Financial Institution Insolvency and the Federal Response to the Regional Bank Failures of 2023

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Financial Institution Insolvency and the Federal Response to the Regional Bank Failures of 2023

SUMMARY

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Three high-profile regional banks collapsed suddenly in the United States during the first half of 2023. On March 10, 2023, the California Department of Financial Protection and Innovation (California DFPI) closed Silicon Valley Bank (SVB). Two days later, the New York State Department of Financial Services shut down Signature Bank. In early May, the California DFPI closed First Republic Bank (First Republic). These closures reflect the second- (First Republic), third- (SVB), and fourth- (Signature Bank) largest bank failures in U.S. history.

Following each bank failure, those state financial regulators appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Congress empowers the FDIC, as the nation's deposit insurer, to resolve failed insured depository institutions (IDIs) with the primary objectives of protecting insured depositors and the Deposit Insurance Fund (DIF). The FDIC entered agreements under which three different healthy banks took over the failed banks. First-Citizens acquired all of SVB's deposits and approximately $72 billion in assets at a discount, and entered a loss-share agreement with the FDIC regarding SVB's commercial loans. Flagstar Bank purchased substantially all of Signature Bank's deposits and approximately $38.4 billion of its assets, including certain loan portfolios at a discount. JPMorgan Chase purchased all of First Republic's deposits and substantially all of its assets, and entered into a loss-share agreement with the FDIC involving First Republic's commercial, residential, and single-family loans. The FDIC will continue to operate the portions of the institutions that it retained until they are fully liquidated and otherwise wound-down.

The failures of SVB, Signature Bank, and First Republic sparked debate among policymakers about how IDIs are managed and supervised for safety and soundness to avoid failure, as well as how the FDIC resolves IDIs when they become insolvent. These regional bank failures have prompted regulatory reviews by the FDIC and the Board of Governors of the Federal Reserve System, multiple congressional hearings, the introduction of several legislative proposals by Members of Congress, and calls for congressional action by President Biden.

This report analyzes the FDIC's authority over failed IDIs, the process by which IDIs are closed and the FDIC is appointed conservator or receiver, the FDIC's powers as conservator and receiver, the resolution options utilized by the FDIC applying the "least-cost resolution" requirement, the receiver claims process, and the FDIC's authority to hold officers and directors accountable for an IDI's failure. The report concludes with recent legislative actions in response to the regional bank failures of 2023 and other considerations for Congress.

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Overview of Bank Supervision and the Bank Failures of 2023

Multiple high-profile regional banks collapsed in the United States during the first half of 2023, raising concerns about the financial stability of the banking sector and putting a spotlight on the processes by which federal regulators supervise banks for safety and soundness and resolve failed banks.[1]

For a financial institution to offer federally insured deposits, it must receive a banking charter from either the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Fed Board), the Federal Deposit Insurance Corporation (FDIC), or a state banking regulator. These state and federally chartered banks and thrifts (insured depository institutions, or IDIs) are subject to comprehensive regulation for both safety and soundness (prudential regulation), with the goal of ensuring that banks maintain profitability and avoid failure. Consumer compliance regulation is designed to ensure that banks comply with applicable consumer protection and fair-lending laws. The OCC is the prudential regulator for federally chartered IDIs. The state chartering authorities and the Fed Board share prudential regulation of state-chartered IDIs that are members of the Federal Reserve System (state-chartered member banks). State chartering authorities and the FDIC are the prudential regulators of state-chartered IDIs that are not members of the Federal Reserve System (state-chartered nonmember banks). The FDIC, in addition to its role as supervisor, insures deposits of IDIs up to the statutory limit of $250,000, per depositor, per FDIC-insured bank, per ownership category[2] and maintains the Deposit Insurance Fund (DIF).[3] The FDIC also plays a crucial role in the resolution of banks. Congress empowers the FDIC, as the nation's deposit insurer, to resolve failed IDIs with the primary objectives of protecting insured depositors and the DIF.

On March 10, 2023, the California DFPI closed Silicon Valley Bank (SVB), a state-chartered member bank.[4] Two days later, the New York State Department of Financial Services shut down Signature Bank, a state-chartered, nonmember bank.[5] Then on May 1, the California DFPI closed First Republic Bank (First Republic), another state-chartered, nonmember bank.[6] Each of these institutions held between $100 billion and $250 billion in total consolidated assets,[7] making these failures the second- (First Republic), third- (SVB), and fourth- (Signature Bank) largest bank

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[1] For an overview of bank regulation, see CRS In Focus IF11055, *Introduction to Bank Regulation: Supervision*, by Marc Labonte and David W. Perkins.

[2] 12 U.S.C. § 1821(a). *See also Deposit Insurance FAQs*, Fed. Deposit Ins. Corp. (last updated Mar. 20, 2023).

[3] 12 U.S.C. § 1821(a)(1)(E).

[4] *California Financial Regulator Takes Possession of Silicon Valley Bank*, Cal. Dep't of Fin. Prot. and Innovation (Mar. 10, 2023), https://dfpi.ca.gov/2023/03/10/california-financial-regulator-takes-possession-of-silicon-valley-bank/. For an overview of bank chartering authorities, see CRS Report R47014, *An Analysis of Bank Charters and Selected Policy Issues*, by Andrew P. Scott.

[5] *Notice Regarding Signature Bank*, N.Y. Dep't of Fin. Servs. (Mar. 12, 2023), https://www.dfs.ny.gov/consumers/alerts/SignatureBank.

[6] *California Financial Regulator Takes Possession of First Republic Bank*, Dep't of Fin. Prot. and Innovation (May 1, 2023), https://dfpi.ca.gov/2023/05/01/california-financial-regulator-takes-possession-of-first-republic-bank; *Notice Regarding Signature Bank*, N.Y. Dep't of Fin. Servs. (Mar. 12, 2023), https://www.dfs.ny.gov/consumers/alerts/SignatureBank.

[7] Karl Russell & Christine Zhang, *3 Failed Banks This Year Were Bigger than 25 That Crumbled in 2008*, N.Y. Times (May 1, 2023), https://www.nytimes.com/interactive/2023/business/bank-failures-svb-first-republic-signature.html#:~:text=Government%20regulators%20seized%20and%20sold,of%20%24532%20billion%20in%20assets.

failures in U.S. history.[8] In each instance, the state bank regulators closed the IDI and appointed the FDIC as its receiver.[9]

The FDIC, as receiver, transferred all deposits and substantially all assets of SVB and Signature Bank into separate, newly chartered bridge banks—Silicon Valley Bridge Bank, N.A.[10] and Signature Bridge Bank, N.A.[11] These bridge banks opened the Monday after regulators closed the failed banks, giving customers full access to their deposits.[12] The FDIC organized and operated these bridge banks temporarily to give it more time to find acceptable purchasers for the failed institutions. On the same day the bridge banks opened, the Secretary of the Treasury, on the recommendation of the FDIC and the Fed Board, invoked the systemic risk exception under Section 13 of the Federal Deposit Insurance Act (FDI Act)[13] to provide the FDIC greater flexibility in the resolving both SVB and Signature Bank, while protecting financial stability.[14] The invocation of the systemic risk exception allowed the FDIC to guarantee all of the deposits—both insured and uninsured—of both banks.[15]

Approximately two weeks after the establishment of the bridge banks, the FDIC entered into purchase and assumption (P&A) agreements with First-Citizens Bank & Trust Company (First-Citizens)[16] and Flagstar Bank, National Association[17] for SVB and Signature Bank, respectively. First-Citizens acquired all of SVB's deposits and approximately $72 billion in assets at a discount, and entered a loss-share agreement with the FDIC regarding SVB's commercial loans.[18] At the time the P&A with First-Citizens was announced, the FDIC estimated that SVB's failure would cost the DIF $20 billion.[19] Flagstar Bank purchased substantially all of Signature Bank's deposits and approximately $38.4 billion of its assets, including certain loan portfolios at a

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[8] Matthew Goldberg, *The 7 Largest Bank Failures in U.S. History*, Bankrate (May 1, 2023), https://www.bankrate.com/banking/largest-bank-failures/.

