very Low-income</u> means a family income that is less than 50 percent of the area median income.</p> <p><u>Extremely Low-income</u> means (A) in the case of owner-occupied units, income not in excess of 30 percent of area median income; and (B) in the case of rental units, income not in excess of 30 percent of area median income, with adjustments for smaller and larger families, as determined by the Secretary.</p> <p><u>Low income area</u> means a census tract or block numbering area in which the median income does not exceed 80 percent of the median income for the area in which such census tract or block numbering area is located, and, for the purposes of section 1332(a)(2), includes families having incomes not greater than 100 percent of the area median income who reside in minority census tracts.</p> | <p><u>Low-income</u> means income below 50 percent of area median income.</p> <p><u>Moderate-income</u> means income between 50 percent and 80 percent of area median income.</p> <p><u>Middle-income</u> means income between 80 percent and 120 percent of the area median income.</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|--|---|--|
| Agency Structure | | | | |
| <p>Section 1311 Establishes the Office of Federal Housing Enterprise Oversight within HUD</p> <p>Section 1312 OFHEO has a Director appointed by the president and confirmed by the Senate for a five-year term. An individual may not be appointed as Director if they have served as an executive officer or director of an enterprise during the prior three years.</p> <p>The office has a Deputy Director who has such functions, powers, and duties as the Director shall prescribe. The Deputy Director shall serve as acting Director if a Director is absent.</p> <p>Section 1313 The Director may delegate to officers and employees of the Office any of the functions, powers, and duties of the Director, as the Director considers appropriate.</p> | <p>Section 101 Establishes the Federal Housing Finance Agency as an independent agency. It has general regulatory authority over Fannie Mae, Freddie Mac, the FHLBs, and the FHLB Office of Finance. The Director shall exercise its general regulatory authority including its duties and authorities under § 1313, to ensure that the purposes of the revised 1992 Act, the Authorizing Statutes, and other applicable laws are carried out.</p> <p>The Agency has a Director appointed by the president and confirmed by the Senate for a five-year term. The first Director is OFHEO's Director until a successor is appointed and confirmed. There are three Deputy Directors, one for Fannie Mae and Freddie Mac, one for the FHLBs, and one for the housing mission and goals of the regulated entities. The Director divides functions between the Deputies.</p> <p>The Agency has an ombudsman to consider complaints and appeals from regulated entities or other persons with a business relationship with a regulated entity.</p> <p>Section 103 adds § 1313A Creates the Federal Housing Finance Oversight Board (Board) to advise the Director. The Board has 4 members – the Secretaries of Treasury and HUD, the Chair of the SEC, and the Director, who</p> | <p>Section 311 Establishes the Federal Housing Finance Agency as an independent agency. It has general supervisory and regulatory power over the regulated entities. The Director shall exercise its general regulatory authority including its duties and authorities under § 1313, to ensure that the purposes of the revised 1992 Act, the Authorizing Statutes, and other applicable laws are carried out.</p> <p>The Director has the same supervisory and regulatory authority over any joint office of the Federal home loan banks, including the Office of Finance, as the Director has over the individual Federal home loan banks.</p> <p>The Agency has a Director appointed by the president and confirmed by the Senate for a five-year term. The first Director is OFHEO's Director until a successor is appointed. There are three Deputy Directors, one for Fannie Mae and Freddie Mac, one for the FHLBs, and one for the housing mission and goals of all the regulated entities. The Director divides functions between the Deputies. The President may appoint the Director immediately, although the Agency is not created until six months after enactment. (See Section 365)</p> <p>The Agency has an ombudsman to consider complaints and appeals from regulated entities or other persons with a business relationship with a regulated entity.</p> | <p>OCC is given general authority to prescribe regulations to carry out the responsibilities of the Office. [12 USC § 93a] OTS has similar authority. 12 U.S.C. 1462a(b)(2).</p> <p>Comptroller appointed by the President, with the advice and consent of the Senate, for a 5-year term. President may remove "upon reasons communicated to the Senate." [12 USC § 2]</p> <p>The Director of OTS is appointed by the president with the advice and consent of the Senate for a 5-year term. The Director is "subject to the general oversight of the Secretary of the Treasury" but the Secretary of the Treasury may not intervene in matters before the Director unless otherwise specifically provided by law. 12 U.S.C. § 1462a(b).</p> <p>Four Deputy Comptroller are specified by statute and others can be created by administrative action of the Comptroller. [12 USC § 4]</p> <p>During a vacancy or during the death or disability of the Comptroller, the First Deputy Comptroller shall possess the power and perform the duties of the Comptroller. [12 USC § 4]</p> | <p>The bills creates a rigid accountability structure for the Agency, including – besides regular reports and testimony to Congress – annual GAO audits, an inspector general, and ability of the regulated entities to complain to an ombudsman. At least one of these oversight provisions should be dropped so that the Agency can do its work while remaining accountable.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|---|---|---|
| | <p>chairs the Board. Any member may call a meeting at any time, and the Board must meet quarterly. The Board testifies before Congress annually.</p> <p>The Board may not exercise any executive authority, and the Director may not delegate to the Board any of the functions, powers, or duties of the Director.</p> <p>The Board's or Board Members' views on safety and soundness of the regulated entities, any material deficiencies in their operation, their operational status and mission performance is to be included in the annual Director's report to Congress. In addition, the report must cover the enterprises' housing goals compliance and the FHLBs' compliance with their community investment and affordable housing programs.</p> <p>Section 105 Creates the position of Inspector General of the Agency.</p> | <p>Section 313 adds § 1313B Creates the Federal Housing Enterprise Board (Board) to advise the Director. The Board has 3 members – Secretaries of Treasury and HUD, and the Director, who chairs the Board. Any Board member may call a meeting at any time, and the Board must meet quarterly. The Board testifies before Congress annually.</p> <p>The Board may not exercise any executive authority, and the Director may not delegate to the Board any of the functions, powers, or duties of the Director.</p> <p>The Board's or Board Members' views on safety and soundness of the regulated entities, any material deficiencies in their operation, their operational status and mission performance is to be included in the annual Director's report to Congress. In addition, the report must cover the enterprises' housing goals compliance and the FHLBs' compliance with their community investment and affordable housing programs.</p> <p>Section 372 The Board proposes a list of individuals to serve as independent directors of each Federal Home Loan Bank. The Director of the Agency selects the independent directors from this list.</p> <p>Section 363 Creates the position of Inspector General of the Agency.</p> | <p>OCC has no formal advisory board.</p> <p>Federal Reserve Board has several advisory councils.</p> <p>FDIC is governed by a five-member Board</p> | |
| Director's Duties | | | | |
| Section 1313 The duty of the Director shall be | Section 102 replaces §1313 as follows: The Director has two principal duties – first, to | Section 312 replaces §1313 as follows: The Director has two principal duties – first, to | No similar provision for the OCC. | H.R. 3221 is flawed by requiring that the Director's principal duties shall include |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|---|--|---|
| <p>to ensure that the enterprises are adequately capitalized and operating safely, in accordance with this chapter.</p> <p>The Director is authorized, without the review or approval of the HUD Secretary, to make such determinations, take such actions, and perform such functions as the Director determines necessary regarding -</p> <p>(1) the issuance of regulations to carry out part I of subtitle A, subchapter II, and subchapter III of this chapter (including the establishment of capital standards);</p> <p>(2) examinations of the enterprises;</p> <p>(3) determining the capital levels of the enterprises and classification of the enterprises within the capital classifications;</p> <p>(4) decisions to appoint conservators for the enterprises;</p> <p>(5) administrative and enforcement actions under subchapter II of this chapter, actions taken under subchapter III of this chapter with respect to enforcement of subchapter II of this chapter, and other matters relating to safety and soundness;</p> <p>(6) approval of payments of capital distributions by the enterprises under specified sections of this title;</p> | <p>oversee the prudential operations of each regulated entity, and second, to ensure the following:</p> <p>safety and soundness, including maintenance of adequate capital and internal controls;</p> <p>that the regulated entities “foster liquid, efficient, competitive, and resilient” markets, including housing activities for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities;”</p> <p>that the regulated entities comply with the amended 1992 Act and with rules, regulations, guidelines, and orders issued under the amended 1992 Act or the Authorizing Statutes;</p> <p>the regulated entities carry out their mission only through authorized activities consistent with the Act and the authorizing statutes;</p> <p>the regulated entities’ activities “are consistent with the public interest”;</p> <p>the regulated entities remain adequately capitalized “after due consideration of the risk to such” regulated entity.</p> <p>The Director has authority to review acquisition or transfer of a controlling interest in Fannie Mae or Freddie Mac, and to reject it if warranted under the Director’s principal duties.</p> <p>The Director also has incidental powers as “necessary or appropriate” to fulfill its duties and responsibilities.</p> <p>The Director may sue and be sued.</p> <p>Section 201 Prior to taking any formal or informal action relating to the Federal Home Loan Banks, the Director shall consider the differences between</p> | <p>oversee the operations of each regulated entity, and second, to ensure the following:</p> <p>safety and soundness, including maintenance of adequate capital and internal controls;</p> <p>that the regulated entities “foster liquid, efficient, competitive, and resilient” markets, <i>that minimize the cost of housing finance</i> including housing activities for low- and moderate-income families “involving a reasonable economic return that may be less than the return earned on other activities;”</p> <p>that the regulated entities comply with the amended 1992 Act and with rules, regulations, guidelines, and orders issued under the amended 1992 Act or the Authorizing Statutes;</p> <p>The Director has authority to review acquisition or transfer of a controlling interest in Fannie Mae or Freddie Mac, and to reject it if warranted under the Director’s principal duties.</p> <p>The Director also has incidental powers as “necessary or appropriate” to fulfill its duties and responsibilities.</p> <p>The Director may sue and be sued. Except if delay could impair safety and soundness, the Director shall consult with the Attorney General before bringing litigation.</p> | <p>The Director of OTS “shall provide for the examination, safe and sound operation, and regulation of savings associations. The Director of OTS shall exercise all power so as to “encourage savings associations to provide credit for housing safely and soundly.” [12 USC § 1463(a)]</p> <p>A change in control of an insured bank requires the approval of the appropriate Federal banking agency. [12 USC § 1817(j)]</p> <p>Comptroller may delegate to any employee or duly authorized representative any power vested in the Office. [12 USC § 4a] The same is true for OTS. [12 U.S.C. § 1462a(h)(4)(A)(ii).]</p> <p>OCC has independent litigating authority. [12 USC § 93], as does OTS. [12 U.S.C. § 1464(d)(1).]</p> <p>OCC testimony does not have to be cleared. [12 USC § 250]</p> | <p>ensuring that the regulated entities foster housing finance markets <i>that minimize the cost of housing finance</i>. Because the GSEs use their government subsidies to lower costs, this arguably could place the Director in the position of being called upon to encourage GSE expansion.</p> <p>The definition of the scope of the Director’s principal duties in the Senate committee bill is preferable. The bill should clarify, however, that capital requirements also should consider risk to the financial system from the regulated entities.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|---|---|--|
| <p>(7) requiring the enterprises to submit reports under specified sections of this title;</p> <p>(8) prohibiting the payment of excessive compensation by the enterprises to any executive officer of the enterprises;</p> <p>(9) the management of the Office, including the establishment and implementation of annual budgets, the hiring of, and compensation levels for, personnel of the Office, and annual assessments for the costs of the Office;</p> <p>(10) conducting research and financial analysis; and</p> <p>(11) the submission of reports required by the Director under this chapter.</p> <p>(c) Authority subject to approval of Secretary</p> <p>Any determinations, actions, and functions of the Director not referred to above shall be subject to the review and approval of the HUD Secretary.</p> <p>The Director shall have independence in providing information to Congress</p> | <p>the FHLBanks and the enterprises.</p> | | | |
| Inclusion of minorities and women; diversity | | | | |
| Section 1319A requires each enterprise to establish a minority | No provision | Section 320 Each regulated entity shall establish an Office of | 12 USC Section 1833e requires each federal bank agency to establish and oversee a | Because both bills neglect to authorize the Director expressly to enforce orders under |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|---|---|
| <p>outreach program to ensure the inclusion of minorities and women and minority- and women-owned businesses in contracts.</p> | | <p>Minority and Women Inclusion and develop and implement standards and procedures to ensure, to the maximum extent possible, the inclusion and utilization of minorities and women, and minority- and women-owned businesses in all business and activities of the regulated entity at all levels, including in procurement, insurance, and all types of contracts. Provides for reporting.</p> <p>The agency shall take affirmative steps to seek diversity in its workforce at all levels of the agency consistent with the demographic diversity of the United States, including extensive outreach.</p> | <p>minority outreach program within each such agency to ensure inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women in all contracts.</p> | <p>Subtitle A in court (Section 154 of the Semate committee bill and Section 354 of H.R. 3211) the Director may need to seek other ways to enforce this provision if it is enacted.</p> |
| <p>Issuance of regulations and orders (general regulatory authority)</p> | | | | |
| <p>Section 1319G</p> <p>The Director shall issue any regulations and orders necessary to carry out the duties of the Director and this chapter. Any regulations issued by the Director under this section shall be issued after notice and opportunity for public comment. The Director may not publish any such regulation for comment unless the Director has submitted a copy of the regulation to the congressional banking committees at least 15 days</p> | <p>Sections 101, 107, and 121 Together these sections repeal HUD's general regulatory authority and give general regulatory authority to the Director.</p> <p>Section 107 Expands § 1319G, which currently requires OFHEO to issue regulations necessary to carry out the 1992 Act and OFHEO's duties. Requires the Director to issue regulations, guidelines, or orders necessary to ensure the purposes of the amended 1992 Act and the Authorizing Statutes are accomplished.</p> | <p>Sections 311 and 331 Together these sections repeal HUD's general regulatory authority and give general regulatory authority to the Director.</p> <p>Section 321 Expands § 1319G, which currently requires OFHEO to issue regulations necessary to carry out the 1992 Act and OFHEO's duties. Requires the Director to issue regulations, guidelines, or orders necessary to ensure the purposes of the amended 1992 Act and the Authorizing Statutes are accomplished. Requires public notice and comment on all regulations. Repeals current requirement that the Director give Congress 15 days to review regulations before</p> | <p>Comptroller may issue regulations to carry out the responsibilities of the Office. OCC regulations are not subject to prior Congressional review. [12 USC § 93a]. The same is true for OTS. [12 U.S.C. § 1462a(b)(4).]</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|--|---|
| <p>beforehand.</p> <p>Section 1321 The Secretary of HUD has general regulatory authority but the Director does not have express authority.</p> | | <p>proposing them.</p> | | |
| Authority to Require Reports | | | | |
| <p>Section 1314</p> <p>The Director may require an enterprise to submit reports of financial condition and operations (in addition to required annual and quarterly reports). The Director may also require an enterprise to submit special reports whenever, in the judgment of the Director, such reports are necessary to carry out the purposes of this chapter. The Director may not require the inclusion, in any report pursuant to this section of any information that is not reasonably obtainable by the enterprise.</p> <p>The Director shall notify the enterprise, a reasonable period in advance of the date for submission of any report under this subsection, of any specific</p> | <p>Section 104 Expands current authority of the Director, in Section 1314, to require regular and special reports from the regulated entities on their condition and other matters the Director considers appropriate. The Director may require the regulated entities to submit fair value financials to the Director.</p> <p>Prescribes penalties for failure to make, obtain, transmit, or publish any report or information required by the Director under this section or section 309(k) of the Fannie Mae Charter Act, or section 307(c) of the Freddie Mac Charter Act.</p> <p>Section 115 Requires Director by to require regulated entities to make timely reports if they discover they have purchased or sold a fraudulent loan or financial instrument or suspect fraud in connection with such a purchase or sale. Shields those who report from liability for the report or for failure to provide notice of such report to a party.</p> | <p>Section 314 Expands current authority of the Director, in Section 1314, to require regular and special reports from the enterprises on their financial condition and other matters the Director considers appropriate.</p> <p>Requires the Director to require a report to the Director when a regulated entity discovers it has purchased or sold a fraudulent loan or financial instrument or suspects possible fraud relating to a purchase or sale of any loan or financial instrument. Other types of fraud are not covered. Regulated entities and regulated entity affiliated parties who make or require another to make any such report are protected from liability in private lawsuits if the report is made in good faith.</p> <p>Section 315 The Director must, by regulation, require the enterprises to disclose to the Director the "total" value of enterprise contributions to nonprofit organizations. If a contribution exceeds an amount the Director designates, the enterprise must disclose the</p> | <p>OCC may obtain reports and special reports in such form and containing such information as may be prescribed. [12 USC § 161]</p> <p>Certain CRA agreements made by a bank with non-governmental entities must be publicly disclosed. [12 USC § 1831y]</p> <p>Banks are required to file suspicious activity reports with the Financial Crimes Enforcement Network of the Department of the Treasury (FinCen) when they suspect a violation of Federal law, money laundering or the Bank Secrecy Act. [12 CFR § 21.11]</p> | <p>Because both bills neglect to authorize the Director expressly to enforce orders under Subtitle A in court (Section 154 of the Semate committee bill and Section 354 of H.R. 3211) the Director may need to seek other ways to enforce these requirements.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|--|--|----------|