[9] Press Release, Cal. Dep't of Fin. Prot. & Innovation, *California Financial Regulator Takes Possession of Silicon Valley Bank*, Cal. Dep't of Fin. Prot. and Innovation (Mar. 10, 2023), https://dfpi.ca.gov/2023/03/10/california-financial-regulator-takes-possession-of-silicon-valley-bank/.

[10] Prior to establishing the SVB bridge bank, the FDIC briefly established a Depository Institution National Bank (DINB) with the expectation of liquidating the bank through a deposit payoff. *See* Press Release, FDIC, FDIC Creates a Deposit Insurance National Bank of Santa Clara to Protect Insured Depositors of Silicon Valley Bank, Santa Clara, California, Fed. Deposit Ins. Corp. (Mar. 10, 2023), https://www.fdic.gov/news/press-releases/2023/pr23016.html. For more information on DINBs and deposit payoffs, see the *infra* p.10 "Options for Resolving IDI Failures."

[11] Press Release, FDIC, FDIC Acts to Protect All Depositors of the former Silicon Valley Bank, Santa Clara, California, (Mar. 13, 2023), https://www.fdic.gov/news/press-releases/2023/pr23019.html; Press Release, FDIC, FDIC Establishes Signature Bridge Bank, N.A., as Successor to Signature Bank, New York, NY, (Mar. 13, 2023), https://www.fdic.gov/news/press-releases/2023/pr23018.html.

[12] *Id*.

[13] 12 U.S.C. § 1823(c)(4)(G).

[14] Press Release, FDIC, Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC, Fed. Deposit Ins. Corp. (Mar. 12, 2023), https://www.fdic.gov/news/press-releases/2023/pr23017.html. For more information on the systemic risk exception, see CRS In Focus IF12378, *Bank Failures: The FDIC's Systemic Risk Exception*, by Marc Labonte.

[15] See Joint Statement by the Department of the Treasury *supra* note 14.

[16] Press Release, FDIC, First–Citizens Bank & Trust Company, Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23023.html.

[17] Press Release, FDIC, Subsidiary of New York Community Bancorp, Inc., to Assume Deposits of Signature Bridge Bank, N.A., From the FDIC, (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23021.html.

[18] Press Release, FDIC, First–Citizens Bank & Trust Company, Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., From the FDIC, (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23023.html.

[19] *Id*.

discount.[20] The FDIC estimated at the time that Signature Bank's failure would cost the DIF $2.5 billion.[21]

On the day that the California DFPI closed First Republic and appointed the FDIC as its receiver, the FDIC signed a P&A agreement with JPMorgan Chase Bank under which JPMorgan Chase purchased all of First Republic's deposits and substantially all of its assets, and entered into a loss-share agreement with the FDIC involving First Republic's commercial, residential, and single-family loans.[22] The FDIC estimated at the time that First Signature's failure would cost the DIF $13 billion.[23]

The FDIC will maintain receiverships for each of the three failed institutions until it is able to liquidate all the assets and liabilities that were not included in the P&A agreements and otherwise resolve the affairs of the institutions.[24] All proceeds realized from the resolutions of these institutions will be used to reimburse the FDIC for both the administrative costs of the receiverships and disbursements made to protect insured depositors, and to otherwise pay claims against the failed IDIs in accordance with the priority schemes established by the FDI Act.

This report analyzes the FDIC's authority over failed IDIs, the process by which IDIs are closed and the FDIC is appointed conservator or receiver, the FDIC's powers as conservator and receiver, the resolution options utilized by the FDIC applying the "least-cost resolution" requirement, the receiver claims process, and the FDIC's authority to hold officers and directors accountable for an IDI's failure. The report concludes with recent legislative actions in response to the regional bank failures of 2023 and other considerations for Congress.

FDIC's Authority Over Failed Insured Depository Institutions

Background and Overview

The FDI Act establishes the FDIC as an independent federal agency to provide federal deposit insurance to IDIs.[25] To further this statutory purpose, the FDIC administers the DIF, which consists of premiums assessed on IDIs based on the amount of insured deposits each institution holds.[26] If an IDI fails, the FDIC must see to it that insured deposits are protected through disbursements from the DIF and proceeds derived from the resolution and wind-down of the

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[20] Press Release, FDIC, Subsidiary of New York Community Bancorp, Inc., to Assume Deposits of Signature Bridge Bank, N.A., From the FDIC, (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23021.html.

[21] *Id*.

[22] Press Release, FDIC, JPMorgan Chase Bank, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California, (May 1, 2023), https://www.fdic.gov/news/press-releases/2023/pr23034.html.

[23] *Id*.

[24] *Failed Bank Information for Silicon Valley Bank, Santa Clara, CA*, Fed. Deposit Ins. Corp., https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/silicon-valley.html; *Failed Bank Information for Signature Bank, New York, NY*, Fed. Deposit Ins. Corp., https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/signature-ny.html; *Failed Bank Information for First Republic Bank, San Francisco, CA*, Fed. Deposit Ins. Corp., https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/first-republic.html#:~:text=On%20Monday%2C%20May%201%2C%202023,a%20financial%20institution%20is%20closed.

[25] 12 U.S.C. §§ 1811–12.

[26] For a description of deposit insurance, see CRS Report R41718, *Federal Deposit Insurance for Banks and Credit Unions*, by Darryl E. Getter.

failed institution. Federal deposit insurance is backed by the full faith and credit of the United States.[27] If the DIF is exhausted, the FDIC has a permanent appropriation authorizing it to borrow from the Treasury to protect insured depositors.[28]

Due to the possible threat to the federal fisc,[29] among other reasons,[30] Congress established a special regime for resolving depository institution insolvencies. Rather than subjecting IDIs to the U.S. Bankruptcy Code[31] that is applicable to most corporate bankruptcies,[32] the FDI Act establishes an FDIC-administered conservatorship/receivership regime for resolving IDIs.[33] When an IDI fails, the institution's charterer, its primary federal regulator, or the FDIC is authorized to act *ex parte* (i.e., without notice or a hearing) to seize the institution and its assets and install the FDIC as conservator or receiver.[34] If the circumstances allow for it, the institution's regulator and the FDIC consult prior to acting so that the FDIC may investigate the situation and determine its resolution strategy before the public is made aware of the looming failure.[35]

The IDI's regulators decide whether to appoint the FDIC as conservator or receiver based on one or more grounds specified in Section 11 of the FDI Act.[36] Neither the creditors of an institution nor its managers have the authority to declare the institution insolvent. Appointment of the FDIC as conservator or receiver for a federally chartered depository institution is generally at the discretion of the institution's chartering authority.[37] In the case of a state-chartered depository

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[27] 12 U.S.C. § 1828(a)(1)(B).