| <p>information to be contained in the report and the date for the submission of the report. Each report under this subsection shall contain a declaration by the president, vice president, treasurer, or any other officer designated by the board of directors of the enterprise to make such declaration, that the report is true and correct to the best of such officer's knowledge and belief.</p> <p>The Director may require an enterprise to submit a report to the Director after the declaration of any capital distribution by the enterprise and before making the capital distribution. The report shall be made in such form and under such circumstances and shall contain such information as the Director shall require.</p> | | <p>recipient's name and the value of the contribution to that individual recipient.</p> <p>If a contribution exceeds an amount the Director designates and was to a nonprofit where an enterprise director, officer, controlling person, or spouse thereof, was a director or trustee, the enterprise must disclose the recipient's name and the value of the contribution to that individual recipient. The Director must make public the information submitted pursuant to this section.</p> <p>Each enterprise shall include in its annual report to the SEC under the 1934 Act the income that it reported to the IRS for the prior fiscal year. Such information shall be presented prominently and shall enable comparisons with other reports of income in the same document.</p> | | |
| Examiners and Accountants | | | | |
| <p>Section 1317</p> <p>The Director shall annually conduct an on-site examination under of each enterprise to determine its condition and financial safety and soundness, and also special examinations for such purpose.</p> <p>The Director may contract with</p> | <p>Section 105</p> <p>Permits the Director to hire examiners, economists, accountants, and specialists in financial markets or in technology, outside of the competitive service for supervising or regulating the enterprises. May conduct other examinations as appropriate, in addition to regular examinations.</p> | <p>Section 317</p> <p>Each examination must review a regulated entity's procedures for reporting fraudulent loans.</p> <p>Permits the Director to hire examiners, accountants, financial and IT specialists, and economists, outside of the competitive service, for supervising or regulating the regulated entities. May conduct other examinations as appropriate, in addition to regular examinations.</p> | <p>OCC may hire examiners and other specialists without regard to the civil service laws. [12 USC § 482]</p> <p>Banking agencies are required to conduct annual on-site examinations of institutions with \$250 million or more in assets. [12 USC § 1820(d)].</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|---|--|---|
| <p>the federal bank regulators for the services of examiners, on a reimbursable basis. The Director may obtain the services of any technical experts the Director considers appropriate to provide temporary technical assistance relating to examinations to the Director, officers, and employees of the Office. The Director shall describe, in the record of each examination, the nature and extent of any such temporary technical assistance.</p> <p>The Director and each examiner shall have the same authority and each examiner shall be subject to the same disclosures, prohibitions, obligations, and penalties as are applicable to examiners employed by the Federal Reserve banks.</p> <p>In connection with examinations under this section, the Director shall have the authority (oaths, evidence, and subpoena powers) provided under section 1379B of this title.</p> | | | | |
| Reviews of Enterprises | | | | |
| Section 1319 Authorizes the Director to | Section 105 Deletes "by rating organization" from the heading, but not the text, of § 1319. This section | Section 319 The Director may require a review of any regulated entity by any appropriate party, including a rating | OCC may enter into contracts with third parties, but such third parties probably could not formally examine banks. [18 | The language of H.R. 3221 is preferable to the Senate committee bill because it changes the statutory text along with the |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|---|---|
| contract with a rating agency to conduct a review of the enterprises. | permits the Director to have a rating organization review the regulated entities. | agency. Except as otherwise provided, such third parties probably could not formally examine a regulated entity. [Section 18 USC § 1905] | USC § 1905] | heading. |
| Assessments | | | | |
| <p>Section 1316</p> <p>Subjects OFHEO to the appropriations process; requires the Director to report annually to OMB on financial operating plans and forecasts and quarterly to OMB on operations.</p> | <p>Section 106</p> <p>Amends § 1316 by fully removing the Agency’s funding from the appropriations process. . The regulated entities are assessed based on their assets. For the enterprises this includes both on-balance sheet assets and securities issued or guaranteed, and for the FHLBs it includes assets as the Director determines in accordance with GAAP.</p> <p>The Director may increase the assessment of a regulated entity that is not adequately capitalized. The Director may adjust semi-annual assessments so that the costs of bringing an enforcement action are borne only by that regulated entity.</p> <p>Authorizes the Director to maintain a working capital fund.</p> <p>The Director must file quarterly financial reports with OMB, and is subject to annual GAO audits.</p> <p>The Director must provide an “assertion” to GAO about the effectiveness of the Agency’s internal controls.</p> | <p>Section 316</p> <p>Amends § 1316 by fully removing the Agency’s funding from the appropriations process. The regulated entities are assessed based on their assets. For the enterprises this includes both on-balance sheet assets and securities issued or guaranteed, and for the FHLBs it includes assets as the Director determines in accordance with GAAP.</p> <p>The Director may increase the assessment of a regulated entity that is not adequately capitalized. The Director may adjust semi-annual assessments so that the costs of bringing an enforcement action are borne only by that regulated entity.</p> <p>Authorizes the Director to maintain a working capital fund.</p> <p>The Director must file quarterly financial reports with OMB, and is subject to annual GAO audits.</p> <p>The Director must provide an “assertion” to GAO about the effectiveness of the Agency’s internal controls.</p> | <p>OCC charges assessments based on the asset size and condition of the national bank. [12 U.S.C. § 481; 12 CFR part 8] OTS similarly assesses thrifts by size, condition, and complexity. [12 U.S.C. § 1467; 12 CFR part 502].</p> <p>Assessments are not appropriated or Government funds are not subject to apportionment. Excess assessments are retained by the Agency. [12 USC §§ 481, 482 (OCC) § 1467(1) (OTS)]</p> | <p>Both of these bills follow the language applicable to the federal bank regulators, which allows the regulator to deposit the funds outside of the Treasury.</p> <p>Because both bills neglect to authorize the Director expressly to enforce orders under Subtitle A in court (Section 154 of the Semate committee bill and Section 354 of H.R. 3211) the Director may need to seek other ways to enforce collection of an assessment.</p> |
| Prudential Management and Operations Standards | | | | |
| No provision. | Section 108 adds § 1313A. This section states that the Director may establish | Section 312 adds § 1313A. This section states that the Director shall establish | The banking agencies are required to promulgate standards relating to internal | The provision of the Senate committee bill requiring standards with respect to |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|---|---|---|---|
| | <p>standards, "by regulation, order, or guideline," for Fannie Mae and Freddie Mac relating to:</p> <p>(1) adequacy of internal controls and information systems taking into account the nature and scale of business operations;</p> <p>(2) independence and adequacy of internal audit systems;</p> <p>(3) management of interest rate risk exposure;</p> <p>(4) management of market risk, including standards that provide for systems that accurately measure, monitor, and control market risks and, as warranted, that establish limitations on market risk;</p> <p>(5) adequacy and maintenance of liquidity and reserves;</p> <p>(6) management of asset and investment portfolio growth;</p> <p>(7) investments and acquisitions of assets by a regulated entity, to ensure that they are consistent with the purposes of this title and the authorizing statutes;</p> <p>(8) overall risk management processes, including adequacy of oversight by senior management and the board of directors and of processes and policies to identify, measure, monitor, and control material risks, including reputational risks, and for adequate, well-tested business resumption plans for all major systems with remote site facilities to protect against disruptive events;</p> <p>(9) management of credit and counterparty risk;</p> <p>(10) maintenance of adequate records, in accordance with consistent accounting policies and practices that enable the Director to evaluate the financial condition of the regulated entity;</p> <p>and</p> <p>(11) such other operational and management standards as the Director determines to be appropriate.'</p> | <p>standards "by regulation, guideline, or order," for Fannie Mae, Freddie Mac, and the FHLBs, relating to:</p> <p>(1) adequacy of internal controls and information systems, including information security and privacy policies and practices, taking into account the nature and scale of business operations;</p> <p>(2) independence and adequacy of internal audit systems;</p> <p>(3) management of credit and counterparty risk, including systems to identify concentrations of credit risk and prudential limits to restrict exposure of the regulated entity to a single counterparty or groups of related counterparties;</p> <p>(4) management of interest rate risk exposure;</p> <p>(5) management of market risk, including standards that provide for systems that accurately measure, monitor, and control market risks and, as warranted, that establish limitations on market risk;</p> <p>(6) adequacy and maintenance of liquidity and reserves;</p> <p>(7) management of any asset and investment portfolio;</p> <p>(8) investments and acquisitions by a regulated entity, to ensure that they are consistent with the purposes of this Act and the authorizing statutes;</p> <p>(9) maintenance of adequate records, in accordance with consistent accounting policies and practices that enable the Director to evaluate the financial condition of the regulated entity;</p> <p>(10) issuance of subordinated debt by that particular regulated entity, as the Director considers necessary;</p> <p>(11) overall risk management processes, including adequacy of oversight by senior management and the board of directors and of processes and policies to identify, measure, monitor, and control material risks, including reputational risks, and for adequate, well-tested business resumption plans for all major</p> | <p>controls, information systems, internal audit, loan documentation, credit underwriting, interest rate exposure, asset growth, excessive compensation and benefits, and any other operational and managerial standards determined to be appropriate.</p> <p>[12 USC §1831p-1].</p> <p>If a bank fails to meet a standard prescribed by the agency, the agency may require the bank to submit a safety and soundness compliance plan. If the bank fails to submit a plan, or fails to implement an approved plan, the agency may issue a safety and soundness order and in addition, may limit the bank's growth, require additional capital, restrict interest rates paid on deposits, or take any other action. Under appropriate circumstances, the order may be issued <i>ex parte</i> and will be immediately effective. [12 USC §1831p-1].</p> | <p>management of asset and investment portfolio growth, would be a valuable addition.</p> <p>Because both bills neglect to authorize the Director expressly to enforce orders under Subtitle A in court (Section 154 of the Semate committee bill and Section 354 of H.R. 3211) the Director may need to seek other ways to enforce these standards.</p> <p>While the compliance provisions of these sections are helpful, they ultimately depend on the ability of the regulator to enforce them in court.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--------------------------------|--|---|---|--|
| | If there is a failure to meet a standard, the Director must (if the standard is a regulation) or may (if the standard is by guideline) require a compliance plan. Failure to comply with the plan may result in growth restrictions, capital surcharges, or other measures. This section is in addition to any other authority. | systems with remote site facilities to protect against disruptive events; and (12) such other operational and management standards as the Director determines to be appropriate. If there is a failure to meet a standard, the Director must (if the standard is a regulation) or may (if the standard is by guideline) require a compliance plan. Failure to comply with the plan may result in growth restrictions, capital surcharges, or other measures. This section is in addition to any other authority. | | |
| Assets and Obligations | | | | |
| No provision | Section 109 Requires the Director by regulation to establish criteria to ensure that the portfolio holdings of the enterprises are backed by sufficient capital and consistent with the mission and the safe and sound operation of the enterprises. The Director may, by order, make temporary adjustments if this would help to mitigate market disruptions in the housing finance system Permits the Director by order to require an enterprise to dispose of the asset or obligation when that action is consistent with the purposes of the Act or with the charter acts. | Section 325 adds § 1369E Requires the Director by regulation to establish standards by which the portfolio holdings, or rate of growth of the portfolio holdings, of the enterprises will be deemed to be consistent with the mission and the safe and sound operations of the enterprises. The Director shall periodically review the assets and obligations of the enterprises, both on- and off-balance sheet. The Director may make temporary adjustments to the standards. Permits the Director by order to require an enterprise to dispose of the asset or obligation when that action is consistent with the purposes of the Act or with the charter acts. | Banking agency may order a bank to dispose of assets or acquire an asset or obligation under the agency's cease-and-desist authority, if the grounds for a cease-and-desist order exist. [12 USC § 1818(b)] | In its provision for GSE portfolio holdings (Section 109) , the Senate Committee bill is superior to other GSE reform bills including H.R. 3221. Given the experience of the recent mortgage market turmoil, it would be good to expand this section to apply to GSE securitizations as well. Both bills fail to give the Director express authority to monitor enterprise portfolios for systemic risk. H.R. 3221, which mentions systemic risk only in the context of a study, in section 362, creates a possible negative inference that the Director is not supposed to address systemic risk in the supervisory process. |
| Risk-Based Capital Test | | | | |
| Section 1361 | Section 110 Repeals OFHEO's statutory risk-based capital | Section 323 Repeals OFHEO's statutory risk-based capital stress | By statute, the banking agencies are to establish a risk- adjusted capital standard. | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|---|---|----------|
| <p>Requires the Director, by regulation, to establish a risk-based capital test to determine the amount of total capital that is sufficient for the enterprise to maintain positive capital during a 10-year period in which narrowly specified circumstances occur.</p> <p>Makes confidential any information anyone receives, whether from the Director or an enterprise, to enable the risk-based capital standards to be applied, and exempts all such information from FOIA disclosure.</p> | <p>stress test. Requires Director to establish risk-based capital requirement by regulation, for all regulated entities, to ensure that they operate safely and soundly “with sufficient capital and reserves to support the risks that arise in the operations and management.” The Director shall establish risk-based capital standards for the Federal Home Loan Banks under Section 6 of the FHLBAct.</p> | <p>test and the risk-based capital standards of § 6(a)(3)(A) of FHLB Act. Requires the Director to set a risk-based capital requirement for the regulated entities, by regulation, “to support the risks that arise in the operations and management of” the regulated entities. The requirement for the enterprises could be different than that for the FHLBs.</p> <p>Extends the provision on confidentiality of information to information about FHLBs’ risk-based capital.</p> | <p>That standard is currently the subject of the Basel II process.</p> <p>The agencies currently require banks to meet an 8% ratio of total capital to risk-adjusted assets, and a tier 1 capital to risk-adjusted ratio of at least 4%.¹ [12 USC § 1831o; 12 CFR parts 3 (OCC)]</p> | |

Minimum Capital Levels

| | | | | |
|--|--|---|---|---|
| <p>Section 1362</p> <p>Sets the minimum capital level at 2.5 percent of aggregate on-balance sheet assets of an enterprise, as determined by GAAP, plus 0.45 percent of the unpaid principal balance of outstanding MBSs of the enterprise, and substantially equivalent instruments issued or guaranteed by the enterprise but not included in the on-balance sheet assets, and 0.45 percent of other off-balance sheet</p> | <p>Section 111</p> <p>Authorizes the Director, by regulation or order, to establish minimum capital requirements for the regulated entities that are higher than the numerical requirements set in the 1992 Act or the FHLBAct, respectively.</p> <p>Authorizes the Director by regulation or order, to establish a minimum capital requirement for the FHLBs that is higher than the requirements set in the Federal Home Loan Bank Act. Authorizes the Director to, by order, increase the minimum capital level for a regulated entity temporarily, when necessary and consistent with prudential regulation and the safe-and-sound operations of a</p> | <p>Section 324</p> <p>Retains the current minimum capital requirement for all regulated entities. Permits the Director to increase this requirement by regulation.</p> <p>The Director may impose temporary increases if: The regulated entity is in unsafe or unsound condition or faces a rapid capital depletion, or, for the enterprises only, the value of mortgages it holds or securitizes has decreased significantly; or a regulated entity is operating in an unsafe and unsound manner because of violation of a prudential operating standard.</p> <p>The Director may “at any time by order or regulation” increase capital requirement for “any program or activity” to ensure that the regulated</p> | <p>By statute, the banking agencies are to establish a risk-adjusted capital standard. The agencies currently require banks meet an 8% ratio of total capital to risk-adjusted assets, and a tier 1 capital to risk-adjusted ratio of at least 4%.</p> <p>A bank that is rated 1 under the CAMELS rating system currently must have a leverage ratio of at least 3%, otherwise a 4% ratio applies. [12 USC 3907; 12 CFR part 3 (OCC)]</p> <p>All banking agencies may increase the minimum capital requirements for a</p> | <p>The language of the Senate committee bill with respect to minimum capital levels is close to the authority of the federal bank regulators, and superior to the provision of H.R. 3221.</p> <p>The federal bank regulators have authority, under 12 U.S.C. Sec. 3907, to issue and enforce directives to assure that a regulated entity actually increases its capitalization to the required levels. This authority is lacking in H.R. 3221.</p> <p>The bills also should authorize the Director</p> |
|--|--|---|---|---|

¹ Tier 1 capital consists of stockholders equity, noncumulative perpetual preferred stock, and minority interests in consolidated subsidiaries.

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|--|--|---|
| <p>obligations of the enterprise (excluding commitments in excess of 50 percent of the average dollar amount of commitments outstanding over the previous four quarters), adjusted for the credit risk of such obligations.</p> | <p>regulated entity.</p> <p>Retains the current critical capital requirement for the enterprises.</p> <p>The Director must periodically review the capital levels and requirements.</p> | <p>entity has capital “to support the risks that arise in the operations and management of the regulated entity.”</p> <p>Retains the current critical capital requirement for the enterprises. Adds authority to set critical capital requirements for the FHLBs “as the Director shall, by regulation require.” The Director must consider the critical capital requirement for the enterprises and make appropriate modifications to reflect the differences between the enterprises and the FHLBs. FHLB critical capital regulation must be final within 180 days after the new law’s effective date (one year after enactment).</p> <p>The Director must periodically review the capital levels and requirements.</p> | <p>particular institution or class of institutions as the agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution. [12 USC 3907]</p> | <p>to establish critical capital levels for the enterprises that are higher than the numerical levels set in the 1992 Act.</p> |
| <p>SEC Registration</p> | | | | |
| <p>No provision</p> | <p>Section 112 Requires each regulated entity to register and maintain registration of their equity securities under the Securities Exchange Act of 1934; requires each enterprise to comply with sections 14 (proxies) and 16 (directors, officers and principal stockholders) of the 1934 Act. Requires each Federal Home Loan Bank to register a class of its common stock and to comply with stock exchange rules.</p> <p>Section 208 The FHLBs and their members are exempt from specified SEC rules. The SEC shall issue regulations necessary or appropriate to implement these exemptions. The SEC shall consider the FHLBs’ distinctive characteristics when evaluating the accounting treatment of REFCORP payments, the role of the combined FHLB financials, the accounting</p> | <p>Section 327 Requires each regulated entity to register and maintain registration of at least one class of capital stock under the Securities Exchange Act of 1934; requires each enterprise to comply with sections 14 (proxies) and 16 (directors, officers and principal stockholders) of the 1934 Act.</p> <p>Section 326 If an enterprise deregisters or does not register its common stock with the SEC, the enterprise remains subject to specified provisions of the Securities Exchange Act of 1934 and of the Sarbanes Oxley Act, unless the Director provides otherwise by regulation. An enterprise must notify the Director if it deregisters.</p> <p>Section 375 The Director shall issue regulations to ensure that</p> | <p>Publicly traded bank holding companies are required to register with the SEC. Publicly traded national banks with 500 or more shareholders and assets of \$1 million or more are required to register with the OCC rather than the SEC.</p> | <p>The Senate bill is superior to H.R. 3221 in promoting disclosures to investors in enterprise equity securities.</p> <p>In addition, registration of MBSs could help to avoid concern that the GSEs may not always adequately disclose all material characteristics of mortgages in MBS pools.</p> <p>By its wording, the Senate bill would appear to be enforceable by the SEC. By contrast, some aspects of this provision of H.R. 3221 may need to be enforced by the Director. Because H.R. 3221 neglects to authorize the Director expressly to enforce orders under Subtitle A in court (Section 354 of H.R. 3211) the Director may need to seek other ways to enforce these requirements under that section.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|---|---|--|
| | classification of redeemable FHLB stock, and the accounting treatment of the joint and several nature of FHLB debt. | <p>each FHLB has access to information it needs “to determine the nature and extent of its joint and several liability.” Provides that by this information sharing, or by permitting this information sharing, the Director does not waive any privilege.</p> <p>Section 377 The FHLBs, their members, and securities are exempt from specified SEC rules. In issuing any regulations to implement these exemptions, the SEC shall consider the FHLBs’ distinctive characteristics when evaluating the accounting treatment of REFCORP payments, the role of the combined FHLB financials, the accounting classification of redeemable FHLB stock, and the accounting treatment of redeemable capital stock and of the joint and several nature of FHLB debt.</p> | | |
| Compensation, Golden Parachutes and Indemnification Payments | | | | |
| No provision | <p>Section 113 The Director may prohibit unreasonable executive compensation at a regulated entity in cases of wrongdoing. The Director may require a regulated entity to withhold compensation during a review of its reasonableness and comparability. Expressly states that Director approval of a contract providing severance pay does not preclude the Director from prohibiting excessive compensation under § 1318(a).</p> <p>Section 114 The Agency may, by regulation or order, prohibit or limit golden parachute or indemnification payments. <u>Golden parachute payments</u> are payments “in the</p> | <p>Section 326 Enterprise compensation of directors, officers, and employees shall be reasonable and appropriate, commensurate with duties, consistent with long-term enterprise goals. Compensation may not focus solely on earnings but must take into account risk management, operational stability, and legal compliance.</p> <p>Enterprise CEO and CFO are subject to the disgorgement provisions of Sarbanes Oxley § 304.</p> <p>Section 372 FHLBs may pay their directors “reasonable and appropriate” compensation and expenses. The Director must report “information” about FHLB</p> | <p>By statute, golden parachute payments and indemnification payments are subject to prohibition or regulation by the FDIC. [12 USC 1828(k)]</p> <p>Excessive compensation is an unsafe or unsound banking practice; banks must comply with interagency guidelines on excessive compensation found at 12 CFR part 30, Appendix A (III).</p> | Because both bills neglect to authorize the Director expressly to enforce orders under Subtitle A in court (Section 154 of the Senate committee bill and Section 354 of H.R. 3211) the Director may need to seek other ways to enforce these requirements. |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|--|---|---|
| | <p>nature of compensation” to “any affiliated party,” pursuant to a regulated entity’s obligation, that are contingent on that party’s termination of affiliation with the regulated entity, and are made after the regulated entity becomes insolvent, has a conservator or receiver appointed, or the Agency determines the regulated entity is in a troubled condition, as defined by regulation. The definition also reaches such payments that precede but are in contemplation of the regulated entity’s insolvency, conservatorship, receivership, or troubled condition. Payments under retirement plans and deferred compensation plans are allowed.</p> <p><u>Indemnification payments</u> A regulated entity’s purchases of directors’ and officers’ insurance is permitted, as long as the insurance does not pay actual penalties, remedial payments, or judgments.</p> <p>In prohibiting or limiting golden parachute or indemnification payments, the Director must consider factors that it prescribes by regulation.</p> | <p>directors’ compensation to Congress annually.</p> <p>Section 318 The Director may prohibit unreasonable executive compensation at a regulated entity in cases of wrongdoing. The Director may require a regulated entity to withhold compensation during a review of its reasonableness and comparability. Expressly states that Director approval of a contract providing severance pay does not preclude the Director from prohibiting excessive compensation under § 1318(a).</p> | | |
| Corporate Governance | | | | |
| <p>No provision</p> <p>As shareholder-owned companies with stock registered on the New York Stock Exchange, the enterprises are subject to NYSE governance rules.</p> | <p>No provision.</p> | <p>Section 326 A majority of the seated directors of each enterprise must be independent as the NYSE defines the term. Enterprise boards must meet at least 8 times a year and not less once each quarter. Non-management enterprise directors must regularly meet without management. A quorum for the enterprises is at least a majority of seated directors. Enterprise Directors may not vote by proxy. There are requirements for management information to the board and for board committees. Each enterprise must administer a written code of</p> | <p>Publicly traded bank holding companies are subject to Sarbanes-Oxley provisions. Publicly traded banks that are required to register with the OCC under the '34 Act are subject to sections 302, 303, 304, 306, 401(b), 404, 406 and 407 of Sarbanes-Oxley. These sections are administered by the OCC with respect to national banks. [Section 12(i) of the Securities Exchange Act of 1934, codified at 15 USC § 781(i)] Banking agencies are required to promulgate substantially similar regulations to those of the SEC, or to publish a detailed</p> | <p>Because H.R. 3221 neglects to authorize the Director expressly to enforce orders under Subtitle A in court (Section 354 of H.R. 3211) the Director may need to seek other ways to enforce these requirements of H.R. 3221.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|---|--|---|----------|
| | | <p>conduct. Enterprise boards must oversee corporate strategy, major plans of action, risk policy, legal compliance, hiring, disclosures and compensation, among other matters. Enterprise boards must also oversee “responsiveness of executive officers in providing accurate and timely reports to Federal regulators and in addressing the supervisory concerns of Federal regulators in a timely and appropriate manner.” Each enterprise must have a compliance officer and a risk officer reporting to the CEO.</p> | <p>explanation for why such regulations are not appropriate.</p> <p>Publicly traded banks that are subject to 406 of Sarbanes-Oxley, as administered by the OCC. [15 USC § 781(i)]</p> <p>Publicly traded banks that are subject to 404 of Sarbanes-Oxley, as administered by the OCC. [15 USC § 781(i)]</p> <p>Similar requirements are also imposed under the FDI Act. [12 USC 1831m]</p> <p>Publicly traded banks that are <i>not</i> subject to 402 of Sarbanes-Oxley, as administered by the OCC. [15 USC § 781(i)] However, the Federal Reserve Act limits bank loans to directors and senior officers. [12 USC §§ 375a & 375b]</p> <p>Publicly traded banks that are <i>not</i> subject to 203 of Sarbanes-Oxley, as administered by the OCC. [15 USC § 781(i)]</p> <p>OCC examiner guidance provides that all banks must have a consumer compliance program in place that includes appropriate internal controls.</p> <p>Safety and soundness standards promulgated under 12 USC § 1831-p require banks to have systems and controls to monitor various risks to the institution. OCC supervisory guidance requires banks to have appropriate risk management program in light of the size and activities of the institution.</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|--|--|--|
| FFIEC | | | | |
| | No provision. | Section 328 Adds the new agency as liaison to the Federal Financial Institutions Examination Council. | The Comptroller, Chairman of the FDIC, Chairman of the Federal Reserve Board, Chairman of the NCUA Board, and Director of OTS are full members of the FFIEC. | Liaison status is not the same as full membership in the FFIEC. |
| Mission Regulation Authority | | | | |
| <p>Section 1322</p> <p>The Secretary shall require each enterprise to obtain the approval of the HUD Secretary for any new program of the enterprise before implementing the program. The Secretary shall approve any new program of an enterprise for unless the Secretary determines that the program is not authorized under specified paragraphs of the enterprise's charter act or that the new program is not in the public interest.</p> <p>The enterprise charter acts prescribe that the enterprise may not implement any new program</p> | <p>Section 121 Repeals HUD's authority over new programs.</p> <p>Section 122 Transfers authority from HUD to the Director for new programs and affordable housing goals. Retains HUD's authority for fair housing</p> <p>Section 123 Requires the Director to require each enterprise to obtain approval from the Director for any product before initially offering the product. Limits approval to products rather than programs.</p> <p>Criteria for approval are whether the product is (1) authorized under specified (mortgage and MBS-related) sections of the enterprise charter acts, (2) in the public interest, (3) is in the public interest, and (4) the product is consistent with</p> | <p>Section 331 Transfer authority from HUD to the Director for new programs. Limits approval to products rather than programs.</p> <p>Section 332 Requires the Director to require each enterprise to obtain approval from the Director for any product before initially offering the product. An enterprise may not initially offer any new product before obtaining approval by the Director.</p> <p>Criteria for approval are whether the product is (1) authorized under specified (mortgage and MBS-related) sections of the enterprise charter acts, (2) in the public interest, (3) consistent with safety and soundness, and (4) the product does not materially impair the efficiency of the mortgage finance system.</p> | <p>National banks may engage in activities authorized by statute, primarily the National Bank Act. Under 12 USC § 24, national banks may engage in activities that are part of the business of banking or incidental thereto.</p> <p>A similar, but not identical, restriction, applies to federal thrifts. <i>See</i> 12 U.S.C. 1464(b), (c).</p> <p>If an activity has not been previously approved by the OCC, the Comptroller may determine at any time that the activity is impermissible either because it is not part of or incidental to the business of banking, or because it constitutes an unsafe or unsound practice. [12 USC §§ 24 & 1818]</p> | <p>These provisions significantly restrict oversight of new enterprise activities compared to current law.</p> <p>Because both bills neglect to authorize the Director expressly to enforce orders under Subtitle A in court (Section 154 of the Senate committee bill and Section 354 of H.R. 3211) the Director may need to seek other ways to enforce violations of this provision.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|--|----------|
| (as defined in section 1303 of the 1992 Act) before obtaining the approval of the Secretary under section 1322 of such Act. | <p>safety and soundness of the enterprise or the mortgage finance system.</p> <p>The enterprise must submit a written request in such form as prescribed by the Director. The Director shall publish notice and give 30 days for public comment. The Director shall approve or deny the product within 30 days of the close of the public comment period or the product is deemed approved.</p> <p>Permits the Director to approve a product conditionally and set terms, conditions, and limitations.</p> <p>A 'product' does not include enterprise AUS in existence as of the enactment date, or modifications to mortgage terms, provided that the modifications do not include services or financing other than residential mortgage financing.</p> <p>Authorizes Director to review all new and existing programs or activities for consistency with the statutory mission of the enterprises.</p> | <p>The enterprise must submit a written request in a form prescribed by the Director. The Director shall publish notice and give 30 days for public comment. The Director shall approve or deny the product within 30 days of the close of the public comment period or the product is deemed approved.</p> <p>Permits the Director to approve a product conditionally and set terms, conditions, and limitations.</p> <p>A product does not include enterprise AUS in existence as of the enactment date, or modifications to mortgage terms, with some limitations.</p> <p>If an enterprise determines that any new activity, service, undertaking, or offering is not a product, the enterprise shall provide written notice to the Director prior to the commencement of such activity, service, undertaking, or offering.</p> <p>If the Director determines that any new activity, service, undertaking, or offering consists of, relates to, or involves a product, the Director shall notify the enterprise; the new activity, service, undertaking or offering shall be considered a product; and the enterprise shall withdraw its request or submit a written request for approval of the product.</p> <p>The Director has authority to review all new and existing products or activities to determine that they are consistent with the statutory mission of the enterprise.</p> | | |
| Affordable Housing Goals | | | | |
| Section 1303 | Section 127 Requires HMDA-type reporting by the | Section 337 Transfer authority from HUD to the Director for | Banks are subject to the Community Reinvestment Act (CRA) and examined for | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|---|----------|
| <p>The term <u>low-income</u> means (A) in the case of owner-occupied units, income not in excess of 80 percent of area median income; and (B) in the case of rental units, income not in excess of 80 percent of area median income, with adjustments for smaller and larger families, as determined by the Secretary.</p> <p>The term <u>moderate-income</u> means (A) in the case of owner-occupied units, income not in excess of area median income; and (B) in the case of rental units, income not in excess of area median income, with adjustments for smaller and larger families, as determined by the Secretary.</p> <p>The term <u>very low-income</u> means (A) in the case of owner-occupied units, income not in excess of 60 percent of area median income; and (B) in the case of rental units, income not in excess of 60 percent of area median income, with adjustments for smaller and larger families, as determined by the Secretary.</p> <p>The term <u>new program</u> means any program for the purchasing, servicing, selling, lending on the security of, or otherwise dealing</p> | <p>enterprises.</p> <p>Section 128 Requires the Director to establish housing goals for each enterprise. The Director shall determine whether an enterprise receives full, partial, or no credit for a transaction. The Director shall require the enterprises to report on interest rate disparities charged to minorities, as compared with similarly creditworthy non-minorities, and requires the Director to report to Congress on any pattern of disparity and to report to a regulatory or enforcement agency for appropriate action</p> <p>Authorizes the Director to reduce housing goals on petition of an enterprise.</p> <p>Requires the Director to establish annual goals for each enterprise of conforming single-family owner-occupied (A) purchase money home mortgages and (B) mortgages to refinance and (C) mortgages that finance rental dwelling units, for (1) low-income families, (2) families residing in low income areas, and (3) very-low income families.</p> <p>Section 129 Requires the enterprises to lead the market to facilitate a secondary market (1) for mortgages on manufactured homes for very-low, low- and moderate-income families, (2) to preserve housing affordable to very-low, low- and moderate-income families, (3) for mortgages on housing for very-low, low- and moderate-income families in rural areas and other underserved areas that the Director identifies, and (4) unconventional affordable housing loans originated through Community Development Financial Institutions.</p> | <p>affordable housing goals. HUD retains authority for fair housing.</p> <p>The Director, in implementing the goals, may request information from the enterprises to assess disparities between interest rates on loans to minorities and nonminorities of similar creditworthiness. Upon a preliminary finding by the Director that a pattern of disparities in interest rates with respect to any lender or lenders exists pursuant to the data provided by an enterprise, the Director shall refer the preliminary finding to the appropriate regulatory or enforcement agency for further review; require the enterprise to submit additional data with respect to any lender or lenders, as appropriate and to the extent practicable, to the Director who shall submit any such additional data to the regulatory or enforcement agency for appropriate action; and require the enterprise to undertake appropriate remedial actions.</p> <p>Repeals existing goals and replaces them with three single family goals and three multifamily goals. Goals are annual.</p> <p><u>Income definitions</u></p> <p>The term <u>very low-income</u> means (A) in the case of owner-occupied units, income not in excess of 50 percent of area median income; and (B) in the case of rental units, income not in excess of 50 percent of area median income, with adjustments for smaller and larger families, as determined by the Secretary.</p> <p>The term <u>low-income area</u> means a census tract or block numbering area in which the area median does not exceed 80 percent of the area median income, and includes families with incomes not greater than</p> | <p>compliance by the banking agencies. Separate CRA rating is assigned to each bank. [12 USC §§ 2901 – 2902; 12 CFR part 25]</p> <p>The CRA regulations define “low-income” as less than 50% of the area median. “Moderate-income is defined as between 50% but less than 80% of area median. [e.g., 12 CFR § 345.12]</p> <p>CRA compliance is considered when a bank or bank holding company applies to establish a branch, merge with another institution, acquire another institution, or obtain similar regulatory approvals. [12 USC §§ 2901 – 2902; 12 CFR part 25]</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|--|-------------|----------|
| <p>in, conventional mortgages that (A) is significantly different from programs that have been approved under this Act or that were approved or engaged in by an enterprise before October 28, 1992; or (B) represents an expansion, in terms of the dollar volume or number of mortgages or securities involved, of programs above limits expressly contained in any prior approval.</p> <p>Section 1331 The Secretary shall establish housing goals by regulation, that "shall include" (1) low and moderate-income ("low/mod") housing, (2) special affordable housing, and (3) central cities, rural areas and other underserved areas.</p> <p>In establishing any housing goal, the Secretary may take into consideration the number of housing units financed by a multifamily mortgage that an enterprise purchases.</p> <p>The Secretary may, by regulation, adjust any housing goal from year to year, except as otherwise provided in the Act.</p> <p>Section 1332</p> | <p>Requires enterprises to take affirmative steps to assist depository institutions to meet their CRA obligations.</p> <p><u>Underserved</u> means those urban census tracts that have (A) an average median family income less than 80 percent of the area median family income, or (B) a minority population of at least 30 percent and a median family income of less than 100 percent of the area median income.</p> <p>Section 130 Authorizes the Director to use cease-and-desist authority under Section 1341 of the 1992 Act, impose civil money penalties under Section 1345, or order other specified remedies. Strengthens the Director's authority under Sections 1341 and 1345 of the 1992 Act.</p> <p>Provides for enforcement of the duty to provide mortgage credit to underserved markets to the same extent that housing goals are enforceable.</p> | <p>100 percent of the area median income who live in minority census tracts.</p> <p>The term <u>extremely low income</u> means 30 percent or less of the area median income.</p> <p><u>Single family goals</u></p> <p>The single family goals are set for:</p> <ul style="list-style-type: none"> • Low-income families, • Families in low income areas, and • Very low income families. <p>Qualifying loans are purchase money, conventional, conforming. The property must be owner occupied. Within each single-family goal is also a subgoal for loans used to refinance a mortgage.</p> <p>The goals must be set as a percentage of the enterprises' business. They are set at a base level, and the Director has some authority to raise them and lower them. The base level for each goal (target) is set at the same percentage that loans qualifying for that goal are of the entire market. That is, if low-income loans make up X% of the market, the low-income base goal is X%. The percentage is measured using the average percentage for the three most recent years for which HMDA data are public. The market is defined as conventional, conforming, single-family, owner-occupied, purchase money loans. For goals purposes, the Director determines what a conforming loan is by the original principal balance as reported in HMDA data. Borrower income is measured as of origination.</p> <p><u>Multifamily goals</u></p> <p>The multifamily goal includes:</p> <ul style="list-style-type: none"> • Loans on dwelling units for very low- | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|-------------|----------|