[28] 12 U.S.C. § 1824(a). For instance, in the savings and loan crisis of 1985–1995, 1,043 thrifts failed with combined assets of over $500 billion, costing taxpayers $124 billion and the thrift industry, $29 billion. Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, 13 FDIC BANKING REV. 26, 33 (2000).

[29] The *public fisc* refers to the U.S. Treasury. *See, e.g.*, United States *ex rel.* Ryan v. Endo Pharms., 27 F. Supp. 3d 615, 626 n.11 (E.D. Pa. 2014), *aff'd sub nom*, United States *ex rel.* Dhillon v. Endo Pharms., 617 F. App'x 208 (3d Cir. 2015); *see also* Helen Schroeder, *Getting Away with Murder: Why U.S. Courts Should Incorporate the VCLT in the Interpretation of International Tax Treaties*, 21 SANTA CLARA J. INT'L L. 19, 29 n.79 (2023).

[30] The general assumption has been that the pivotal role banks and thrifts play in mainstream economic life justifies government control of bank and thrift insolvencies. *See, e.g.*, David A. Skeel, Jr., *The Law and Finance of Bank and Insurance Insolvency Regulation*, 76 TEX. L. REV. 723 (1998). It has also been suggested that the risk of insider abuse is another primary reason for treating bank or thrift insolvencies under a special regime. *See*, Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 DUKE L. J. 469 (1992).

[31] 11 U.S.C. § 109(b), (d). *See* CRS Legal Sidebar LSB10926, *Federal Statutory Bankruptcy Alternatives: A Roadmap*, by Michael D. Contino.

[32] See Robert R. Bliss & George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation*, 2 Va. L. & Bus. Rev. 143 (2007) (comparing bank and other corporate insolvencies).

[33] 12 U.S.C. § 1821.

[34] 12 U.S.C. § 1821(c)(2)–(4). The FDIC must be appointed conservator or receiver of a failed federally chartered depository. State-chartered depositories can be resolved in accordance with state law. Nevertheless, the FDIC is usually appointed conservator or receiver upon their failure. In a rare instance in which another entity is appointed to resolve a failed state-chartered depository, the FDIC can still appoint itself conservator or receiver under certain circumstances. 12 U.S.C. § 1821(c)(4), (9), (10).

[35] FDIC, CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013, 186 (2017).

[36] 12 U.S.C. § 1821(c).

[37] 12 U.S.C. § 1464(d)(2)(E)(ii) (national savings institution); 12 U.S.C. § 191 (national banks). The decision to appoint a receiver for a national bank is to be determined by the OCC "in the Comptroller's discretion." 12 U.S.C. § 191. OCC's decision is generally not subject to judicial review. U.S. Savs. Bank v. Morgenthau, 85 F. 2d 811 (D.C. Cir. 1936). In addition to the grounds specified in the FDI Act, 12 U.S.C. § 1821(c)(5), the OCC may appoint a receiver upon determining that the bank's board of directors consists of fewer than five members. 12 U.S.C. § 191(2).

institution, appointment of the FDIC as conservator or receiver may be at the discretion of the state chartering authority, the primary federal regulator, or, in certain cases, the FDIC.[38]

The FDIC holds broad powers as conservator or receiver. The FDIC as conservator or receiver may "take any action authorized by . . . . [the FDI Act], which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation."[39] An IDI in conservatorship remains subject to "banking agency supervision."[40] Otherwise, the FDIC as conservator or receiver is not subject to any other authority in exercising its powers.[41]

Grounds for Appointing the FDIC as Conservator or Receiver

The FDI Act authorizes the appointment of a conservator or receiver on a number of grounds. These include financial insolvency, that is, when the institution has insufficient assets to meet its obligations, but regulators also are authorized to intervene prior to the institution becoming insolvent.[42] The grounds on which the FDIC may be appointed conservator or receiver include if the IDI

- has insufficient assets to meet obligations;
- is undercapitalized with no reasonable prospect of becoming adequately capitalized, fails to submit an adequate recapitalization plan, or materially fails to implement an accepted capital restoration plan;
- suffers losses with no reasonable likelihood of becoming adequately capitalized absent federal assistance;
- is in an unsafe or unsound condition to transact business;
- provides consent through its board of directors or shareholders;
- has its deposit insurance revoked; or

[38] 12 U.S.C. § 1821(c)(2), (6) (appointment of the FDIC as conservator or receiver of federally chartered depository institution at the discretion of the chartering agency); 12 U.S.C. § 1821(c)(3), (4), (9), (10) (appointment of the FDIC as conservator or receiver of state-chartered depository institution). The FDIC may appoint itself as receiver for a state-chartered, FDIC-insured depository institution upon determining that (1) a state-appointed conservator or receiver has been appointed and 15 consecutive days have passed and one or more depositors has been unable to withdraw any amount of insured deposit or (2) the institution has been closed under state law and the FDIC determines that one of the grounds specified in 12 U.S.C. § 1821(c)(4) exists or existed. If the FDIC acts to appoint itself conservator or receiver under any of those circumstances, the institution is provided with an opportunity for judicial review. 12 U.S.C. § 1821(c)(7). There is also authority for the FDIC to appoint itself as conservator or receiver for any insured depository institution "to prevent loss to the deposit insurance fund." 12 U.S.C. § 1821(c)(10).

[39] 12 U.S.C. § 1821(d)(2)(J)(ii). *See* MBIA Ins. Corp. v. FDIC, 708 F.3d 234, 236 (D.C. Cir. 2013); Freeman v. FDIC, 56 F.3d 1394, 1398–99 (D.C. Cir. 1995) ("In particular, the FDIC's broad powers as receiver include the power to foreclose on the property of a debtor held by the failed bank as collateral, and no court may enjoin the exercise of that power."); FDIC v. Am. Cas. Co., 975 F.2d 677, 681 (10th Cir. 1992) ("Section 1821(d)(2) enunciates some of the broad powers granted to the FDIC.").

[40] 12 U.S.C. § 1821(c)(2)(D), 3(D).

[41] 12 U.S.C. § 1821(c)(2)(C). This provision states: "When acting as conservator or receiver. . . , the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers, and privileges." *See also* 12 U.S.C. § 1821(j), entitled "Limitation on court action," which sets forth: "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or receiver."

[42] Keith R. Fisher, 2 Banking Law Manual § 1.03[4] (Lexis Pub. (3d ed.) (hereinafter *Fisher*), ("[T]he United States banking industry has long been subject to a heavy overlay of government regulation whose implicit (if not explicit) aim is to *avoid* insolvency.").

- is convicted of a money laundering offense.[43]

General Missions as Conservator and Receiver

The FDI Act establishes distinct missions for the FDIC as conservator on the one hand and receiver on the other. The FDIC's primary role as conservator is to take any action "(i) necessary to put the insured depository institution in a sound and solvent condition . . . and (ii) [any action which is] appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution."[44] The U.S. Court of Appeals for the Eleventh Circuit has noted that "[t]he conservator's mission is to conserve assets which often involves continuing an ongoing business."[45] The FDIC can use a conservatorship to stabilize an institution, but more frequently the FDIC uses the mechanism to give it time to prepare for the institution's ultimate closure and receivership.[46] In practice, the vast majority of failed IDIs result in receiverships, and conservatorships are rare.[47]

In contrast, the FDIC's general mission as receiver is to liquidate the IDI and sell its assets.[48] To further this mission, the FDI Act grants the FDIC more powers as receiver than when acting as a conservator, as discussed below.