| <p>The Secretary shall establish an annual goal for the purchase of mortgages on housing for low- and moderate-income families.</p> <p>In establishing the goal, the Secretary shall consider six enumerated factors: (1) national housing needs, (2) economic, housing and demographic conditions, (3) past enterprise performance and effort in achieving the goal, (4) size of the conventional market for low/mod income housing relative to the overall conventional mortgage market, (5) ability of the enterprises to lead the industry in making mortgage credit available for low/mod families, and (6) the need to maintain the sound financial condition of the enterprises.</p> <p>The Secretary shall monitor the performance of the enterprises. Rent levels affordable to low/mod income families should not exceed 30 percent of the maximum income level of the categories referred to in this section, with adjustments for unit size, as measured by number of bedrooms.</p> <p>The Secretary may establish separate specific subgoals within</p> | | <p>income families, and</p> <ul style="list-style-type: none"> Loans on dwelling units assisted by low income housing tax credits (LIHTCs). <p>The Director shall give full credit toward the goal for qualifying dwelling units financed by bonds (taxable or not) that state or local housing finance agencies issue, only if the enterprise either: guarantees the bond; or purchases it and it is not investment grade. There are “additional requirements” for small multifamily housing projects. Small may be based on number of units or loan size, or both, but the requirement must include projects of a size typical in rural areas. The additional requirements would apparently work like subgoals.</p> <p>For the multifamily goals, income must be measured by the income of actual or prospective tenants if data are available, and otherwise by rent levels affordable to low-income and very low-income families.</p> <p>A rent level is affordable for its income category if the rent level is no more than 30% of the top of that income category, adjusted for unit size.</p> <p>In establishing the multifamily goals, the Director must consider a number of factors. The factors are similar to those currently in §§ 1332 and 1334, including “ability of the enterprises to lead the industry,” but the factor of “economic, housing, and demographic conditions” is omitted.</p> <p>The Director may increase a single family target above the base, by regulation “to reflect expected changes in market performance related to such information under” HMDA; and upon considering a number of factors. The factors are similar to those currently in §§ 1332 and 1334, except the “ability of the enterprises to lead the industry” factor is omitted.</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|---|-------------|----------|
| <p>this goal and such subgoals shall not be enforceable.</p> <p>Section 1333</p> <p>The Secretary shall establish a special annual goal to meet the then-existing unaddressed needs of low income families in low income areas and very low income families. This goal shall not be less than one percent of the dollar amount of mortgage purchases by the enterprise for the previous year.</p> <p>In establishing the goal, the secretary shall consider five enumerated factors: (1) data submitted to the Secretary in connection with this goal for previous years, (2) past enterprise performance and effort in achieving the goal, (3) national housing needs within the categories set forth in this section, (4) ability of the enterprises to lead the industry in making mortgage credit available for low-income and very low-income families, and (5) the need to maintain the sound financial condition of the enterprises.</p> <p>The Secretary shall give full credit for purchase or securitization of otherwise qualifying federally insured or</p> | | <p>Authorizes the Director to reduce housing goals on petition of an enterprise. Denial of a petition is judicially appealable.</p> <p>Section 338 <u>Duties</u> Creates two new duties for the enterprises: Increase the liquidity of mortgage investments; and Improve the distribution of investment capital available for mortgage financing for underserved markets.</p> <p><u>Requirements for duties</u> To meet these duties, the enterprises must lead the industry in developing loan products and flexible underwriting guidelines to facilitate a secondary market: For loans on manufactured homes for very low, low-, and moderate-income families; To preserve housing affordable to very low, low-, and moderate-income families, including projects subsidized under several federal housing programs; For mortgages for very low, low-, and moderate-income families in rural areas and other underserved markets that the Director finds lack adequate conventional credit. Underserved markets may be defined geographically or by borrower type or market segment. Within 18 months of enactment, the Director must create a method of evaluating compliance with the duties. Duties are enforceable just as are the goals.</p> <p>Section 339 <u>Compliance determinations</u> After year-end, the Director determines whether the enterprises meet their single family goals, and must</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|--|-------------|----------|
| <p>guaranteed mortgages if they cannot be readily securitized through Ginnie Mae and participation of the enterprises substantially enhances the affordability of the housing subject to such mortgages.</p> <p>The Secretary shall give full credit for purchase or refinancing of existing, seasoned portfolios of loans, if the seller is engaged in a specific program to use the proceeds of such sales to originate additional loans that meet this goal, and such purchases or refinancings support additional lending for housing that otherwise qualifies under this goal.</p> <p>The Secretary shall monitor the performance of the enterprises. Rent levels affordable to low-income and very low-income families should not exceed 30 percent of the maximum income level of the categories referred to in this section, with adjustments for unit size, as measured by number of bedrooms.</p> <p>Section 1334</p> | | <p>give its determination to each enterprise within 30 days of making it. The Director may not make the determination public before giving it to the enterprise. Each enterprise has 30 days to comment. For the multifamily goal and additional requirements, the Director determines compliance. Goals are enforced the same as duties, as discussed in the next item.</p> <p>Strengthens housing goal enforcement. Under current law, if an enterprise fails or is likely to fail a feasible goal, HUD may require a housing plan. If the enterprise fails to make a good faith effort to comply with the plan, or fails to file the plan, HUD may issue a cease and desist order or assess a civil money penalty.</p> <p>The Director may not require a plan until the enterprise has been permitted a comment period. The Director may issue a cease and desist order or assess a civil money penalty if the enterprise fails to file or fails to comply with a housing plan, or fails a goal. In addition, the Director may prohibit an enterprise from initially offering any product or engaging in any new activities, services, undertakings, and offerings and order the enterprise to suspend products and activities, services, undertakings, and offerings pending its achievement of the goal.</p> <p>Section 342 The Director may issue cease-and-desist orders or apply civil monry penalties for failure to meet the requirements of this section, and may enforce these in court.</p> <p>Section 334 The Director shall submiot an annual report to the</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|--|-------------|----------|
| <p>The Secretary shall establish an annual goal for the purchase of mortgages on housing located in central cities, rural areas, and other underserved areas.</p> <p>The Secretary may establish separate subgoals within this goal and such subgoals shall not be enforceable.</p> <p>In establishing the goal, the secretary shall consider six enumerated factors: (1) urban and rural housing needs and the housing needs of underserved areas, (2) economic, housing and demographic conditions, (3) past enterprise performance and effort in achieving the goal, (4) size of the conventional market for housing in central cities, rural areas, and other underserved areas relative to the overall conventional mortgage market, (5) ability of the enterprises to lead the industry in making mortgage credit available for central cities, rural areas, and other underserved areas, and (6) the need to maintain the sound financial condition of the enterprises.</p> <p>The Secretary shall monitor the performance of the enterprises and shall evaluate performance based on the location of the</p> | | <p>Congress on the extent that the regulated entities comply with their affordable housing responsibilities</p> <p>Section 335 The regulated entities shall report annually and provide information to determine the level of affordable housing stock in the United States and changes in the amount of that stock</p> <p>Section 336 The regulated entities shall not deal in mortgages where the borrower, at time of origination, does not possess a Social Security Number.</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|-------------|----------|
| <p>properties subject to mortgages that the enterprises purchase.</p> <p>Section 1335. Other Requirements.</p> <p>To meet the housing goals under sections 1332, 1333, and 1334, the enterprises shall —</p> <p>(1) design programs and products that facilitate the use of assistance provided by the Federal Government and State and local governments;</p> <p>(2) develop relationships with nonprofit and for-profit organizations that develop and finance housing and with State and local governments, including housing finance agencies;</p> <p>(3) take affirmative steps to—</p> <p>(A) assist primary lenders to make housing credit available in areas with concentrations of low-income and minority families, and</p> <p>(B) assist insured depository institutions to meet their obligations under the Community Reinvestment Act of 1977, which shall include developing appropriate and prudent underwriting standards, business practices, repurchase requirements, pricing, fees, and</p> | | | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|-------------|----------|
| <p>procedures; and</p> <p>(4) develop the institutional capacity to help finance low-and moderate-income housing, including housing for first-time homebuyers.</p> <p>Section 1336</p> <p>The Secretary shall monitor and enforce compliance with the housing goals established under Sections 1332, 1333, and 1334.</p> <p>If the Secretary determines that an enterprise has failed to meet a housing goal or that there is a substantial probability that the enterprise will fail, then the Secretary may require the enterprise to submit a housing plan for the Secretary's approval.</p> <p>Sections 1341-1348</p> <p>The Secretary may issue a cease and desist order that requires an enterprise to submit a housing plan and may impose a civil money penalty for failure (1) to submit a compliant housing plan or (2) to make a good faith effort to comply with an approved housing plan. The Secretary shall have subpoena authority in connection with an</p> | | | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|--|-------------|----------|
| administrative proceeding under this subpart. | | | | |
| Affordable Housing Fund | | | | |
| | <p>Section 131 The enterprises shall set aside an amount equal to 4.2 basis points for each dollar of unpaid principal of its total new business purchases. 65 percent of such amounts shall fund the Housing Trust Fund program established by the Secretary of Housing and Urban Development and 35 percent shall fund the Capital Magnet Fund established as a special account within the Community Development Financial Institutions Fund in the Treasury Department, pursuant to this section.</p> <p>The Director shall, by regulation, prohibit each enterprise from redirecting the costs of any allocation required by this section to originators of mortgages purchased or securitized by the enterprises, through increased charges or fees or decreased premiums or in any manner.</p> <p>The purpose of the Housing Trust Fund is (1) to increase and preserve the supply of rental housing for extremely low- and very-low income families, including homeless families, and (2) increase homeownership for extremely low- and very-low income families.</p> <p>Housing Trust Fund amounts shall not be considered to be eligible enterprise activities for purposes of the housing goals, except to the extent</p> | <p>Section 340 The Director, in consultation with the Secretary, shall “establish and manage” an affordable housing fund (AHF). Its purposes are to increase:</p> <ul style="list-style-type: none"> • homeownership for extremely low (30% of AMI) and very low-income (50%) families; • housing investment in low income areas; and preserve the supply of rental and owner occupied housing for extremely low and very low-income families • investment in public infrastructure development in connection with housing assisted by the AHF • and, leverage investments from other sources. <p>An economically underserved area is an “area” that “predominantly includes” census tracts where either: 20% of the population is below the poverty line; or median income is no more than 80% of AMI for the MSA or the state.</p> <p>The enterprises must allocate each year 1.2 basis points of their total mortgage portfolios (including MBSs that they securitize) for the prior year to the AHF, starting the year that begins one year after enactment.</p> <p>Allocations are necessary only if the enterprise is classified as adequately capitalized and had after tax</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|--|--|-------------|----------|
| | <p>that such purchases by the enterprises are funded other than with such grant amounts.</p> <p>25 percent of amounts collected shall be placed in the Treasury to fund the HOPE Reserve Fund. Of the remaining 75 percent, in 2009, all shall be used to reimburse the Treasury for payments made for the HOPE for Homeowners program under Section 257 of the National Housing Act, to help address the mortgage crisis. In 2010, 50 percent of the funds shall be used to reimburse the Treasury, and in 2011, 25 percent. Any excess at the termination of the HOPE for Homeowners program shall be restored to their original statutory purposes.</p> <p>Section 132 The Secretary of the Treasury shall make grants to eligible organizations to provide a range of financial education and counseling services to prospective homebuyers. The Secretary shall authorize not more than five pilot project grants to eligible organizations to provide services to improve the financial stability and economic condition of low- and moderate-income individuals and low-wealth individuals to (1) identify successful methods and (2) establish program models for organizations to carry out effective counseling services. The GAO shall conduct a study on the effectiveness and impact of the grant program established under this section.</p> <p>The GAO shall conduct a study of the effectiveness and impact of the grant program established under this section.</p> | <p>income the prior year.</p> <p>The Director must, by regulation, prohibit the enterprises from redirecting AHF costs, through increased charges or fees, or decreased premiums, or in any other manner, to mortgage originators.</p> <p>The Secretary shall by regulation allocate AHF funds among states and Indian tribes.</p> <p><u>Fund Uses</u> If AHF money goes to states, or their agencies or instrumentalities. The states in turn must establish grantee allocation plans. Funds must support only organizations with demonstrated experience and capability that have the provision of affordable housing or related infrastructure as their primary purpose and that do not engage in federal election activity or expenditures.</p> <p>25% of the allocated amount goes to fund REFCORP obligations. At least 10 percent must go to homeownership activities, and no more than 12.5 percent may go to infrastructure (in connection with affordable housing).</p> <p>All AHF funds for 2008 go to assist eligible activities in areas that were hit by Hurricanes Katrina and Rita.</p> <p>In other years, money in the AHF may be used or committed only for assistance for: (1) Production, preservation, and rehabilitation of rental housing for extremely low- and very low-income families. (2) Production, preservation, and rehabilitation of housing for purchase by, and principal residence of, extremely low- and very low-income families who</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|---|---|-------------|----------|
| | | <p>are first time homebuyers. The home price must meet requirements of the Cranston-Gonzalez National Affordable Housing Act and the home must meet resale restrictions of that act.</p> <p>(3) Public infrastructure development activities in connection with housing activities funded by the AHF).</p> <p>No more than 12.5% of the allocation may be used for (3) above.</p> <p>All allocations must be used or committed within two years.</p> <p>Profits on allocations may only be used for eligible activities (1) – (3) above.</p> <p>Amounts used for these three purposes do not count toward the affordable housing goals. If an enterprise purchases a loan without using AHF money, that loan can count toward the goals even if the AHF assists the loan.</p> <p>Prohibited uses of affordable housing fund grant amounts include political activities; advocacy; lobbying; counseling services; travel expenses; and preparing or providing tax advice. Housing may not be provided for households unless all adult members have appropriate identification. No more than 10 percent, or a lesser amount as the Director prescribes by regulation, of grant amounts may go to administrative costs of the grantee.</p> <p>Use or commitment of AHF funds is exempt from the risk-based capital requirement.</p> <p>The Director shall issue regulations requiring annual audits, requiring a process for determining the grantee’s highest priority uses of AHF amounts, and with respect to other requirements and standards.</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|--|-------------|----------|
| | | <p>The Director must require grantees to track use of grant funds, assure regular audits, and other requirements to assure appropriate grant administration and compliance. The Director shall deal with misuse of funds by reducing available funds, requiring repayment, or terminating assistance to the grantee.</p> <p><u>Reports</u> The Director shall require reports from each grantee as to fund uses and other matters, and shall make them public.</p> <p>There shall be a GAO on the effects of the AHF on availability and affordability of credit for homebuyers.</p> <p><u>Affordable Housing Trust Fund</u> If federal law establishes an affordable housing trust fund, the AHF shall be folded into it, under specific conditions.</p> <p>Section 341 This subpart may not be construed to authorize an enterprise to engage in any program or activity that contravenes or is inconsistent with its charter.</p> | | |
| Conforming Loan Limits | | | | |
| The enterprise charter acts prescribe a formula for increasing (but not decreasing) the conforming loan limit each year, according to the new home | Section 124 The Director sets the conforming loan limits, starting at their current level and adjusting every year. The conforming loan limit may go up. Declines in house prices shall be accumulated to | Section 333 The Director sets the conforming loan limits, starting at their current level and adjusting every year. Adjustments equal changes up or down, in the Director's house price index. The Director may | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|---|---|
| <p>price index [define]. For single-family homes, the conforming loan limit currently is \$ 359,650.</p> | <p>offset future increases. The Director may adopt by regulation a new price index for single family homes. The index must be a national average.</p> <p>For mortgages originated after January 1, 2009, the conforming limit “shall” increase in “any area” where the median home price exceeds the conforming limit, up to the lesser of the median price or 132% of the conforming limit.</p> | <p>adopt a new price index for single family homes. The index must be a national average. GAO audits any changes to the index methodology for accuracy and appropriateness.</p> <p>For mortgages originated after January 1, 2009, the conforming limit “shall” increase in “any area” where the median home price exceeds the conforming limit, up to the lesser of the median price or 175% of the conforming limit. An “area” has the same meaning as it does for the FHA 203(b) program.</p> <p><u>Sense of the Congress</u> It is the sense of the Congress that the enterprises should securitize mortgages that meet the higher limits.</p> | | |
| Critical Capital Levels | | | | |
| <p>Section 1363 Sets the critical capital level for each enterprise at 1.25 percent, 0.25 percent, and 0.25 percent, respectively, of the amounts specified for the categories set forth in Section 1361.</p> | <p>Section 142 Requires the Director to establish critical capital levels for the FHLBs.</p> | <p>Section 324 Requires the Director to establish critical capital levels for the FHLBs.</p> | <p>The banking agency shall, by regulation, specify the ratio of tangible equity to total assets at which an insured depository institution is critically undercapitalized. The agency may, by regulation, specify for 1 or more other relevant capital measures, the level at which an insured depository institution is critically undercapitalized. The level specified shall require tangible equity in an amount (i) not less than 2 percent of total assets; and (ii) except as provided in clause (i), not more than 65 percent of the required minimum level of capital under the leverage limit. 12 U.S.C. Sec. 1831o.</p> | <p>The critical capital level for the enterprises is set so low in the 1992 act as to be largely ineffective as the basis for prompt corrective action.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|---|---|----------|
| Capital Classifications | | | | |
| <p>Section 1364</p> <p>Sets the following capital classifications:</p> <p><u>Adequately capitalized:</u> maintains total capital at or above the risk-based level established under Section 1361 and core capital at or above the critical capital level established under Section 1362.</p> <p><u>Undercapitalized:</u> does not maintain total capital at or above the risk-based capital level, but maintains core capital at or above the minimum capital level</p> <p><u>Significantly Undercapitalized:</u> does not maintain total capital at or above the risk-based capital level, does not maintain core capital at or above the minimum capital level, but maintains core capital at or above the critical capital level</p> | <p>Section 142</p> <p>Retains the existing capital classifications of the 1992 Act: adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized.</p> <p>These apply to the FHLBs, but the Director may modify the classification criteria as appropriate to reflect the differences between the enterprises and FHLBs. Regulations to implement the FHLB classifications are due within 18 months of enactment.</p> <p>The Director may lower a classification one level for any regulated entity when it engages in conduct that could result in a rapid depletion of core capital, or when there is a significant decrease in the value of mortgages that the regulated entity holds or has securitized.</p> <p>Retains current law that permits reclassification, of an enterprise if the value of mortgages held or securitized has decreased significantly.</p> <p>Or a lower classification may be based on an unsafe or unsound condition, after notice and hearing.</p> | <p>Section 345</p> <p>Retains the existing capital classifications of the 1992 Act: adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized.</p> <p>These apply to the FHLBs, but the Director may modify the classification criteria as appropriate to reflect the differences between the enterprises and FHLBs. Regulations to implement the FHLB classifications are due within 18 months of enactment.</p> <p>The Director may lower a classification one level for any regulated entity when it engages in conduct that could result in a rapid depletion of core capital, or when there is a significant decrease in the value of mortgages that the regulated entity holds or has securitized.</p> <p>Retains current law that permits reclassification, of an enterprise if the value of mortgages held or securitized has decreased significantly.</p> <p>Or a lower classification may be based on an unsafe or unsound condition, after notice and hearing.</p> <p>The Director may lower a classification if the</p> | <p>The Prompt Corrective Action (PCA) statute requires the agencies to define, by regulation, five capital categories: (i) well capitalized; (ii) adequately capitalized; (iii) undercapitalized; (iv) significantly undercapitalized; and (v) critically undercapitalized.² The PCA statute provides that the agencies may not set the level for a critically undercapitalized institution below 2 percent of total assets. [12 USC § 1831o]</p> <p>A bank may not make a capital distribution if it would result in the bank becoming undercapitalized. [12 USC § 1831o]</p> <p>If the agency determines (after a hearing) that a bank is in an unsafe or unsound condition, or it received a less than satisfactory rating for asset quality, management, earnings or liquidity, the agency may reclassify a well capitalized bank as adequately capitalized, and may require other banks to comply with the sanctions noted above for undercapitalized or significantly undercapitalized banks. [12 USC § 1831o]</p> | |

² The banking agencies currently define “well capitalized” as having total risk-based capital of at least 10% and leverage ratio capital of at least 5%. Adequately capitalized requires total risk-based capital ratio of at least 8% and a leverage ratio of at least 4% (or if the bank is rated 1 under the CAMELS system, leverage ratio of at least 3%). An undercapitalized bank has a total risk-based capital ratio of not less than 8% or a leverage ratio of not less than 4% (unless CAMELS rate 1, in which case the lower limit is 3%). A significantly undercapitalized bank has a total risk-based capital of less than 6% or a leverage ratio that is equal to or less than 3%). A critically undercapitalized bank has a ratio of tangible equity to total assets that is less than 2%. In addition, the regulations specify various minimum ratios of core or tier 1 capital to total assets. See, e.g. 12 CFR §6.4.