Conservatorship and Receivership Powers

The FDI Act broadly empowers the FDIC as conservator and receiver. In either capacity, the FDIC succeeds to "all rights, titles, powers, and privileges of the insured depository institution" and is endowed with "all the powers of the members or shareholders, the directors, and the officers of the institution."[49] The FDIC may collect all obligations due to the institution, perform its duties, and preserve and conserve its assets.[50] In addition to these general powers, the FDI Act provides the FDIC as conservator or receiver "such incidental powers as shall be necessary to carry out such powers."[51] The FDI Act also provides that, in exercising its conservatorship or receivership authority, the FDIC "shall not be subject to the direction or supervision of any other

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[43] 12 U.S.C. § 1821(c)(5). Other grounds for appointing the FDIC as conservator or receiver include: undercapitalization with no reasonable prospect of becoming adequately capitalized, failing to submit an adequate recapitalization plan, or materially failing to implement an accepted capital restoration plan; critical undercapitalization or substantially insufficient capital; willful violation of a final cease-and-desist order; concealment of the institution's books or records or refusal to submit to a regulatory inspection or examination; asset or earning dissipation due to violation of statute or regulation or an unsafe or unsound condition; legal violation or an unsafe or unsound practice that is likely to cause insolvency, weaken the institution's financial standing, or seriously prejudice the interests of depositors or the DIF. *Id.*

[44] 12 U.S.C. § 1821(d)(2)(D).

[45] Resol. Tr. Corp. v. United Tr. Fund, Inc., 57 F.3d 1025, 1033 (11th Cir. 1995). *See also* Resolution Tr. Corp. v. Cheshire Mgmt. Co., 18 F.3d 330, 333 (6th Cir. 1994); Resolution Tr. Corp. v. CedarMinn Bldg. LP, 956 F.2d 1446, 1453 (8th Cir. 1992).

[46] *See* Del. Cnty. v. Fed. Hous. Fin. Agency, 747 F.3d 215, 219 (3d Cir. 2014). *See also* Fisher *supra* note 42, § 15.03.

[47] Richard M. Hynes & Steven D. Walt, *Why Banks Are Not Allowed in Bankruptcy*, 67 WASH & LEE L. REV. 985, 987 n.3 (2010) ("Conservatorships are very rare, however. Between 1934 and 2005 only two banks were resolved in conservatorships.").

[48] 12 U.S.C. § 1821(d)(2)(E). The statute also specifies that, as receiver of a state-chartered institution, the FDIC may "liquidate the institution in an orderly manner . . . and . . . make any other disposition of any matter concerning the institution, as the [FDIC] determines is in the best interests of the institution, the depositors of the institution, and the [FDIC]." 12 U.S.C. § 1821(c)(13)(B).

[49] 12 U.S.C. § 1821(d)(2).

[50] *Id. See* Zucker v. Rodriguez, 919 F.3d 649, 655–56 (1st Cir. 2019).

[51] 12 U.S.C. § 1821(d)(2)(J). *See* Willner v. Dimon, 849 F.3d 93, 106 (4th Cir. 2017).

agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."[52] The FDIC is provided broad rulemaking authority to issue rules for the conduct of conservatorships or receiverships, which are codified at 12 C.F.R. Part 360.[53]

The FDI Act also provides the FDIC as conservator or receiver a number of specific powers to further its general and incidental authority. These include the power to

- merge the IDI with another IDI;[54]
- transfer any asset of the IDI, including trust department assets;[55]
- pay valid obligations of the IDI;[56]
- issue subpoenas;[57]
- avoid certain fraudulent transfers made with the intent to "hinder, delay, or defraud the IDI";[58]
- repudiate contracts (with the exception of loans from the Federal Home Loan Banks or Federal Reserve Banks) or leases entered into by the institution, under certain conditions;[59]
- enforce most of the IDI's contracts;[60] and
- bring an action to hold a director or officer of an IDI personally liable for gross negligence.[61]

Additional Powers as Receiver

The FDI Act grants the FDIC a broader range of powers in its capacity as receiver relative to its capacity as conservator. As receiver, the FDIC may

- organize a new depository institution under 12 U.S.C. § 1821(m) or a bridge depository institution under 12 U.S.C. § 1821(n);[62]

[52] 12 C.F.R. § 360 (1993); *see* 12 U.S.C. § 1821(c)(2)(B), and (C), (3)(B), (C). The depository institution in conservatorship remains subject to "banking agency supervision." 12 U.S.C. § 1821(c)(2)(D) (federal depository institution) and (c)(3(D) (state depository institution).

[53] 12 U.S.C. § 1821(d)(1).

[54] 12 U.S.C. § 1821(d)(2)(G)(i).

[55] 12 U.S.C. § 1821(d)(2)(G)(ii). Unless the FDIC is transferring assets to a new depository institution or a bridge depository institution, the FDIC may not transfer assets without the approval of the appropriate Federal banking agency.

[56] 12 U.S.C. § 1821(d)(2)(H).

[57] 12 U.S.C. § 1821(d)(2)(I).

[58] 12 U.S.C. § 1821(d)(17).

[59] 12 U.S.C. § 1821(e)(1). The statute requires that the repudiation determination be within a reasonable time following the appointment of the receiver or conservator. 12 U.S.C. § 1821(e)(2). It limits damages to "actual direct compensatory damages," 12 U.S.C. § 1821(e)(3), and contains specific provisions relating to various types of contracts and leases. These include leases for which the insured depository institution is the lessee or lessor, 12 U.S.C. § 1821(e)(4) and (5); contracts for the sale of real property, 12 U.S.C.§ 1821(e)(6); service contracts, 12 U.S.C. § 1821(e)(7); and any certain securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or similar agreement that the FDIC determines to be "a qualified financial contract," 12 U.S.C. § 1821(e)(8)–(10). The Corporation has authority to enforce contracts under 12 U.S.C. § 1821(e)(13). The exception for Federal Home Loan Bank and Federal Reserve Bank loans is found at 12 U.S.C. § 1821(e)(14).

[60] 12 U.S.C. § 1821(e)(12).

[61] 12 U.S.C. § 1821(k).

[62] 12 U.S.C. § 1821(d)(2)(F).

- merge the IDI with another IDI;[63]
- transfer assets and liabilities to another IDI;[64]
- make rules for and determine claims against the receivership, subject to statutory prescriptions;[65]
- assert exemptions from all federal, state, and local criminal prosecution for any act allegedly committed by the IDI, or persons acting on the IDI's behalf, prior to the appointment of the FDIC as receiver;[66] and
- fix fees, compensation, and expenses of the liquidation and administration of the IDI and pay for these out of receivership funds.[67]

Least-Cost Resolution Requirement

One of the guiding principles the FDI Act imposes upon the FDIC in resolving IDI failures is the least-cost resolution requirement.[68] The FDIC, with one exception discussed below, is barred from resolving a failed IDI by any method other than the one that is the least costly to the DIF.[69] Specifically, the FDIC is generally prohibited from resolving failing institutions in any manner unless it determines that (1) the action is necessary to protect that institution's insured deposits and (2) the total to be expended and obligations to be incurred will cost the DIF less than any other resolution method.[70] To determine which approach is least costly, the FDIC is required to evaluate alternatives on a present-value basis, document the underlying assumptions, and include forgone federal tax revenues as part of the cost.[71]

In accordance with the least-cost resolution requirement, the FDIC may not take any action to protect depositors for more than the insured portions of their deposits or protect creditors other than depositors, absent a systemic risk invocation.[72] However, the FDI Act allows the FDIC to arrange purchase and assumption transactions in which the acquiring institution takes on

[63] 12 U.S.C. § 1821(d)(2)(G).