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|--|-------------|----------|
| <p>Critically undercapitalized: does not maintain total capital at or above the risk-based capital level and does not maintain core capital at or above the critical capital level</p> <p>If the Director determines in writing that an enterprise is engaging in conduct not approved by the Director that could result in a rapid depletion of core capital or that the value of the property subject to mortgages held or securitized by it has decreased significantly, the Director may lower its classification by one level.</p> <p>Section 1368 Notice and response. Before a proposed classification, discretionary reclassification, or any proposed supervisory action for a significantly undercapitalized enterprise can be effective, OFHEO must notify the enterprise of OFHEO's proposed classification or action. The enterprise has 30 days to respond to the notice, which period the Director may shorten or lengthen. The Director must consider the enterprise's response then decide whether to make the proposed classification or to take the proposed action. The Director must notify</p> | <p>The Director may lower a classification if the Director determines that the regulated entity is engaging in an unsafe or unsound practice based on an unsatisfactory examination report rating for asset quality, management, earnings, or liquidity.</p> <p>Prohibits dividends that make a regulated entity undercapitalized, but the Director may permit redemptions in some circumstances.</p> | <p>Director determines that the regulated entity is engaging in an unsafe or unsound practice based on an unsatisfactory examination report rating for asset quality, management, earnings, or liquidity.</p> <p>Prohibits dividends that make a regulated entity undercapitalized, but the Director may permit redemptions in some circumstances.</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|--|--|
| <p>Congress of its determinations.</p> <p>Section 1369D</p> <p>Judicial Review of Director Action. An enterprise that is not classified as critically undercapitalized may judicially challenge its capital classification or a discretionary supervisory action OFHEO takes. The action must be filed within 10 days un the U.S. Court of Appeals. The classification or action is effective pending appeal if the enterprise is significantly or critically undercapitalized. Otherwise, the Court may stay the classification or action pending appeal. The Court may modify, terminate, or set aside the classification or action only if it was arbitrary, capricious, an abuse of discretion, or not in accordance with law.</p> | | | | |
| <p>Supervisory Actions Applicable to Undercapitalized Regulated Entity</p> | | | | |
| <p>Section 1365</p> <p>Capital distributions are prohibited if they would result in the enterprise being classified as significantly or critically undercapitalized.</p> | <p>Section 143 Requires the Director to monitor closely an undercapitalized regulated entity and its capital restoration plan; restricts asset growth unless the Director has accepted the capital restoration plan and the increase in total assets is consistent with the plan such that the enterprise can become</p> | <p>Section 346 Requires the Director to monitor closely an undercapitalized regulated entity and its capital restoration plan; restricts asset growth unless the Director has accepted the capital restoration plan, the increase in total assets is consistent with the plan, and total capital-to-assets is increasing such that the</p> | <p>An undercapitalized bank is subject to increased regulatory scrutiny and must file an acceptable capital restoration plan. In addition: (i) Asset growth may be limited (ii) No new acquisitions, branches, or new lines of business without regulatory</p> | <p>The Senate committee bill is superior because of the negative inference created in H.R. 3221 by distinguishing “product” from “activity, service, undertaking or offering, that could further narrow the definition of “product for purposes of new product approval.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|--|--|----------|
| <p>Plan required. A capital restoration plan is required. It must:</p> <ul style="list-style-type: none"> Set a feasible plan for achieving both the minimum and risk-based capital requirements. Specify the level of capital the enterprise will achieve and maintain; Describe how and when it will do so; Specify the types and levels of activities (including new and existing programs) the enterprise will engage in during the plan period. Describe what the enterprise will do to comply with the PCA requirements the Director imposes. <p>Deadline. Plans must be filed within 45 days, but the Director may extend the time. The Director must approve the plan within 30 days, extendable to 60 days. If the Director disapproves the plan, the enterprise must file a new plan in 30 days, but the Director may extend the period if doing so “is in the public interest.”</p> <p>Failure to file a substantially compliant plan, or if the Director does not approve the plan, or failure to make good faith reasonable efforts to comply with the plan may be the basis for lowering a classification one</p> | <p>adequately capitalized in a reasonable time.</p> <p>An undercapitalized regulated entity may not, directly or indirectly, acquire any interest in any entity or engage in any new activity without approval of the Director. The Director may take any of the actions authorized with respect to a significantly undercapitalized regulated entity if the Director determines such actions are necessary to carry out the purposes of the subtitle.</p> | <p>enterprise can become adequately capitalized in a reasonable time.</p> <p>An undercapitalized regulated entity may not, directly or indirectly, acquire any interest in any entity or engage in any new product or new business activity, service, undertaking, or offering without the Director’s approval. The definition of new product is the same as under § 331 above. The Director may take any of the actions authorized with respect to a significantly undercapitalized regulated entity if the Director determines such actions are necessary to carry out the purposes of the subtitle.</p> | <p>approval;</p> <ul style="list-style-type: none"> (iii) No brokered deposits/excessive interest payments on deposits; and (iii) The agency may apply further restrictions as described below for significantly undercapitalized banks. [12 USC §1831o] | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|--|--|--|
| level. | | | | |
| Supervisory Actions Applicable to Significantly Undercapitalized Regulated Entity | | | | |
| <p>Section 1366</p> <p>Capital distributions are prohibited if they would cause the enterprise to be critically undercapitalized, and otherwise require prior OFHEO approval. OFHEO may approve a distribution only if it would help the enterprise meet its capital requirements, would help the enterprise's long term safety and soundness, or is otherwise in the public interest.</p> <p>Plan required. The enterprise must file and carry out the plan. The contents, deadline, and consequence of failure to file or comply with a plan are the same as for undercapitalized enterprises.</p> <p>Discretionary supervisory actions. The Director may do any of the following:</p> <ul style="list-style-type: none"> • Limit growth of, or require a reduction in, the enterprise's obligations and off-balance sheet obligations. • Limit growth of, or require a reduction in, | <p>Section 144</p> <p>Applies to all regulated entities OFHEO's current authority to require capital plans and to restrict dividends. Requires the Director to take one or more of the actions that today are within OFHEO's discretion to take.</p> <p>Gives the Director new authority to order election of a new board for a regulated entity, dismiss directors or executive officers, and require the regulated entity to employ qualified executive officers.</p> <p>Gives the Director new authority to take other actions that the Director "determines will better carry out the purposes of this section". Requires the Director's approval before the regulated entity may give a bonus or raise to executive officers.</p> | <p>Section 347</p> <p>For enterprises, retains Director's current authority to require capital plans and to restrict dividends; and requires the Director to take one or more of the actions that today are within OFHEO's discretion to take.</p> <p>Gives the Director new authority to order election of a new board for a regulated entity, dismiss directors or executive officers, and require the regulated entity to employ qualified executive officers.</p> <p>Gives the Director new authority to take other actions that the Director "determines will better carry out the purposes of this section". Requires the Director's approval before the regulated entity may give a bonus or raise to executive officers.</p> | <p>A banking agency must take at least one of the following actions with respect to a bank that is significantly undercapitalized:</p> <ul style="list-style-type: none"> (i) Require the bank to raise capital by selling shares, including voting shares; (ii) Require the bank to be acquired or merged if grounds exist for appointment of a receiver; (iii) Restrict transactions with affiliates; (iv) Restrict interest paid on deposits; (v) Limit asset growth; (vi) Restrict risky activities; (vii) Order election of new Board of Directors; (viii) Require bank to dismiss directors or officers; (ix) Require bank to hire qualified officers and employees; (xi) Prohibit deposits from correspondent banks; (xii) Prohibit capital distributions by holding company without regulatory approval; (xiii) Require the divestiture of subsidiaries or affiliates; (xiv) Require the holding company to sell the bank; (xv) Take any other action the agency determines appropriate, including actions available for critically undercapitalized institutions. [12 USC §1831o] | <p>The regulator also should be given authority to seek injunctive relief.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|---|----------|
| <p>assets.</p> <ul style="list-style-type: none"> Require the enterprise to acquire new capital in a form and amount the Director determines. Require the enterprise to terminate, reduce, or modify any activity that the Director determines creates “excessive risk to the enterprise.” <p>Conservator. The Director may appoint a conservator if the enterprise fails its minimum capital requirement and alternative remedies are not satisfactory.</p> | | | <p>A significantly undercapitalized bank may not, without the prior written approval of the agency, pay any bonus to any senior executive officer, or provide compensation to such officer at a rate in excess of that paid in the 12 months prior to the bank becoming undercapitalized. [12 USC §1831o]</p> | |
| Conservators and receivers | | | | |
| <p>Section 1367</p> <p>Grounds for Appointment. OFHEO “shall” appoint a conservator for a critically undercapitalized enterprise unless OFHEO and the Treasury agree that a conservatorship “would have serious adverse effects on economic conditions</p> | <p>Section 145</p> <p>Authorizes the Director to appoint the Agency as either conservator or receiver for Fannie Mae, Freddie Mac, or an FHLB.</p> <p>Grounds for Appointment: Mandatory receivership</p> <p>Mandates receivership when for 30 days a regulated entity:</p> | <p>Section 348</p> <p>Authorizes the Director to appoint the Agency as either conservator or receiver for a regulated entity.</p> <p>Grounds for Appointment: Mandatory receivership</p> <p>Appointment as receiver is mandatory when in the past 30 days assets of the entity have been less than liabilities, or the entity has generally not been paying</p> | <p>A conservator or receiver may be appointed for a national bank if:³</p> <p>(i) Assets are less than obligations;</p> <p>(ii) Substantial dissipation of assets or earnings due to violation of law or unsafe practice;</p> <p>(iii) Unsafe or unsound condition;</p> <p>(iv) Willful violation of a final C&D;</p> <p>(v) Concealment of records;</p> | |

³ The FDIC may appoint itself conservator for any insured institution if one of these grounds exist, and the FDIC determines that the appointment is necessary to reduce the risk of or amount of loss that the FDIC fund is expected to incur.

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|--|---|----------|
| <p>of national financial markets or on the financial stability of the housing finance market” and the public interest would be better served by other enforcement action.</p> <p>Section 1369A Powers of Conservator. A conservator shall have all the powers of the shareholders, directors, and officers of the enterprise under conservatorship and may operate the enterprise in the name of the enterprise. A conservator may avoid any security interest taken by a creditor with the intent to hinder, delay, or defraud the enterprise or the creditors of the enterprise.</p> <p>A conservator may enforce any contract, as prescribed by the Director by order or regulation, notwithstanding any provision of the contract providing for the termination, default, acceleration, or other exercise of rights upon, or solely by reason of, the insolvency of the enterprise or the appointment of a conservator. This subsection and any regulation or order issued under this subsection shall apply only to contracts entered into, modified, extended, or renewed after the effective date of the regulation or order.</p> | <ul style="list-style-type: none"> • Has had assets less than its obligations, or • Has not been generally paying its debts. <p>When a regulated entity is critically undercapitalized, the Director must determine monthly whether receivership is mandated.</p> <p>Grounds for discretionary appointment</p> <ul style="list-style-type: none"> • Substantial dissipation of assets or earnings due to violation of law or unsafe or unsound practice; • Unsafe or unsound condition to transact business; • Willful violation of final cease and desist order; • Concealment of books, records, or assets; • Likely inability to pay obligations in the normal course of business; • Actual or likely losses that will deplete all or substantially all capital, and there is no reasonable prospect of becoming adequately capitalized; • Violation of law or unsafe or unsound practice that is likely to cause insolvency or substantial dissipation of assets or earnings, or to weaken the enterprise; • Consent; • Regulated entity is undercapitalized or significantly undercapitalized and: has no reasonable prospect of becoming adequately capitalized, fails to become adequately capitalized, or fails to submit or materially implement a capital plan; • Regulated entity is critically undercapitalized; or • Regulated entity is convicted of money laundering. <p>Powers</p> | <p>its debts.</p> <p>Grounds for discretionary appointment</p> <ul style="list-style-type: none"> • Assets are less than obligations; • Substantial dissipation of assets or earnings due to violation of law or unsafe or unsound practice; • Unsafe or unsound condition to transact business; • Willful violation of final cease and desist order; • Concealment of books, records, or assets; • Likely inability to pay obligations in the normal course of business; • Actual or likely losses that will deplete all or substantially all capital, and there is no reasonable prospect of becoming adequately capitalized; • Violation of law or unsafe or unsound practice that is likely to cause insolvency or substantial dissipation of assets or earnings, or to weaken the enterprise; • Consent; • Regulated entity is undercapitalized or significantly undercapitalized and: has no reasonable prospect of becoming adequately capitalized, fails to become adequately capitalized, or fails to submit or materially implement a capital plan; • Regulated entity is critically undercapitalized; or • Regulated entity is convicted of money laundering. <p>Powers</p> <p>As either conservator or receiver, the Agency may operate the enterprise and perform all functions consistent with a conservatorship or receivership. If</p> | <ul style="list-style-type: none"> (vi) Bank is likely to be unable to pay its obligations in the normal course; (vii) Bank has or is likely to incur losses that will deplete substantially all of its capital, and no reasonable prospect for recapitalization without Federal aid; (viii) Any violation of law or unsafe or unsound practice that is likely to cause insolvency; a substantial dissipation of assets or earnings; weaken the bank's condition, or prejudice depositors; (ix) Consent; (x) Loss of FDIC insurance; (xi) Bank is undercapitalized under PCA and has no reasonable prospect of becoming adequately capitalized, or has failed to submit or implement a capital restoration plan; (xii) The bank is critically undercapitalized under PCA; (xiii) The bank is convicted of certain money laundering crimes. <p>[12 USC §1821 (c)(5)]</p> <p>The appropriate Federal banking agency shall, not later than 90 days after an insured depository institution becomes critically undercapitalized i) appoint a receiver (or, with the concurrence of the FDIC, a conservator) for the institution; or ii) take such other action as the agency determines, with the concurrence of the FDIC, would better achieve the purpose of this section, after documenting why the action would better achieve that purpose.</p> <p>[12 USC § 1831o (h)(3)]</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|---|----------|
| <p>Not later than 45 days after appointment or 45 days after receipt of actual notice of a pending action or proceeding that is pending, a conservator may request a 45-day stay. In any case in which the conservator appointed for an enterprise is a Federal agency or an officer or employee of the Federal Government, the conservator may make a request for a stay only with the prior consent of the Attorney General and subject to the direction and control of the Attorney General.</p> <p>The Director may require a conservator to set aside and make available for payment to creditors any amounts that the Director determines may safely be used for such purpose. All creditors who are similarly situated shall be treated in a similar manner.</p> <p>All expenses of a conservatorship (including compensation of employees other than government employees) shall be paid by the enterprise under conservatorship and shall be secured by a lien on the enterprise, which shall have priority over any other lien.</p> | <p>As either conservator or receiver, the Agency may operate the enterprise and perform all functions consistent with a conservatorship or receivership. If there is a receiver, the Agency shall place the regulated entity in liquidation, which may include selling assets or transferring assets to a limited-life regulated entity, or exercising other Agency rights.</p> <p>Appointment of a receiver terminates all claims stockholders and creditors have against the regulated entity's assets or charter or against the Agency, except to their rights to payment specified in the bill. A regulated entity's assets do not include its charter.</p> <p>Both conservators and receivers, in selling assets, must maximize the return, minimize losses, and ensure "adequate competition and fair and consistent treatment of offerors."</p> <p>A receiver must organize a limited-life regulated entity for an enterprise, but this is optional for an FHLB. The limited-life enterprise succeeds to the enterprise charter. If the Director creates a limited-life FHLB, the Director grants the limited-life entity a temporary charter.</p> <p><u>Who gets what</u></p> <p>A receiver may determine which claims against an enterprise are valid. The receiver, in its discretion, and to the extent funds are available from the assets of the regulated entity, may pay allowed claims. The receiver may also pay dividends on claims, from the assets of the regulated entity.</p> <p>Mortgages held in trust, custodial, or agency capacity for the benefit of any person other than</p> | <p>there is a receiver, the Agency may place the regulated entity in liquidation, having due regard to the conditions of the housing finance market.</p> <p>Both conservators and receivers, in selling assets, must conduct operations in a manner that maintains stability in the housing finance markets, and to the extent consistent with that goal, must maximize the return, minimize losses, and ensure "adequate competition and fair and consistent treatment of offerors."</p> <p><u>Who gets what</u></p> <p>A receiver may determine which claims against an enterprise are valid. The receiver, in its discretion, and to the extent funds are available from the assets of the regulated entity, may pay allowed claims. The receiver may also pay dividends on claims, from the assets of the regulated entity.</p> <p>Mortgages held in trust, custodial, or agency capacity for the benefit of any person other than the regulated entity are only available to MBS holders.</p> <p>Unsecured claims and expenses of the receiver are paid in this order:</p> <ul style="list-style-type: none"> • The receiver's administrative expenses. These include "actual, necessary costs and expenses" the receiver incurs in preserving the assets, or in liquidating or otherwise resolving the affairs of a regulated entity. They include obligations a receiver incurs after being appointed, as "necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the regulated entity." • General or senior debt. • Junior debt. • Shareholders. <p><u>Limited life regulated entity</u></p> <p>When a regulated entity is in default or the Agency</p> | <p>However, the appropriate Federal banking agency shall appoint a receiver for the insured depository institution if the institution is critically undercapitalized on average during the calendar quarter beginning 270 days after the date on which the institution became critically undercapitalized, except if the agency determines, with the concurrence of the FDIC, that the insured depository institution has positive net worth, has been in substantial compliance with an approved capital restoration plan which requires consistent improvement in the institution's capital since the date of the approval of the plan, is profitable or has an upward trend in earnings the agency projects as sustainable, and is reducing the ratio of nonperforming loans to total loans; and the head of the appropriate Federal banking agency and the Chairperson of the Board of Directors both certify that the institution is viable and not expected to fail.</p> <p>[12 USC § 1831o (h)(3)]</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|-------------|----------|