[64] *Id*. The FDIC may also merge or transfer assets in its capacity as conservator.

[65] 12 U.S.C. § 1821(d)(3)–(11).

[66] 12 U.S.C. § 1825(b)(4).

[67] *Id*. The FDIC as receiver may also appoint agents to assist in its duties as receiver, 12 U.S.C. § 1822(a); assert exemption from any requirement to post a bond, *id*.; assert immunity to attachment or execution upon assets of receivership and obtain insulation from judicial oversight of rights in assets of the receivership or claims relating to acts or omissions of the IDI or the FDIC as receiver, 12 U.S.C. § 1821(d)(13)(C), (D); and assert exemptions from state and local taxes (except for real estate taxes), from tax penalties and fines, and from liens or foreclosure on its property without its consent, 12 U.S.C. § 1825(b).

[68] Under § 143 of the Federal Deposit Insurance Corporation Improvement Act of 1991, P.L. 102-242, there is a sense of Congress urging the FDIC to favor early resolution of troubled institutions when doing so involves the least possible long-term cost to the insurance fund. To achieve this end, the FDIC is exhorted to follow various practices: entering into competitive negotiation; requiring substantial private investment; requiring owners and holding companies of troubled institutions to make concessions; making sure that there is qualified management for resulting institutions; assuring FDIC participation in the resulting institution; and structuring transactions so that the FDIC does not acquire too much of a troubled institution's problem assets. 12 U.S.C. § 1823 note.

[69] 12 U.S.C. § 1823(c)(4)(A).

[70] *Id.*

[71] 12 U.S.C. § 1823(c)(4)(B).

[72] 12 U.S.C. § 1823(c)(4)(A).

uninsured deposit liabilities of the failed IDI if doing so does not result in greater loss to the DIF than had the IDI been liquidated.[73]

As a result of the least-cost resolution requirement, the FDIC generally has four options for resolving IDI failures: a purchase and assumption (P&A); a deposit payoff;[74] a bridge bank; or open institution assistance.[75] A P&A is the FDIC's most commonly used resolution method because it typically is the least costly to the DIF. [76] In addition to evaluating options based on the least-cost resolution requirement, the FDIC must consider the potential adverse economic effect of any resolution on the local community and the viability of other depository institutions in the same community, and issue guidelines and take certain actions to alleviate this impact.[77]

Systemic Risk Exception to the Least-Cost Resolution Requirement

The FDI Act provides one exception to the least-cost resolution requirement. The requirement may be waived to prevent systemic risk to financial stability or general economic conditions.[78] Invocation of a systemic risk waiver to the least-cost resolution standard requires that the Secretary of the Treasury, in consultation with the President and two-thirds of both the FDIC and Board of Governors of the Federal Reserve System, determines that

- complying with the least-cost resolution requirement "would have serious adverse effects on economic conditions or financial stability,"[79] and
- waiving the requirement "would avoid or mitigate such adverse effects."[80]

When the systemic risk exception is used, the FDI Act requires the FDIC to impose emergency special assessments on IDIs to cover any losses to the DIF stemming from the resulting resolution.[81]

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[73] 12 U.S.C. § 1823(c)(4)(E).

[74] A *deposit payoff* is also sometimes referred to as a *payout* or a *liquidation*. *See* CRISIS AND RESPONSE, *supra* note 35.

[75] Michael Mitchelson, *The FDIC Response to Penn Square and the Local Implementation of a National Policy*, 27 OKLA. CITY U. L. REV. 1039, 1040 (2002). *See* Buck v. F.D.I.C., 75 F.3d 1285, 1286–87 (8th Cir. 1996) ("The FDIC has a number of options for resolving a bank failure, including, but not limited to, an immediate liquidation, the sale of the failed bank, or the formation of a transition bridge bank with an eventual sale to a healthy succeeding bank.").

[76] CRISIS AND RESPONSE, at 188. *See* MBIA Ins. Corp. v. FDIC, 708 F.3d 234, 243 (11th Cir. 2013) (referring to P&A agreements as "commonly-used"); *see also In re* 604 Columbus Ave Realty Tr., 968 F.2d 1332, 1337 (1st Cir. 1992) ("'The preferred option when a bank fails, therefore, is the purchase and assumption option.'") (quoting Timberland Design, Inc. v. First Serv. Bank for Savs., 932 F.2d 46, 48 (1st Cir. 1991)).

[77] 12 U.S.C. § 1821(h).

[78] 12 U.S.C. § 1823(c)(4)(G).

[79] 12 U.S.C. § 1823(c)(4)(G)(i)(I).

[80] 12 U.S.C. § 1823(c)(4)(G)(i)(II).

[81] 12 U.S.C. § 1823(c)(4)(G)(ii)–(iv). Additionally, the Secretary of the Treasury must document the determination and the Comptroller General of the United States must review the invocation of the exception for, among other things, "the likely effect of the determination and such action on the incentives and conduct of insured depository institutions and uninsured depositors." *Id*. Section 126(c) of the Emergency Economic Stabilization Act of 2008, P.L. 110-343, amended the FDI Act to makes unenforceable certain types of contracts and agreements related to the FDIC's systemic risk exception authority. 12 U.S.C. § 1823(c)(11). The section declares unenforceable and contrary to public policy any contractual provisions that restrict the ability of any person to acquire or to offer to acquire or that prohibit a person from acquiring or offering to acquire "all or part of any insured depository institution . . . in connection with any transaction in which the [FDIC] . . . exercises its authority [with respect to systemic risk]." *Id*. The prohibition covers contractual provisions that prohibit any person from using previously disclosed information in connection with such an offer. For example, this description would apply to an agreement by which the target institution agreed to keep confidential details of the negotiation with the prospective acquirer, and an exclusivity agreement, whereby a (continued...)

The Secretary of the Treasury invoked the systemic risk exception in response to the failures of SVB and Signature Bank in 2023. The Secretary, upon the recommendation of a supermajority of both the FDIC and the Federal Reserve, waived the least-cost resolution requirement applicable to both the SVB and Signature Bank failures. In so doing, the regulators announced that the FDIC would guarantee all of the institutions' deposits, including their uninsured deposits.[82] The regulators did not make a systemic-risk determination for First Republic.