| <p>With respect to the FHLBs, whenever the FHFb finds that the efficient and economical accomplishment of the purposes of the FHLB Act will be aided by such action, the Board may liquidate a FHLBank. [12 USC §1446]</p> | <p>the enterprise are only available to MBS holders. Unsecured claims and expenses of the receiver are paid in this order:</p> <ul style="list-style-type: none"> The receiver’s administrative expenses. These include “actual, necessary costs and expenses” the receiver incurs in preserving the assets, or in liquidating or otherwise resolving the affairs of a failed regulated entity. They include obligations a receiver determines are “necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the regulated entity.” General or senior debt. Junior debt. Shareholders. <p><u>Limited life regulated entity</u> If the Agency is appointed receiver of:</p> <ul style="list-style-type: none"> An FHLB, the Agency “may” organize a limited-life regulated entity for FHLB in default or in danger of default. If so, the Director “shall” grant a temporary charter to the limited-life regulated entity. A regulated entity is in default when a conservator or receiver or legal custodian is appointed. A regulated entity is in danger of default when, in the Agency’s opinion, the FHLB: is unlikely to pay its obligations in the normal course of business; has incurred or is likely to incur losses that will deplete all or substantially all of its capital; and there is no reasonable prospect its capital will be restored. An enterprise, the Agency “shall” organize a limited life-regulated entity. That entity succeeds to the preexisting enterprise charter. | <p>anticipates it will default, the Agency may organize a limited-life enterprise under a temporary charter. The Agency may grant a temporary charter if the Agency finds that continued operation of a regulated entity in default or in danger of default is “in the best interest of the national economy and the housing markets.”</p> <p>The Agency decides which assets and liabilities of a regulated entity in default or in danger of default to transfer to the limited-life regulated entity.</p> <p>The limited-life regulated entity may issue unsecured debt. If it is unable to do so, the Director may authorize the limited-life regulated entity to incur new debt that has priority over “administrative expenses,” or that is secured by a junior lien or by a lien on property that has no other lien.</p> <p>The Director may authorize the limited-life regulated entity to incur debt secured by a senior or equal lien (but not by a senior or equal lien on mortgages that back MBS the regulated entity issued or guaranteed) when the limited-life regulated entity is otherwise unable to obtain such credit and there is adequate protection for others who have liens on the same collateral. The Director must hold a hearing first, and has the burden of proof.</p> <p>If any such authorization to issue debt or to create a prior lien is reversed or modified on appeal, the debt incurred or prior lien created is not affected as to any party who acted in good faith, even if the party knew there was an appeal pending, as long as the authority to incur debt or create a prior lien was not stayed pending appeal.</p> <p>A limited-life regulated entity may, subject to the Director’s approval and conditions, issue debt “to which all other debt obligations of the limited-life regulated entity shall be subordinate in right and</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|--|--|-------------|----------|
| | <p>The Agency decides which assets and liabilities of a regulated entity in default or in danger of default to transfer to the limited-life regulated entity.</p> <p>The limited-life regulated entity can issue unsecured debt. If it is unable to do so, the Director can authorize the limited-life regulated entity to incur new debt that has priority over “all the obligations” of the limited-life regulated entity, or to incur debt that is secured by a junior lien or by a lien on property that has no other lien.</p> <p>The Director can authorize the limited-life regulated entity to incur debt secured by a senior or equal lien (except not by a senior or equal lien on mortgages that back MBS the regulated entity issued or guaranteed) when the limited-life regulated entity is otherwise unable to obtain “such” credit and there is “adequate protection” for others who have liens on the same collateral. The Director must hold a hearing first, and has the burden of proof.</p> <p>If any such authorization to issue debt or to create a prior lien is reversed or modified on appeal, the debt incurred or prior lien created is not affected as to any party who acted in good faith, even if the party knew there was an appeal pending, as long as the authority to incur debt or create a prior lien was not stayed pending appeal.</p> <p>The Agency shall wind up the affairs of the limited life regulated entity within two years, although the Director may extend the period for 3 additional 1-year periods. If the Agency sells at least 80% of the stock of a limited-life regulated entity, it ceases to be limited-life. The Agency is</p> | <p>payment.” This would not necessitate the hearing and other limitations described above.</p> <p>A limited-life regulated entity may, in addition to any other powers:</p> <ul style="list-style-type: none"> • “extend a maturity date or change an interest rate or other terms of outstanding securities;” and • Issue securities in exchange for existing securities, claims, interests, or “for any other appropriate purposes”. <p>The Director may not revoke a regulated entity’s charter.</p> <p>Each Federal Home Loan Bank shall have succession until it is voluntarily merged with another Bank, or until it is merged, reorganized, rehabilitated, liquidated, or otherwise wound up by the Director.</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|--|----------|
| | <p>not required to sell stock, except that if it sells at least 80% of the stock of a limited-life regulated entity with respect to an enterprise, the Agency must sell any remaining stock within 1 to 3 years.</p> <p>The sale creates a new enterprise that succeeds to the charter of the enterprise for which a receiver had been appointed.</p> | | | |
| Judicial Review | | | | |
| <p>Judicial review of any final (not temporary) cease and desist order or civil money penalty order must be according to § 1374. § 1373(b)(2). The Director may modify, terminate, or set aside any final order any time until the party subject to the order files a petition of review in a U.S. Court of Appeals. After a petition is filed, the Director may modify, terminate, or set aside the order with permission of the court. § 1373(b)(2). Petition for judicial review must be filed within 30 days. § 1374(a). The case is in the D.C. Circuit. Filing a petition for review does not stay the order, unless the court specifically orders a stay. § 1374(f). The court hearing an appeal may require payment of a civil money</p> | <p>Maintains current law and adds provisions with respect to civil money penalties and removal and suspension orders as well as:</p> <p>Section 145 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 United States District Court for an order requiring the Agency to remove itself as conservator or receiver. Upon the filing of an action the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.</p> <p>This section also limits the scope of judicial review of actions of the conservator or receiver.</p> | <p>Maintains current law and adds provisions with respect to civil money penalties and removal and suspension orders as well as:</p> <p>Section 348 If the Agency is appointed conservator or receiver under this section, the enterprise may, within 30 days of such appointment, bring an action in United States District Court for an order requiring the Agency to remove itself as conservator or receiver. Upon the filing of an action the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.</p> <p>This section also limits the scope of judicial review of actions of the conservator or receiver.</p> | <p>Judicial review of any § 1818 final order (a temporary cease and desist order is not a final order) must be according to § 1818(h), except that felony suspension, removal, or prohibition orders are not judicially reviewable. (The underlying indictment and conviction themselves are judicially reviewable.) [12 USC § 1818(h)(1)]. The regulator may modify, terminate, or set aside any final order any time until the party subject to the order files a petition of review in a U.S. Court of Appeals. After a petition is filed, the regulator may modify, terminate, or set aside the order with permission of the court. [12 USC § 1818(h)(1)]. A party who consents to an order may not seek judicial review of it. [12 USC § 1818(h)(2)]. Petition for judicial review must be filed within 30 days. It may be filed in the circuit where the depository's home office is, or in the D.C. Circuit. 12 USC § 1818(h)(2)]. Filing a petition for review does not stay the</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|---|----------|
| <p>penalty pending appeal of the penalty order. § 1374(e). There is no comparable provision in banking law because one is not necessary:</p> <p>Banking agencies may judicially enforce civil money penalty assessments as soon as they become final, and courts may enforce those orders.</p> <p>§ 1818(i)(1). (The penalty enforcement action in U.S. District Court and the penalty appeal action in the Circuit Court may take simultaneously.)</p> <p>OFHEO may enforce a civil money penalty order only after the order is no longer subject to appeal. § 1376(d). This means that parties ordered to pay penalties may transfer their funds during the appeals process, leaving no funds to pay any penalty when appeals are concluded. To be comparable to banking agencies, then, OFHEO would have to request the court hearing any appeal to order payment of the penalty pending appeal. Whether the court would do so would depend on the case and on the court. OFHEO would have to make a showing that evasion is a concern, while banking agencies need make no such showing.</p> | | | <p>order, unless the court specifically orders a stay. [12 USC § 1818(h)(3)].</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|---|--|--|
| Cease and Desist Proceedings | | | | |
| <p>Section 1371</p> <p>OFHEO’s cease and desist authority depends on the capital classification of the enterprises. For an adequately capitalized enterprise (one that meets all its regulatory capital requirements without regard to surcharges), OFHEO may issue a cease and desist order against an enterprise that, or director, or executive officer who, is engaging, has engaged, or the Director has reasonable cause to believe is about to engage in:</p> <p>Any conduct that threatens to cause a significant depletion of the enterprise’s core capital;</p> <p>Any conduct or violation by an individual that may result in a restitution order or a third tier civil money penalty;</p> <p>Any violation of the 1992 Act, a charter act, or order, rule or regulation under those statutes, except for affordable housing requirements.</p> <p>Any written agreement between an enterprise and the Director.</p> <p>For an enterprise that fails one or more regulatory capital requirements (again without regard to surcharges), OFHEO</p> | <p>Section 151</p> <p>The Director may issue a cease-and-desist order against a regulated entity or affiliated party for engaging in an unsafe or unsound practice; violating a law, regulation, or order; violating a condition imposed in writing; or violating a written agreement. A cease-and-desist order may include a requirement to take certain affirmative actions.</p> <p>A cease-and-desist order may be issued for less than satisfactory examination rating in asset quality, management, earnings or liquidity.</p> | <p>Section 351</p> <p>The Director may issue a cease-and-desist order against a regulated entity or affiliated party for engaging in an unsafe or unsound practice; violating a law, regulation, condition imposed in writing, or a written agreement. A cease-and-desist order may include a requirement to take certain affirmative actions (as specified current law).</p> <p>Director may not use cease-and-desist powers to enforce orders. Combined with shortcomings of Section 354, this creates a potential enforcement gap, especially for orders the Director issues to enforce provisions of Subtitle A of the 1992 Act.</p> <p>A cease-and-desist order may be issued for less than satisfactory examination rating in asset quality, management, earnings or liquidity.</p> | <p>Regulators may issue a cease and desist order when a depository or an institution-affiliated party is engaging in, has engaged in, or is about to engage in either:</p> <p>An unsafe or unsound practice; or</p> <p>A violation of a: (1) law, rule, or regulation; (2) condition imposed in writing by the regulator in connection with granting an application or request; (3) Written agreement with the regulator. [12 USC § 1818(b)(1)].</p> <p>For purposes of § 1818(b), regulators may deem a less-than-satisfactory examination rating for asset quality, management, earnings, or liquidity, to be an unsafe or unsound practice, if it is not corrected. [12 USC § 1818(b)(8)].</p> <p>“[A]ffirmative action to correct or remedy any conditions resulting from” the underlying misdeeds is specifically authorized. [12 USC § 1818(b)(1), (b)(6)].</p> <p>Regulators may require restitution, through a cease and desist order, from any depository or institution-affiliated party. Restitution (or reimbursement, indemnification, or guarantee against loss) requires a showing that</p> <p>The party charged was unjustly enriched in connection with the violation or practice that underlies the charges, or</p> <p>The violation or practice involved reckless</p> | <p>The Senate committee bill is superior in giving the Director the authority to enforce orders through cease-and-desist orders and the enforcement process that is available for cease-and-desist orders.</p> <p>Neither the Senate committee bill nor H.R. 3221 gives the regulator express authority to enforce capital directives, comparable to the authority of the federal bank regulators. See 12 U.S.C. § 3907 (b). However. The authority to enforce orders in the Senate committee bill would seem to be a workable substitute.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|---|----------|
| <p>may issue a cease and desist order on any basis applicable in the case of an adequately capitalized enterprise, and one additional basis: Any conduct likely to result in material depletion of the enterprise's core capital.</p> <p>"[A]ffirmative action to correct or remedy the conditions resulting from" the underlying violation or conduct is specifically authorized. OFHEO may require restitution, through a cease and desist order, from a director or executive officer but not from an enterprise. OFHEO may require restitution to, or reimbursement, indemnification, or guarantee against loss to the enterprise when the director or executive officer:</p> <ul style="list-style-type: none"> • Was unjustly enriched in connection with the conduct or violation that underlies the charges, or • Engaged in conduct that would subject to director or executive officer to a third tier civil money penalty (the violation or conduct was knowing and caused or is likely to cause a substantial loss to the enterprise). | | | <p>disregard for the law, regulations, or prior order of the regulator. [12 USC § 1818(b)(6)(A)].</p> <p>The regulator may, through a cease and desist order, order a depository or institution-affiliated party to: Restrict the growth of the institution; Dispose of any loan or asset involved; Rescind agreements or contracts; Employ qualified officers and employees, whose hiring may be subject to the regulator's approval; Take "other action" the regulator "determines to be appropriate." The regulator may "place limitations on the activities or functions" of the institution or other party charged in a cease and desist case. [12 USC § 1818(b)(6), (7)].</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|---|--|----------|
| <p>OFHEO can, through a cease and desist order, order an enterprise to:</p> <ul style="list-style-type: none"> • Restrict its growth; • Dispose of any asset involved; • Rescind agreements or contracts; • Employ qualified officers and employees, whose hiring may be subject to the Director’s approval; • Seek restitution; • Take “other action” the Director “determines appropriate.” <p>The Director may “place limitations on the activities or functions” of an enterprise, director, or executive officer charged in a cease and desist case.</p> | | | | |
| Temporary Cease and Desist Orders | | | | |
| <p>Section 1372 The Director may issue a temporary cease and desist order when the underlying conduct or</p> | <p>Section 152 The Director may issue a temporary cease-and-desist order pending resolution of the permanent order if the Director determines that the actions</p> | <p>Section 352 The Director may issue a temporary cease-and-desist order pending resolution of the permanent order if the Director determines that the actions specified in</p> | <p>The regulator may issue a temporary cease-and-desist order when the underlying violation or practice or its continuation, while the hearing proceeds, is likely to:</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|---|----------|
| <p>violation or its continuation, while the hearing proceeds, is likely to:</p> <p>Cause insolvency; Cause significant depletion of the enterprise's core capital; or Otherwise cause irreparable harm to the enterprise.</p> <p>Temporary cease and desist orders are available when a enterprise's books and records "are so incomplete or inaccurate that the Director is unable, through the normal supervisory process, to determine the financial condition of the enterprise or the details or purpose of any transaction or transactions that may have a material effect on the financial condition" of the enterprise. These orders may require "the cessation of any activity or practice" that caused or partially caused the problem, and may require affirmative corrective action. The Director may issue this temporary cease and desist order against an enterprise, director, or executive officer. § 1372(c).</p> <p>A party subject to a temporary order may appeal it to U.S. District Court within ten days of service. The court considers whether the order is valid, and</p> | <p>specified in the notice of charges, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of that entity, or is likely to weaken the condition of that entity prior to the completion of the proceedings, the Director may (A) issue a temporary cease and desist order; and (B) require that entity to take affirmative action to prevent or remedy such insolvency, dissipation, condition, or prejudice pending completion of such proceedings.</p> <p>The temporary cease-and-desist order is immediately effective and may be issued without prior notice or hearing.</p> <p>A party subject to a temporary order may appeal it to U.S. District Court within ten days of service. The court considers whether the order is valid, and may set aside, limit, or suspend the enforcement, operation, or effectiveness of the order. § 1372(d).</p> | <p>the notice of charges, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of that entity, or is likely to weaken the condition of that entity prior to the completion of the proceedings, the Director may (A) issue a temporary cease-and-desist order; and (B) require that entity to take affirmative action to prevent or remedy such insolvency, dissipation, condition, or prejudice pending completion of such proceedings.</p> <p>The temporary cease-and-desist order is immediately effective and may be issued without prior notice or hearing.</p> <p>A party subject to a temporary order may appeal it to U.S. District Court within ten days of service. If the court finds a violation, threatened violation, or failure to obey the order, "it shall be the duty of the court to issue" an injunction to enforce it. This is the same as for the banking agencies.</p> | <p>Cause insolvency; Cause significant dissipation of assets or earnings of the depository; or Weaken the condition of the depository, or to prejudice its depositors. [12 USC § 1818(c)(1)].</p> <p>Temporary cease-and-desist orders are available when a depository's books and records "are so incomplete or inaccurate that the [regulator] is unable, through the normal supervisory process, to determine the financial condition of [the depository] or the details or purpose of any transaction or transactions that may have a material effect on the financial condition" of the depository. These orders may require "the cessation of any activity or practice" that caused or partially caused the problem, and may require affirmative corrective action. Regulators may issue these orders against an institution-affiliated party or a depository. [12 USC § 1818(c)(3)].</p> <p>A party subject to a temporary order may appeal it to U.S. District Court within ten days of service. The court considers whether the order is valid, and may set aside, limit, or suspend the order. [12 USC § 1818(c)(2)].</p> <p>The regulator may enforce a temporary cease and desist order in U.S. District Court. If the court finds a violation, threatened violation, or failure to obey the order, "it shall be the duty of the court to issue" an injunction to enforce it. [12 USC § 1818(d)].</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|---|---|--|
| <p>may set aside, limit, or suspend the enforcement, operation, or effectiveness of the order. § 1372(d).</p> <p>The Director may request the Attorney General to bring an action in U.S. District Court to enforce a temporary cease and desist order. If the court finds a violation, threatened violation, or failure to obey the order, “the court shall issue” an injunction to enforce the order. § 1372(d).</p> | | | | |
| Removal and Prohibition Authority | | | | |
| <p>No provision</p> | <p>Section 153 As under the banking laws, the Director may remove or suspend a person from participating in the affairs of a regulated entity for violating laws, regulations, orders, engaging in unsafe practices, and breaching fiduciary duties. A person who is removed or suspended may not participate in the affairs of any regulated entity, while the order is in effect without the consent of the Director.</p> <p>Also as under the banking laws, a removal or suspension order also prohibits the person from voting the shares of any regulated entity, or transferring such shares.</p> <p>Provides for a hearing before the order becomes effective and authorizes judicial review.</p> | <p>Section 356 As under the banking laws, the Director may remove or suspend a person from participating in the affairs of a regulated entity for violating laws, regulations, orders, engaging in unsafe practices, and breaching fiduciary duties. A person who is removed or suspended may not participate in the affairs of any regulated entity, while the order is in effect without the consent of the Director.</p> <p>The removal or suspension order may also prohibit the regulated entity from paying to the person any compensation or any other thing of value in connection with any resignation, removal, retirement, or other termination of employment.</p> | <p>Banking agencies may remove or prohibit an individual when the following three are true:</p> <p>1) The institution-affiliated party: Violated any law or regulation, cease and desist order, condition imposed in writing by the regulator in connection with granting an application or request; Engaged in an unsafe or unsound practice at any depository or at another business institution; or Breached any fiduciary duty;</p> <p>2) By reason of the violation, practice, or breach: The depository or business institution has suffered or will probably suffer financial loss or other damage; The institution-affiliated party has received financial gain or other benefit, or The depositors’ interests have been or could</p> | <p>The provision of Section 356 of H.R. 3221 is superior because it permits the Director to prohibit the regulated entity from paying further compensation to a person subject to an order under this section.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|---|---|---|----------|