Regulators also invoked the systemic risk exception several times during the banking crisis that began in 2008, including for Wachovia Bank, Bank of America, and Citigroup.[83]

Options for Resolving IDI Failures

When an IDI fails, the institution's chartering authority revokes the banking charter, shuts down the bank, and appoints the FDIC its receiver.[84] The FDIC immediately establishes a receivership.[85] The FDIC has explained that "receivership does not end until *all* the bank's assets are sold and *all* the claims against the bank are addressed."[86] When possible, the FDIC will prepare for the IDI's failure in advance, which can involve taking steps to find an acquirer for the failed institution—a process that the FDIC refers to as "franchise marketing."[87] To market a failing institution's franchise, the FDIC uses a bidding process to determine the best and least-costly option for resolving the institution.[88] These bids include the assets and liabilities that a potential acquirer wants to purchase, along with any money it would want from the FDIC to complete the deal, which can vary depending on the value of the assets versus the liabilities proposed to be acquired, the extent to which those assets and liabilities fit within the acquiring bank's business model, and the extent of competition in the bidding process.[89] After receiving all bids, the FDIC conducts the least-cost resolution analysis.[90] This process typically results in some form of a P&A, with the FDIC generally preferring to sell the bank's assets to a healthy IDI as quickly as possible to reduce the cost and complexity of FDIC-run receivership.[91] When the FDIC is unable to find an acquirer or all proposed acquisitions would be more costly to the DIF than a deposit payoff, the FDIC usually will use a payoff.[92] Though infrequent, the FDIC may also use a

prospective acquirer secures a commitment from the target institution that it will not sell the institution to another party. An exclusivity agreement, for example, arose in the aftermath of Wachovia Bank's failure. Citigroup sued Wells Fargo, accusing it of interfering with an exclusivity agreement to purchase Washington Mutual. *See* Debra Cassens Weiss, *Citi Abandons Wachovia Bid, but Not Its Lawsuit*, ABA LAW NEWS NOW (Oct. 10, 2008). https://www.abajournal.com/news/article/citigroup_abandons_wachovia_bid_but_not_its_lawsuit. Wells Fargo ultimately paid Citi $100 million to settle the suit. Maria Aspan & Jonathan Stempel, *Update 3-Wells to pay Citi $100 mln, Ends Wachovia Lawsuits*, REUTERS (Nov. 19, 2010), https://www.reuters.com/article/citigroup-wellsfargo/update-3-wells-to-pay-citi-100-mln-ends-wachovia-lawsuits-idUSN1918939120101119.

[82] Press Release, FDIC, *Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC* (Mar. 12, 2023), https://www.fdic.gov/news/press-releases/2023/pr23017.html.

[83] CRISIS AND RESPONSE, *supra* note 35, at 68.

[84] *Id*. at 177.

[85] *Id*. at 176.

[86] *Id*.

[87] *Id*. at 177.

[88] *Id*. at 184.

[89] *Id*. at 187.

[90] *Id*.

[91] *Id*. at 179–80. *See* Langley v. FDIC, 484 U.S. 86 (1987); FDIC v. Leach, 772 F.2d 1262, 1264 (6th Cir. 1985) ("To accomplish this, the transaction must be consummated with great speed, usually overnight.").

[92] CRISIS AND RESPONSE, *supra* note 35, at 184.

bridge bank, as it did with SVB and Signature Bank, or provide open bank assistance.[93] These resolution options are discussed in turn.[94]

Regardless of the resolution option used, the FDIC must administer the receivership until "all the bank's assets and liabilities have been sold, liquidated, transferred, or otherwise passed beyond the FDIC's responsibility to care for them."[95] Until that happens, the FDIC as receiver must manage the affairs of the bank, including overseeing any agreements with an acquiring institution, servicing the loans and other assets that remain in the receivership, complying with accounting and reporting requirements, identifying and paying depositor and other claims against the failed bank, and bringing suit against officers and directors who played a role in the bank's failure, as warranted.[96]

Purchase and Assumption Agreements (P&As)

In a P&A, a healthy IDI buys some or all of the assets and assumes some or all of the liabilities of the failed institution. The FDIC will transfer the purchased assets and liabilities to the acquiring bank and manages what remains as receiver. There are several types of P&As, including the following:

- **Basic P&A**—the acquiring bank assumes insured deposits and acquires cash and cash equivalent assets of the failed bank.[97]
- **Whole bank P&A**—the acquiring bank purchases all of the failed institution's assets and assumes all of its liabilities as-is, at a discount, without the FDIC providing any guarantees or sharing in any subsequent losses experienced in the acquisition.[98]
- **Loan purchase P&A**—the acquiring bank assumes insured deposits and acquires cash, cash equivalents, and certain portions of the failed bank's loan portfolio, such as installment loans.[99] The FDIC entered into a variation of a loan purchase P&A with Flagstar Bank for Signature Bank.[100]
- **Loss sharing P&A**—the acquiring bank assumes deposits and acquires cash, cash equivalents, and other assets, with the FDIC agreeing to share some of the future losses that the acquirer may experience on those assets.[101] The FDIC

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[93] *Id*.

[94] For additional information on bank resolution options, see CRS In Focus IF10055, *Bank Failures and the FDIC*, by Raj Gnanarajah.

[95] CRISIS AND RESPONSE *supra* note 35, at 177.

[96] *Id*.

[97] *Id*. at 189.

[98] *Id*. at 190–91.

[99] *Id*. at 193–94.

[100] Press Release, FDIC, *Subsidiary of New York Community Bancorp, Inc., to Assume Deposits of Signature Bridge Bank, N.A., from the FDIC* (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23021.html.

[101] CRISIS AND RESPONSE *supra* note 35 at 191–92.

entered into loss share P&A agreements with First-Citizens for SVB[102] and with JPMorgan Chase Bank for First Republic.[103]

Deposit Payoff

If the FDIC is unable to find an acquirer for a P&A, it may decide upon a deposit payoff[104] to comply with the FDI Act's requirement that the FDIC pay insured deposits "as soon as possible" after a bank closes.[105] In such cases, the FDIC will calculate the amount of insured deposits for each customer and make those funds available to them via one of two mechanisms: (1) a *straight deposit payoff*, in which the FDIC pays depositors directly; or (2) an *insured deposit transfer*, in which the FDIC transfers deposits to a healthy institution acting as an agent of the FDIC, and the transferee IDI pays the depositors of the failed institution or allows the depositors to open new accounts with the transferee IDI.[106] The FDIC will notify customers where their funds will be available to them.[107] In a straight payoff, the checks will be written by the FDIC and available either at the closed IDI or by mail.[108] In an insured deposit transfer, the funds will be available at the transferee IDI.[109]

Less frequently, the FDIC will perform a deposit payoff through a newly chartered Deposit Insurance National Bank that temporarily provides customers access to their insured deposits in order to allow depositors time to find new banks to hold their deposit accounts.[110]

Bridge Bank

The FDIC can charter and operate a new national bank, called a *bridge bank*, to acquire the assets and assume the liabilities of a failed institution on a temporary basis as the FDIC weighs its resolution options under the least-cost resolution requirement.[111] The FDIC often uses bridge banks when resolving large, complex IDIs.[112] The FDIC used bridge banks in the resolutions of SVB and Signature Bank.[113] During the financial crisis in 2008, the FDIC also used a bridge bank

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[102] *First–Citizens Bank & Trust Company, Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., from the FDIC*, Fed. Deposit Ins. Corp. (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23023.html.

[103] *JPMorgan Chase Bank, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California*, Fed. Deposit Ins. Corp. (May 1, 2023), https://www.fdic.gov/news/press-releases/2023/pr23034.html.

[104] CRISIS AND RESPONSE *supra* note 35, at 184.

[105] 12 U.S.C. § 1821(f)(1).

[106] FDIC, *When a Bank Fails - Facts for Depositors, Creditors, and Borrowers*, https://www.fdic.gov/consumers/banking/facts/payment.html (last updated July 27, 2010).

[107] *Id*.

[108] FDIC, *Resolution Handbook*, 94, https://www.fdic.gov/bank/historical/reshandbook/glossary.pdf.

[109] *Id*. at 92.

[110] CRISIS AND RESPONSE *supra* note 35, at 177.

[111] 12 U.S.C. § 1821(n). *See also* FDIC, *Resolution Handbook*, 90, https://www.fdic.gov/bank/historical/reshandbook/glossary.pdf.

[112] CRISIS AND RESPONSE *supra* note 35, at 182, 196–97.

[113] Press Release, FDIC, *FDIC Acts to Protect All Depositors of the former Silicon Valley Bank, Santa Clara, California*, Fed. Deposit Ins. Corp. (Mar. 13, 2023), https://www.fdic.gov/news/press-releases/2023/pr23019.html; Press Release, FDIC, *FDIC Establishes Signature Bridge Bank, N.A., as Successor to Signature Bank, New York, NY*, Fed. Deposit Ins. Corp. (Mar. 13, 2023), https://www.fdic.gov/news/press-releases/2023/pr23018.html.

to resolve IndyMac, F.S.B., which at the time was the most expensive bank failure in FDIC history, costing the DIF more than $12 billion.[114]

Open Institution Assistance

Section 13(c) of the FDI Act provides the FDIC with discretion, subject to the least-cost resolution requirement,[115] to provide assistance to an institution to prevent default, to restore an institution in default to normal operations, or to deal with conditions that threaten the stability of "a significant number of IDIs or of IDIs possessing significant financial resources."[116] This open institution assistance, which is designed either to aid a merger or to keep the troubled institution or institutions from failing, may take the form of FDIC loans, guarantees, asset acquisitions, or liability assumptions.[117] When the FDIC provides open institution assistance, it often requires a change in bank management and dilution of shareholders' interests in the institution.[118] Before the FDIC can provide open institution assistance, the FDIC and the IDI's primary federal regulator must determine that, prior to the IDI's deterioration, its managers were competent, complied with all banking laws and regulations, and did not engage in abusive activity like insider trading.[119]

Claims Process as Receiver

Overview

As receiver of a failed IDI, the FDIC is responsible for settling claims against the institution. The FDIC settles creditors' claims using proceeds from the sale and liquidation of the institution's assets to the extent that funds are available after paying insured depositors. The FDIC's liability to creditors is limited to what each would have received had the FDIC liquidated the institution.[120] Creditors are notified that they must present their claims within a certain time, which may not be less than 90 days from the date of the notice.[121] Within 180 days of receiving a claim, the FDIC must notify the claimant whether or not it will allow the claim.[122] The FDIC has authority to disallow claims "not proved to the satisfaction of the receiver."[123] When a claim has been disallowed, the claimant has 60 days to seek administrative[124] or judicial review or the FDIC's disallowance decision is final.[125]

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[114] CRISIS AND RESPONSE *supra* note 35, at 182.

[115] 12 U.S.C. § 1823(c)(4).

[116] 12 U.S.C. § 1823(c)(1)(A)–(C).

[117] 12 U.S.C. § 1823(c)(1)–(2).

[118] FDIC, *Resolution Handbook*, 96, https://www.fdic.gov/bank/historical/reshandbook/glossary.pdf.

[119] 12 U.S.C. § 1823(c)(8).

[120] 12 U.S.C. § 1821(i)(2).

[121] 12 U.S.C. § 1821(d)(3)(B). Creditors who are suing the institution are also subject to this requirement to provide the FDIC with notice and proof of their claim, giving the FDIC the opportunity to seek a stay of the proceeding under 12 U.S.C. § 1821(d)(12).

[122] 12 U.S.C. § 1821(d)(5)(A)(i).

[123] 12 U.S.C. § 1821(d)(5)(D)(i).

[124] 12 U.S.C. § 1821(d)(7)(A). Administrative review is subject to the judicial review provisions of the federal Administrative Procedure Act (APA), meaning that final agency action may be appealed on grounds specified in that law. 5 U.S.C. §§ 701–706. *See* Miller v. FDIC, 738 F.3d 836, 841 (7th Cir. 2013) ("One option is to request further administrative review of the claim. A claimant who follows this route may, if unsuccessful or only partially successful, seek judicial review after the extra round of administrative process is complete.") (citation omitted).

[125] 12 U.S.C. § 1821(d)(6)(A). *See* FDIC v. Estrada-Rivera, 722 F.3d 50, 54 (1st Cir. 2013).

Payment of Claims and Priority of Claimants

The FDI Act specifies the order in which claims are paid from the funds generated by a failed IDI's liquidation in receivership.[126] The FDI Act imposes a depositor preference, which means that depositors' claims have priority over all other unsecured claims, except those involving administrative expenses of the receivership.[127] Secured claims, including advances from a federal home loan bank and loans from the Federal Reserve's discount window, take precedence over any unsecured claims.[128] The FDIC pays secured claims up to the value of the security and treats any liability beyond what is secured as an unsecured claim.[129] The statute establishes the priority for other classes of unsecured creditors, with shareholder claims at the bottom.

The statute specifies the following priority:[130]

- secured claims;
- administrative expenses of the receivership;
- insured deposit liabilities;
- uninsured deposit liabilities;
- any other general or senior liability;
- any obligation subordinated to depositors or general creditors that is not an obligation owed to shareholders as shareholders;
- obligations owed to shareholders arising as a result of their status as shareholders.[131]

Agreements Against the Interests of the FDIC

The FDIC as receiver may defeat claims against its interest in assets it has acquired in a receivership or through open institution assistance.[132] To prevail on a claim that might defeat or diminish the FDIC's interest in such an asset, the claimant must show that there was a written

[126] Slattery v. United States, 583 F.3d 800, 825 (Fed. Cir. 2009) ("Section 1821(d) establishes the priority of distribution of funds held by the receiver for an insured institution."), *vacated en banc*, 369 F. App'x 142 (Fed. Cir. 2010). State law is preempted to the extent that the FDIC determines the state law is inconsistent with the applicable federal law, subject to judicial review under the judicial review provisions of the federal APA. 12 U.S.C. § 1821(d)(11)(B). The judicial review provisions of the APA are found at 5 U.S.C. §§ 702–706.

[127] 12 U.S.C. § 1821(d)(11).

[128] 12 U.S.C. § 1821(d)(11)(A).

[129] *Id.*

[130] *Id.*; 12 C.F.R. § 360.3.

[131] 12 U.S.C. § 1821(d)(11)(A)(i)–(v). FDIC regulations establish prioritization of these claims in greater granularity. 12 C.F.R. § 360.3.