| | | | <p>be prejudiced; and</p> <p>3) The violation, practice, or breach involves personal dishonesty or demonstrates willful or continuing disregard for the safety or soundness of the depository or of the other business institution. [12 USC § 1818(e)(1)].</p> <p>Regulators may suspend a person from a depository pending a hearing on removal and prohibition charges, when the regulator determines that a suspension is “necessary for the protection of the depository institution or the interests” of its depositors. [12 USC § 1818(e)(3)].</p> <p>A suspension order also is a prohibition order. [12 USC § 1818(e)(7)(A)].</p> <p>Suspension orders are effective on service, and remain in effect while the removal case is heard. [12 USC § 1818(e)(3)(B)]. The suspended party may appeal the order to U.S. District Court within 10 days, and the court has jurisdiction to stay the order. [12 USC § 1818(f)].</p> <p>Banking agencies may suspend or prohibit an institution-affiliated party when: The party is charged with a felony involving dishonesty or breach of trust, or of certain money laundering or currency transaction reporting offenses; and Continued participation by the party may pose a threat to the depositors’ interests or may impair public confidence in the depository. [12 USC § 1818(g)(1)]. Felony suspension orders are effective upon service and</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|---|---|---|----------|
| | | | <p>remain in effect until final disposition of the criminal charges. [12 USC § 1818(g)(1)(B)(ii)].</p> <p>A person suspended based on a felony indictment may appeal to the regulator that issued the order. Within 30 days of the appeal (longer if the person requests an extension), the agency must let the person appear for a hearing. Within 60 days of the hearing, the agency must decide whether to continue, modify, or terminate the suspension order. [12 USC § 1818(g)(3).</p> <p>If the person is convicted of the criminal charges and after appeals are run in the criminal case:</p> <p>If the conviction is for specified money laundering or currency transaction reporting offenses, the regulator must prohibit the person; and</p> <p>If the conviction is for other charges, and if continued participation by the party may pose a threat to the depositors' interests or may impair public confidence in the depository, the regulator may prohibit the person.</p> <p>[12 USC § 1818(g)(1)(C)].</p> <p>Prohibited parties may not do any of the following:</p> <p>(1) Participate in any manner in the conduct of the affairs of any bank, thrift, insured credit union, institution chartered under the Farm Credit Act, any banking agency, or the FHFBS.</p> <p>(2) Solicit, procure, transfer, attempt to transfer, vote, or attempt to vote, any proxy, consent, or authorization with respect to any voting right in any institution listed in (1)</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|---|---|--|----------|
| | | | <p>above.</p> <p>(3) Violate any voting agreement approved by the regulator; or</p> <p>(4) Vote for a director or serve as an institution-affiliated party. [12 USC § 1818(e)(6), (7)(A)].</p> <p>A prohibition order may be partially or fully lifted, after consultation and consent of the regulator that issued it and of the regulator of the institution the party proposes to become affiliated with. [12 USC § 1818(e)(7)(B)].</p> <p>A prohibition order may only apply to individuals unless the regulator specifically finds that it should apply to a corporation, firm, or other business. [12 USC § 1818(e)(7)(F)].</p> <p>In a suspension or removal case against an officer, director, or person associated with a foreign bank, failure of the person to appear for the proceeding or to comply with any order in the action, and any failure by the foreign bank to secure the person's removal from the bank, shall be grounds to terminate deposit insurance at any branch of the bank. [12 USC § 1818(r)(3)].</p> <p>Anyone subject to a prohibition or suspension order under § 1818(e) or a felony suspension under § 1818(g) who, without prior consent of the appropriate regulator, knowingly participates, directly or indirectly, in any manner in the conduct of the affairs of any depository, credit union, or institution chartered under the Farm Credit Act, shall be fined not more than \$1 million, imprisoned up to 5 years,</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|--|---|---|
| | | | or both. [12 USC § 1818(j)]. | |
| Subpoena Authority | | | | |
| <p>Section 1379B</p> <p><u>Investigatory Subpoenas</u></p> <p>In the course of or in connection with any administrative proceeding under this subpart, the Director shall have the authority -</p> <ul style="list-style-type: none"> (1) to administer oaths and affirmations; (2) to take and preserve testimony under oath; (3) to issue subpoenas and subpoenas duces tecum; and (4) to revoke, quash, or modify subpoenas and subpoenas duces tecum issued by the Director. <p>The attendance of witnesses and the production of documents provided for in this section may be required from any place in any State at any designated place where such proceeding is being conducted.</p> <p>The Director may request the Attorney General of the United States to bring an action in the</p> | <p>Section 158</p> <p>The Director may, in the discretion of the Director, apply to United States District Court for the enforcement of any effective and outstanding subpoena issued under this title. Such court shall have jurisdiction and power to order and require compliance with such subpoena.</p> <p>This provision expands subpoena authority to apply to proceedings, examinations, and investigations.</p> <p>A person shall be guilty of a misdemeanor, and upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than 1 year, or both, if that person willfully fails or refuses, in disobedience of a subpoena issued, to— (1) attend court; (2) testify in court; (3) answer any lawful inquiry; or (4) produce books, papers, correspondence, contracts, agreements, or such other records as requested in the subpoena.</p> | <p>Section 358</p> <p>Except for adding authority for the Director to go directly to court, H.R. 3221 retains the provisions of current law with respect to subpoenas.</p> | <p>Investigatory subpoenas. In connection with any examination to determine compliance with applicable law and regulation, the regulator or its designated representatives may administer oaths and affirmations, take testimony under oath as to any matter in respect to the affairs or ownership of the institution or affiliate thereof, and may exercise other powers under § 1818(n). (For § 1818(n), see below.) [12 USC § 1820(c); <i>see also</i> § 1464(d)(1)(B)(v), OTS authority to issue and enforce subpoenas and to take testimony].</p> <p>Enforcement subpoenas. In connection with any proceeding under § 1818, the regulator or the person designated to conduct a hearing under § 1818 may administer oaths and affirmations, take depositions, issue, revoke, quash, or modify subpoenas and subpoenas <i>duces tecum</i> (for documents or things, rather than for testimony). Attendance may be required from any place subject to U.S. jurisdiction. Either the regulator or the party subject to § 1818 proceedings may bring a subpoena enforcement action in U.S. District Court. Willful failure to obey a subpoena is a misdemeanor subject to a fine of up to \$1000, imprisonment up to a year, or both.</p> | <p>The Senate committee bill is far superior and more consistent with the authority of the bank regulators. H.R. 3221 retains the restrictive provisions of current law that preclude issuance of subpoenas in examinations, investigations, and other proceedings.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|---------------------|----------|
| <p>United States district court for the judicial district in which such proceeding is being conducted, or where the witness resides or conducts business, or the United States District Court for the District of Columbia, for enforcement of any subpoena or subpoena duces tecum issued pursuant to this section. Such courts shall have jurisdiction and power to order and require compliance therewith.</p> <p>Witnesses subpoenaed shall be paid fees and mileage and may be paid reasonable expenses and attorneys fees. Such expenses and fees shall be paid by the enterprise or from its assets.</p> <p>Section 1348</p> <p>Provides the same authority for the Secretary</p> <p>Section 1317</p> <p>In connection with examinations, the Director shall have the subpoena authority provided in Section 1379B.</p> <p><u>Enforcement Subpoenas</u></p> <p>The difficulties that OFHEO had subpoenaing Leland Brendsel show the shortcomings of current</p> | | | [12 USC § 1818(n)]. | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|--|--|--|
| law with respect to enforcement subpoenas. See, <i>United States of America v. Leland Brendsel</i> , 301 F. Supp. 2d 518, decided February 2, 2004 | | | | |
| Prejudgment Attachment | | | | |
| The case of <i>Leland C. Brendsel v. OFHEO</i> , 339 F. Supp. 2d 52, decided August 30, 2004, shows the limits of current law. (OFHEO precluded from freezing assets pending the outcome of administrative proceedings). | No provision | Section 353 In any action brought pursuant to this title, or in enforcement actions, the court may, upon application of the Director or the Attorney General, issue a restraining order that prohibits a subject person from removing funds or dissipating assets or other property. | In Cease and desist order or temporary cease and desist order, or in any action in aid of or to enforce any administrative or other civil action the agency brings, the court may restrain the person subject to the proceeding from transferring assets, and may appoint a receiver to administer the restraining order. It is necessary for the regulator to show likelihood of success on the merits, but not to show irreparable and immediate loss. [12 USC §§ 1818(i)(4); 1818(b)(10)]. | H.R. 3221 is preferable because it allows action to prevent a subject person from taking or dissipating assets. |
| Civil Money Penalties | | | | |
| Section 1376 The Director may issue a civil money penalty (CMP) order against an enterprise, director, or executive officer. There are three tiers of penalties, based largely on the gravity of the conduct, although the underlying misconduct varies by tier. First tier penalties are based on violation of: Any provision of the 1992 Act, a | Section 155 The Director may assess a CMP against a regulated entity or executive office [sic] of a regulated entity or of an entity-affiliated party for violating certain laws, orders, regulations, conditions and written agreements. There are three tiers of penalties, depending on the nature of the violation: (i) \$10,000 per day; (ii) \$50,000 per day; and (iii) \$2,000,000 per day for an entity and up to \$2,000,000 for an individual. Unlike the banking agencies, only violations of certain laws can result in a CMP, and | Section 355 The Director may assess a CMP against a regulated entity or an executive officer of a regulated entity or of an entity-affiliated party or director of an entity for violating the 1992 Act or the charter act, or any rule, regulation, or order issued under these statutes. This section does not cover violations of the housing goals or the AHP. There are three tiers of penalties, depending on the nature of the violation: (i) \$10,000 per day; (ii) \$50,000 per day; and (iii) \$2,000,000 per day for an entity and up to \$2,000,000 for an individual. | Regulators may assess civil money penalties against any depository or institution-affiliated party. There are three tiers of penalties, based largely on the gravity of the conduct, although the underlying misconduct varies by tier. First tier penalties are based on violation of: Any law or regulation; A final or temporary cease and desist order; A prohibition or felony suspension order; A, prompt corrective action order (12 USC § 1831o) or a safety and soundness standard | The Senate Committee bill contains a typo in Section 155: "offices" should read "officers" S. 1100 usefully provided that An entity may not reimburse or indemnify a party subject to a penalty for a third tier violation. |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|--|--|----------|
| <p>charter act, or order, rule or regulation under those statutes, except for affordable housing requirements;</p> <p>Any final or temporary cease and desist order;</p> <p>Any order under §§ 1365 or 1366 (supervisory actions applicable to undercapitalized and significantly undercapitalized enterprises) (roughly analogous to prompt corrective action orders); or</p> <p>A written agreement between an enterprise and the Director.</p> <p>A first tier penalty is up to \$5,500 per day the violation continues.</p> <p>Second tier penalties require a showing of both:</p> <p>(1) The same violation as for a first tier penalty, or</p> <p>Conduct that causes or is likely to cause a loss to the enterprise, and</p> <p>(2) That the violation or conduct either:</p> <p>Is part of a pattern of misconduct, or</p> <p>Involves recklessness and caused or is likely to cause a material loss to the enterprise.</p> <p>Second tier penalties are up to \$27,500 per day against an enterprise, and up to \$11,000 per day against a director or executive officer.</p> <p>Third tier penalties require a</p> | <p>the amounts of the CMP differ. Violations of the housing goals are not covered under this section.</p> <p>The Director may go to court to obtain a monetary judgment if the party refuses to pay the penalty.</p> | <p>An entity may not reimburse or indemnify a party subject to a penalty for a third tier violation.</p> <p>The Director may go to court to obtain a monetary judgment if the party refuses to pay the penalty.</p> <p>The Director may issue a regulation or order allowing an entity to reimburse or indemnify a party subject to a CMP.</p> | <p>order (12 USC § 1831p-1);</p> <p>A condition imposed in writing in connection with an application or request by a depository; or</p> <p>A written agreement between a depository and the agency.</p> <p>A first tier penalty is up to \$6,500 per day the violation continues.</p> <p>Second tier penalties require a showing of both:</p> <p>(1) The same violation as for a first tier penalty; or</p> <p>Reckless unsafe or unsound practice at a depository; or</p> <p>Breach of any fiduciary duty, and</p> <p>(2) That the violation, practice, or breach:</p> <p>Is part of a pattern of misconduct;</p> <p>Causes or is likely to cause more than a minimal loss to the depository;</p> <p>Results in pecuniary or other gain to the party.</p> <p>A second tier penalty is up to \$32,500 per day the violation, practice, or breach continues.</p> <p>Third tier penalties require a showing of both:</p> <p>(1) Knowing:</p> <p>Violation that is subject to a first tier penalty;</p> <p>Unsafe or unsound practice at the depository; or</p> <p>Breach of any fiduciary duty; and</p> <p>(2) The violation, practice, or breach:</p> <p>Was knowing or reckless; and</p> <p>Causes a substantial loss to the depository or substantial pecuniary or other gain to the institution-affiliated party.</p> <p>A third tier penalty is, for each day the</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|---|----------|
| <p>showing of both</p> <p>(1) The same violation as for a first tier penalty, or Conduct that causes or is likely to cause a loss to the enterprise, and</p> <p>(2) The violation or conduct: Was knowing; and Caused or would be likely to cause a substantial loss to the enterprise.</p> <p>A third tier penalty is up to \$1,150,000 against an enterprise, and up to \$110,000 against a director or executive officer. § 1376.</p> <p>Maximum penalty amounts adjust every four years for inflation. 28 U.S.C. § 2461 note. Current amounts are at 12 C.F.R. § 1780.80.</p> <p>In assessing penalties, the Director must consider factors such as:</p> <ul style="list-style-type: none"> The gravity of the violation; Any history or prior violations; The effect of the penalty on the safety and soundness of the enterprise; Any injury to the public; Any benefits received; Deterrence of future violations; <p>and</p> <p>Other appropriate matters as determined by regulation.</p> <p>OFHEO does not have a regulation setting out any such factors.</p> | | | <p>violation, practice or breach continues, up to the lesser of:</p> <p>For a depository, the lesser of \$1.25 million or 1% of assets; or \$1.25 million per day for an institution-affiliated party. [12 USC § 1818(i)(2)].</p> <p>Maximum penalty amounts adjust every four years for inflation. 28 U.S.C. § 2461 note. <i>See, e.g.</i>, 12 C.F.R. § 19.240 (2005), setting the penalty amounts in OCC cases at levels higher than in 12 U.S.C. § 1818(i)(2). In assessing penalties, the agency must consider:</p> <ul style="list-style-type: none"> The size of the financial resources and good faith of the party charged; The gravity of the violation; The history or previous violations; and Other matters as justice may require. <p>[12 USC § 1818(i)(2)(G)].</p> <p>Penalties are paid to the U.S. Treasury. [12 USC § 1818(i)(2)(J)].</p> <p>Banking agencies are not restricted from retroactive penalty assessments.</p> | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|--|--|--|
| <p>Penalties are paid to the U.S. Treasury.</p> <p>An entity may not reimburse or indemnify a party subject to a penalty for a third tier violation.</p> <p>The Director may request the Attorney General to go to court to obtain a monetary judgment if the party refuses to pay the penalty.</p> | | | | |
| Enforcement and Jurisdiction | | | | |
| <p>Section 1375</p> <p>The Director may request the Attorney General to bring an action in U.S. District Court in Washington, D.C. to enforce any cease and desist order, temporary cease and desist order, civil money penalty, order under subtitle B (capital classifications and supervisory actions applicable to undercapitalized enterprises, roughly analogous to prompt corrective action orders). Unless otherwise provided in subtitle C (enforcement provisions), §§ 1369 (capital classifications), or in § 1369C (capital restoration plans), the</p> | <p>Section 154</p> <p>The Director may, in the discretion of the Director, apply to the United States District Court for the District of Columbia, or the United States district court within the jurisdiction of which the headquarters of the regulated entity is located, for the enforcement of any effective and outstanding notice or order <i>issued under subtitle B or subtitle C</i>, or request that the Attorney General of the United States bring such an action. Such court shall have jurisdiction and power to order and require compliance with such notice or order.</p> <p>This provision, because it does not expressly permit enforcement of orders issued under the complete title, could have the effect of impeding the Director's direct enforcement of orders for matters covered under subtitle A of the 1992 Act, such as the prudential management and operations</p> | <p>Section 354</p> <p>The Director may, in the discretion of the Director, apply to the United States District Court for the District of Columbia, or the United States district court within the jurisdiction of which the headquarters of the regulated entity is located, for the enforcement of any effective and outstanding notice or order <i>issued under subtitle B or subtitle C</i>, or request that the Attorney General of the United States bring such an action. Such court shall have jurisdiction and power to order and require compliance with such notice or order.</p> <p>This provision, because it does not expressly permit enforcement of orders issued under the complete title, could have the effect of impeding the Director's direct enforcement of orders for matters covered</p> | <p>In general. Banking agencies may go to court to enforce any notice or order issued under the enforcement provisions, or under prompt corrective action, or issued to enforce compliance with a safety and soundness standard or guidelines. [12 USC §1818(i)(1)]</p> <p>Preemptive suits by the regulated institutions precluded. Except as otherwise provided no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order. [12 USC §1818(i)(1)]</p> | <p>Both current bills are seriously flawed because they do not allow the agency to enforce any effective and outstanding notice or order issued under the whole title.</p> <p>Under this language, all of the items in Subtitle A may not be directly enforced. Subtitle A is currently named, "Supervision and Regulation of Enterprises." It includes many important provisions for which the regulator may want to issue and enforce an order. Both bills requires or authorizes the regulator to issue orders under subtitle A with respect to correcting deficiencies in prudential management and operations standards, corporate governance, and prior approval. Assessments on the GSEs to fund the regulator are also prescribed in subtitle A.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|---|--|--|---|
| <p>court cannot affect, by injunction or otherwise the issuance or enforcement of any notice or order under subtitle B or any cease and desist order (temporary or final) or civil money penalty, or to review, modify, suspend, terminate, or set aside any such notice or order. § 1375(b).</p> <p>Section 1377 The Director may bring charges against a director or executive officer who has separated from service at an enterprise, within 2 years of separation from service. There is no mention of applying OFHEO's enforcement authority retroactively.</p> | <p>standards, required reports by the enterprises, collection of assessments on the GSEs to fund the agency, examinations, reviews of the enterprises, withholding of executive compensation, and new program approval.</p> | <p>under subtitle A of the 1992 Act, such as the prudential management and operations standards, required reports by the enterprises, collection of assessments on the GSEs to fund the agency, examinations, excessive compensation, reviews of the enterprises, SEC registration, withholding of executive compensation, corporate governance, and new program approval.</p> | <p>Capital Directives. Failure of a banking institution to maintain capital at or above its minimum level may be deemed by the agency, in its discretion, to constitute an unsafe and unsound practice. In addition to, or in lieu of, any other action, the agency may issue a directive to a banking institution that fails to maintain capital at or above its required level Such directive may require the institution to submit and adhere to a plan acceptable to the agency describing the means and timing by which the banking institution shall achieve its required capital level. Any such directive, including plans submitted pursuant thereto, shall be enforceable to the same extent as an effective and outstanding cease-and-desist order which has become final. [12 U.S.C. § 3907]</p> <p>Cease and desist administrative hearings (but not § 1818(c)(2) temporary cease and desist hearings, which are judicial) are held within 30 to 60 days of service of the notice of charges, unless the regulator sets a different date at the request of the party charged. Failure to appear is deemed consent to the cease and desist order.</p> <p>Removal and prohibition administrative hearings (but not § 1818(e)(3) suspension hearings, which are judicial, and not § 1818(g)(3) felony suspension or removal hearings, covered above) are held within 30 to 60 days of service of the notice of charges, unless the regulator sets a different date at the request of the party charged, for</p> | <p>Both bills thus create a stumbling block for the regulator by omitting a key part of the comparable language for federal bank regulators (12 U.S.C. Sec. 1818(i)).</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|---|---|
| | | | <p>good cause, or at the request of the Attorney General. Failure to appear is deemed consent to the removal or prohibition order. Civil money penalty hearings must be requested within 20 days of service of the assessment. § 1818(i)(2)(H). If a party fails to request a hearing, the penalty assessment is a final and unappealable order. [12 USC § 1818(i)(2)(E)(ii)].</p> <p>All hearings are on the record and are open to the public unless the regulator determines that that would be contrary to the public interest. Transcripts must be prepared, and are subject to FOIA disclosure. [12 USC § 1818(u)(2), (3)].</p> <p>A regulator may file a document under seal if disclosure would be contrary to the public interest, and the regulator must make a report of a determination to file under seal. [12 USC § 1818(u)(5)].</p> <p>In all § 1818 hearings (except § 1818(g)(3) felony suspension or removal hearings), the regulator notifies the parties, after the hearing, that the case has been submitted to the regulator for final decision. The regulator must issue any order within 90 days after that notification. [12 USC § 1818(h)(1)].</p> | |
| Notice After Separation From Service | | | | |
| <p>Section 1377 The resignation, termination of employment or participation, or separation of a director or executive officer of an enterprise shall not affect the jurisdiction</p> | <p>Section 157 The resignation, termination of employment or participation, or separation of a director or executive officer of a regulated entity or entity-affiliated party shall not affect the jurisdiction and authority of the Director to issue any notice and</p> | <p>Section 359 The resignation, termination of employment or participation, or separation of a director, executive officer or regulated entity-affiliated party shall not affect the jurisdiction and authority of the Director to issue any notice and proceed under this subtitle</p> | <p>Parties separated from service. Banking agencies may bring charges against an institution-affiliated party who has separated from service at a depository, within 6 years of separation from service. Congress enacted this provision in 1989,</p> | <p>The six year period of both the Senate committee bill and banking law is preferable to two years, which is too brief to allow for detection and prosecution of wrongdoing.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|---|----------|
| and authority of the Director to issue any notice and proceed under this subtitle against any such director or executive officer, if such notice is served before the end of the 2-year period beginning on the date such director or executive officer ceases to be associated with the enterprise. | proceed under this subtitle against any such director or executive officer, if such notice is served before the end of the 6-year period beginning on the date such director or executive officer ceases to be associated with the regulated entity or entity-affiliated party. | against any such director or executive officer, if such notice is served before the end of the 2-year period beginning on the date such director or executive officer ceases to be associated with the enterprise. | and expressly made it applicable to persons who separated from service before enactment of this provision. [12 USC § 1818(i)(3)]. | |
| Criminal Penalty | | | | |
| No provision | Section 156 Anyone who is subject to a suspension or prohibition order and who, without the prior written approval of the Director, knowingly participates, directly or indirectly, in any manner in the conduct of the affairs of any enterprise shall be fined not more than \$1,000,000, imprisoned for not more than 5 years, or both. | Section 357 Anyone who is subject to a suspension or prohibition order and who, without the prior written approval of the Director, knowingly participates, directly or indirectly, in any manner in the conduct of the affairs of any regulated entity shall be fined not more than \$1,000,000, imprisoned for not more than 5 years, or both. | A criminal penalty is imposed for violating a removal or suspension order. [12 USC 1818(j)] | |
| Enterprise directors/ Presidentially appointed directors | | | | |
| <u>Enterprises</u> Under its charter act, each currently has 18 directors, 5 of whom are presidentially appointed. | Section 162 <u>Enterprises</u> Eliminates the presidentially appointed directors and leaves the 13 stockholder-elected directors. Sitting presidentially appointed directors remain until the end of their one-year | Section 361 <u>Enterprises</u> Eliminates the presidentially appointed directors and leaves the 13 stockholder-elected directors. Sitting presidentially appointed directors remain until the end of their one-year terms. The | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|---|-------------|----------|
| <p><u>FHLBs</u> Under the Federal Home Loan Bank Act , the FHFb may appoint 6 directors for each FHLB, and its members elect the other directors.</p> | <p>terms. The Director may set a different board size. The President no longer may remove a director for good cause. The boards still must contain one member from each of the following: home building, mortgage lending, and real estate industries, and one from consumer or community interest groups.</p> <p>Section 202 <u>FHLBs</u> Sets the board size at 13 and permits the Director to change the size. All directors are elected by FHLB member vote. A majority of each board must be directors or officers of a member of the FHLB (member directors), and non-member directors must be at least two-fifths of the board. At least 2 of the non-member directors must be public interest directors, that is, consumer or community representatives Directors must be U.S. citizens.</p> | <p>Director may set a different board size. The President no longer may remove a director for good cause. The boards still must contain one member from each of the following: home building, mortgage lending, and real estate industries, and one from consumer or community interest groups.</p> <p>Section 372 <u>FHLBs</u> Board size is 13 or sauch other number as the Director determines. All directors other than independent directors are elected by FHLB member vote. Independent directors are appointed by the Agency Director from individuals nominated by the Agency Board.</p> <p>A majority of directors of each FHLB must be an officer or director of a member bank of that FHLB's district. At least two-fifths of the directors of each FHLB must be independent. Independent means they must reside in the district and may not serve as officer or director of any member. At least 2 of the independent directors must be public interest directors, that is, consumer or community representatives. Other independent directors must have financial or management expertise.</p> <p>The Federal Housing Finance Oversight Board proposes a list of individuals to serve as independent directors of each Federal Home Loan Bank. The Director of the Agency selects the independent directors from this list</p> <p>Each member institution gets a number of votes related to the amount of FHLB stock it must hold. The provision that lets each state have at least the number of directors it had in 1960 is repealed.</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|---|--|----------|
| | | Terms are changed from 3 years to 4, and are staggered. | | |
| Effective Date | | | | |
| | Section 163 Provides that, except as otherwise provided, the amendments made by this Act shall take effect upon enactment. | Section 365 Provides that, except as otherwise provided, the amendments made by this Act shall take effect six months after enactment. | | |
| Joint FHLB Organizations | | | | |
| Currently the Office of Finance issues consolidated obligations on behalf of the Federal Home Loan Bank System. Under current law, the FHFBB has express authority to set "terms and conditions" for issuance of consolidated obligations, for which the FHLBs are jointly and severally liable. | Section 207 Authorizes mergers of Federal Home Loan Banks. Section 208 Authorizes a reduction in number of FHLBank districts below 8 in cases of voluntary merger of FHLBanks or dissolution by the Director. Section 204 Under current law, the FHFBB has express authority to set "terms and conditions" for issuance of consolidated debt for which the FHLBs are jointly and severally liable. This bill replaces that with express authority of the Office of Finance, "as agent for" the FHLBs, to issue the debt and set its terms and conditions. | Section 374 Permit the FHLBs to establish and operate joint entities, subject to the Director's regulation, to perform functions for or to provide services to the FHLBs. Two or more FHLBs may require the Office of Finance perform the functions or services. This authority for joint activity is expressly limited to what the FHLBs are authorized to do individually. Section 373 Under current law, the FHFBB has express authority to set "terms and conditions" for issuance of consolidated debt for which the FHLBs are jointly and severally liable. This bill replaces that with express authority of the Office of Finance, "as agent for" the FHLBs, to issue the debt and set its terms and conditions. | | |
| Privacy Act | | | | |
| The regulated entities are exempt from the consumer financial privacy provisions of the Gramm-Leach-Bliley Act, 15 U.S.C. Sections 6801-6809. See | No provision | No provision | Banks are subject to the Consumer Financial Privacy provisions of the Gramm-Leach-Bliley Act. See 15 U.S.C. Section 6809(3). | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|---|--|---|-------------|--|
| 15 U.S.C. Section 6809(3)(D). | | | | |
| Federal Home Loan Banks/ Federal Housing Finance Board | | | | |
| Generally not covered in this side-by-side | <p>This bill makes extensive revisions to applicable law, makes the Agency the regulator of the Federal Home Loan Banks, terminates the Federal Housing Finance Board, and provides transition provisions.</p> <p>Title II Makes additional revisions to the Federal Home Loan Bank Act including providing that all directors of the Federal Home Loan Banks are elected, authorizing the Director to limit or prohibit golden parachutes and indemnity payments, setting housing goals “with respect to the purchase or mortgages by the Federal Home Loan Banks,” and specifying SEC disclosure exemptions and exclusions. FHLB securities would enjoy several exemptions, but one form of capital stock must be registered. Provides that “in issuing final regulations” implementing this new law, the SEC “shall consider” the FHLBs’ distinctive characteristics when evaluating the accounting treatment for REFCORP payments, the FHLBs’ “combined financial statements,” accounting classification of redeemable capital stock, and accounting treatment of joint and several consolidated debt.</p> | <p>This bill makes extensive revisions to applicable law, makes the Agency the regulator of the Federal Home Loan Banks, terminates the Federal Housing Finance Board, and provides transition provisions.</p> <p>Title II Makes additional revisions to the Federal Home Loan Bank Act including authorizing information sharing among the Banks for purposes of determining their joint-and-several liability, authorizing joint activities and voluntary mergers of Banks, providing that all directors of the Federal Home Loan Banks are elected, providing for governance requirements, and specifying SEC disclosure exemptions and exclusions. FHLB securities would enjoy several exemptions, but one form of capital stock must be registered. Provides that “in issuing final regulations” implementing this new law, the SEC “shall consider” the FHLBs’ distinctive characteristics when evaluating the accounting treatment for REFCORP payments, the FHLBs’ “combined financial statements,” accounting classification of redeemable capital stock, and accounting treatment of joint and several consolidated debt.</p> | | The provision for affordable housing goals in the Senate committee bill would seem to contemplate that the Federal Home Loan Banks shall purchase mortgages and not merely make advances on the security of mortgages. |
| Abolishment of OFHEO | | | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|------------------------------------|---|--|-------------|----------|
| | <p>Section 301 Effective immediately, provides for winding up of OFHEO over a one-year period; abolishes OFHEO, and the positions of OFHEO Director and Deputy Director, one year after enactment of the Act; the Federal Housing Finance Agency may use property of OFHEO to perform functions during the transition; agencies, departments or instrumentalities providing supporting services to OFHEO shall continue to provide such services, on a reimbursable basis, until the transition is complete; savings provisions continue the validity of rights, duties, and obligations, and provide for the continuation of actions and proceedings.</p> <p>Section 311 provides for the abolishment of the Federal Housing Finance Board one year after the date of enactment.</p> | <p>Section 385 Effective immediately, provides for winding up of OFHEO over a six-month period, during which the agency may continue its functions; abolishes OFHEO, and the positions of OFHEO Director and Deputy Director six months after the enactment of the Act; The Federal Housing Finance Agency may use property of OFHEO to perform its functions; agencies, departments or instrumentalities providing supporting services to OFHEO shall continue to provide such services, on a reimbursable basis, until the transition is complete; savings provisions continue the validity of rights, duties, and obligations, and provide for the continuation of actions and proceedings.</p> <p>Section 391 Provides for the abolishment of the Federal Housing Finance Board six months after the date of enactment; provides for winding up of the FHFB.</p> <p>Section 395 Provides for the abolishment of the functions of HUD's enterprise-related functions; effective six months after the date of enactment, provides for winding up of these functions.</p> | | |
| Continuation of Regulations | | | | |
| | <p>Section 302 All regulations, orders, determinations, and resolutions that relate to functions transferred by this Act and are in effect on the date of the abolishment of OFHEO shall remain in effect and enforceable according to their terms until modified, terminated, set aside, or superseded in accordance with applicable law by the Director or HUD Secretary, as the case may be, any court of</p> | <p>Section 386 All regulations, orders, determinations, and resolutions that relate to functions transferred by this Act and are in effect on the date of the abolishment of OFHEO shall remain in effect and enforceable according to their terms until modified, terminated, set aside, or superseded in accordance with applicable law by the Director, any court of competent jurisdiction, or operation of law.</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|--|---|-------------|--|
| | <p>competent jurisdiction, or operation of law.</p> <p>Section 312 similarly provides for continuation of FHFB regulations, orders, determinations, and resolutions.</p> | <p>Section 392 similarly provides for continuation of FHFB regulations, orders, determinations, and resolutions.</p> | | |
| Transfer and Rights of Employees of OFHEO | | | | |
| | <p>Section 303</p> <p>Each OFHEO employee shall be transferred to the Agency for employment no later than the date of the abolishment. Each employee transferred shall be guaranteed a position with the same status, tenure, grade, and pay as that held on the day immediately preceding the transfer. Each such employee holding a permanent position shall not be involuntarily separated or reduced in grade or compensation for 12 months after the date of transfer, except for cause or, if the employee is a temporary employee, separated in accordance with the terms of the appointment. The Director may decline a transfer of excepted service positions (and the employees appointed to such positions) to the extent that such positions are excepted from the competitive service because of their confidential, policy-making, policy-determining, or policy-advocating character. If the Director of the Federal Housing Finance Agency determines, after the end of the 1-year period beginning on the date of the abolishment, that a reorganization of the combined work force is required, that reorganization shall be deemed a major reorganization for purposes of affording affected employees retirement. Establishes conditions for continuation of benefits for 12</p> | <p>Section 387</p> <p>Each OFHEO employee shall be transferred to the Federal Housing Finance Agency for employment no later than the date of the abolishment. Each employee transferred shall be guaranteed a position with the same status, tenure, grade, and pay as that held on the day immediately preceding the transfer. Each such employee holding a permanent position shall not be involuntarily separated or reduced in grade or compensation for 12 months after the date of transfer, except for cause or, if the employee is a temporary employee, separated in accordance with the terms of the appointment. The Director may decline a transfer of excepted service positions (and the employees appointed to such positions) to the extent that such positions are excepted from the competitive service because of their confidential, policy-making, policy-determining, or policy-advocating character. If the Director of the Federal Housing Finance Agency determines, after the end of the 1-year period beginning on the date of the abolishment, that a reorganization of the combined work force is required, that reorganization shall be deemed a major reorganization for purposes of affording affected employees retirement. Establishes conditions for continuation of benefits for 12 months for those employees accepting employment with the</p> | | <p>These protective provisions are essential to reduce the chance that there will be a race of OFHEO employees to leave – and especially the most capable employees who have attractive alternative employment – when the bill nears enactment. Such a rush to exit could greatly impede an orderly assumption of functions by the new office.</p> |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|--|---|---|-------------|----------|
| | <p>months for those employees accepting employment with the Agency.</p> <p>Section 313 does the same for FHFB employees.</p> <p>Section 133 does the same for HUD employees who administer the federal housing goals.</p> | <p>Director.</p> <p>Section 393 does the same for FHFB employees.</p> <p>Section 395 does the same for HUD employees who transfer to the Agency.</p> | | |
| Transfer of Property and Facilities | | | | |
| | <p>Section 304 Upon abolishment, all property of OFHEO shall transfer to the Director of the Federal Housing Finance Agency.</p> <p>Section 314 similarly transfers property of the FHFB to the Agency.</p> | <p>Section 394 Upon abolishment, all property of OFHEO shall transfer to the Director of the Federal Housing Finance Agency.</p> <p>Section 324 similarly transfers property of the FHFB to the Agency.</p> | | |
| Studies and Reports | | | | |
| <p>Section 1355</p> <p>Required studies on the desirability and feasibility of privatizing the enterprises have been completed</p> | <p>Section 501 Requires the Director to conduct an ongoing study of enterprise G-fees and to submit annual reports; requires the Director to establish procedures for data collection;</p> | <p>Section 329 Requires the Director, in consultation with the heads of the federal banking agencies, to submit to the Congress within eighteen months of the date of enactment a study of the pricing, transparency, and reporting of guarantee fees by the regulated entities and concerning analogous practices of other market participants, including advances pricing practices of the Federal Home Loan Banks.</p> <p>Section 362 Requires the Director to report to the Congress on holdings of Fannie Mae and Freddie Mac of retained mortgages and repurchased MBS, the use of derivatives for hedging, the implications for safety</p> | | |

| 1992 ACT -- CURRENT LAW | SENATE BANKING COMMITTEE BILL 5/20/2008 | H.R. 3221 PASSED THE HOUSE 5/08/2008 | BANKING LAW | COMMENTS |
|-------------------------|---|--|-------------|----------|
| | | <p>and soundness, and whether such holdings fulfill the enterprises' mission purposes.</p> <p>Section 364 Requires the Director, in consultation with the Federal Reserve and the Secretaries of Treasury and HUD, to conduct a comprehensive study of the effects of alternatives to the current secondary market system for housing finance.</p> <p>Section 380 Requires the GAO to conduct a study of the use of the affordable housing programs of the Federal Home Loan Banks to determine their use to assist long-term care facilities for low- and moderate-income individuals, and the applicability of such use to the affordable housing programs to be established by the enterprises.</p> | | |