[132] This authority is described as a "superpower"—a term used to describe the tools available to the FDIC to deal with insolvent IDIs, stemming from long-standing judicial decisions and legislation enacted following the savings and loan crisis of the 1980s. These powers, in some respect, exceed the authority of a bankruptcy court. They include the power to reorganize the institution, to sell its assets, and repudiate certain claims, with little judicial oversight. *See, e.g.*, Thomas C. Baxter, Jr., et al., *Two Cheers for Territoriality: An Essay on International Bank Insolvency Law*, 78 Am. Bankr. L. J. 57, 72 (2004); Robert W. Norcross, Jr., *The Bank Insolvency Game: FDIC Superpowers, the D'Oench Doctrine, and Federal Common Law*, 103 Banking L. J. 316, 328 (1986); Fred Galves, *Might Does Not Make Right: The Call for Reform of the Federal Government's D'Oench, Duhme and 12 U.S.C. 1823(e) Superpowers in Failed Bank Litigation*, 80 Minn. L. Rev. 1323 (1996); Robert W. Norcross, Jr., *The Bank Insolvency Game: FDIC Superpowers, the D'Oench Doctrine, and Federal Common Law*, 103 Banking L. J. 316, n.137 (1986).

agreement, executed contemporaneously with the IDI's acquisition of the assets, approved by the IDI's board of directors or its loan committee, and continuously reflected on the IDI's books.[133]

Statutes of Limitation Applicable to Conservatorships and Receiverships

Special statutes of limitation apply to actions brought by the FDIC as conservator or receiver.[134] For contract actions, the statute of limitations begins on the longer of the six-year period beginning on the date the claim accrues or the period applicable under state law. For tort claims, the statute of limitations is three years, unless state law provides a longer time frame.[135]

Officer and Director Liability

Pursuant to a provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the FDIC, as receiver, may hold officers and directors of a failed IDI personally liable for civil monetary damages.[136] This provision established a federal fiduciary standard of care for bank officers and directors.[137] Prior to the enactment of FIRREA, which Congress passed in response to the savings and loan crisis of the 1980s, bank officers and directors were subject to varying state corporate duties of care to the institutions they served.[138] The FIRREA provision, codified at 12 U.S.C. § 1821(k), changed the relevant framework by establishing a statutory duty of care applicable to officers and directors of failed IDIs.[139]

The FDIC explains that the duty of care generally means that officers and directors are obligated to monitor the bank's activities and employees; to be informed of all material facts and circumstances when making decisions for the bank; and to ensure that bank decisions further a legitimate business purpose.[140] The stringency of these duties, however, is often tempered in practice by the "business judgment rule," which can shield officers and directors from liability for

[133] 12 U.S.C. § 1823(e). To some extent, this codifies and expands upon the common law doctrine emanating from the Supreme Court's decision in *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942). Under the holding of that case, the FDIC's actions to collect on notes may not be defeated by defenses based on secret side agreements. Subsequently, the doctrine has been extended to cover "innocent understandings about regular bank transactions that were never recorded," as well as fraudulent arrangements. Fisher *supra* note 42 § 16.04[1]. There also are statutory exemptions from the contemporaneous execution requirement—agreements lawfully collateralizing deposits or other loans by governmental entities, bankruptcy estate funds, extensions of credit from Federal Home Loan Banks and Federal Reserve Banks and "qualified financial contracts." 12 U.S.C. § 1823(e)(2).

[134] 12 U.S.C. § 1821(d)(14). The FDI Act also expressly provides the following specific authorities: use private-sector services if available and most cost effective, 12 U.S.C. § 1821(d)(2)(K); obtain temporary stays of judicial actions in which the IDI is or becomes a party, 12 U.S.C. § 1821(d)(12); exercise rights of the IDI with respect to any appealable judgment, including removal to federal court, 12 U.S.C. § 1821(d)(13); contract with state housing finance authorities to sell mortgage-related assets of a defaulting IDI without having to secure any other approval, assignment, or consent, 12 U.S.C. § 1821(d)(16); obtain court-ordered attachment, that is, an asset freeze, of any of the assets acquired or liabilities assumed by the FDIC as conservator or receiver, 12 U.S.C. § 1821(d)(18).

[135] *Id.* There is also a provision authorizing the FDIC to revive tort claims subject to a state statute of limitation if the claim has expired not more than five years before appointment of a conservator or receiver. 12 U.S.C. § 1821(d)(14)(C).

[136] P.L. 101-73, § 212(a), 103 STAT. 243 (Aug. 9, 1989).

[137] 12 U.S.C. § 1821(k).

[138] Atherton v. FDIC, 519 U.S. 213, 217 (1997).

[139] FIRREA § 212(a), 103 Stat. 183, 243 (codified at 12 U.S.C. § 1821(k)).

[140] *Id*.

bad business decisions—i.e., exercising poor judgment—as long as those decisions are rational and made in good faith, with full information, and absent conflicts of interest.[141]

Under 12 U.S.C. § 1821(k), the FDIC, as receiver of a failed IDI, may hold officers and directors personally liable for civil monetary damages for "gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct," as defined by state law.[142] The provision concludes with a savings clause that states that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law."[143]

The meaning of this provision was litigated in the 1990s.[144] Some bank personnel argued that FIRREA established a uniform federal standard of gross negligence for directors and officers of failed banks.[145] The FDIC, in contrast, contended that the provision authorized, at a minimum, claims of gross negligence, but also any lower standard that might be applicable under state law.[146]

The Supreme Court ultimately sided with the FDIC in the 1997 decision *Atherton v. FDIC*.[147] Relying largely on the provision's savings clause, the Court held that §1821(k) establishes a gross negligence floor, but also allows the FDIC to pursue claims against bank officers and directors under less stringent standards, such as simple negligence, when permitted under applicable state law.[148]

As a result, the standards for bank officer and director liability vary state by state. These standards generally range from simple negligence (i.e., what a reasonably prudent person with similar experience would do in similar circumstances) to gross negligence (i.e., a heightened standard often requiring recklessness or willful indifference).[149] Some states have also adopted various intermediate standards that apply in certain circumstances.

The FDIC has used its § 1821(k) authority extensively. Since the 2008 financial crisis, the FDIC has filed dozens of lawsuits and entered into nearly 1,000 settlement agreements with officers, directors, and other professionals related to losses suffered by failed IDIs.[150] These actions have led to recoveries totaling more than $4 billion.[151]

The FDIC has noted, however, that it "will not bring civil suits against directors and officers who fulfill their responsibilities . . . and who make reasonable business judgments on a fully informed

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[141] Julie Andersen Hill & Douglas K. Moll, *The Duty of Care of Bank Directors and Officers*, 68 Ala. L. Rev. 965, 978–79 (2017).

[142] *Id.*

[143] *Id.*

[144] Hill & Moll, *supra* note 141, at 995.

[145] *Id.*

[146] *Id.*

[147] 519 U.S. 213, 213 (1997).

[148] *Id.* at 216.

[149] *See Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[150] *Professional Liability Program Lawsuits*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/resources/resolutions/professional-liability/lawsuits.html (last updated May 22, 2023); *Professional Liability Settlement Agreements*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/foia/plsa/index.html (last accessed Aug. 17, 2023).

[151] *Professional Liability Program*, FED. DEPOSIT INS. CORP. (June 3, 2022), https://www.fdic.gov/resources/resolutions/professional-liability/.

basis and after proper deliberation."[152] The FDIC has stated that it largely brings personal liability cases against the officers and directors of failed banks in the following situations:

- dishonest conduct;[153]
- inappropriate transactions with bank insiders;[154]
- failure to establish, follow, or monitor sound underwriting policies and procedures;[155] and
- failure to respond to concerns raised by regulators, accountants, counsel, or other professionals.[156]

Considerations for Congress

The failures of SVB, Signature Bank, and First Republic sparked debate among policymakers about how IDIs are managed and supervised for safety and soundness to avoid failure, as well as how they are resolved by the FDIC when they become insolvent. The regional bank failures of 2023 have prompted a regulatory review by the Fed Board,[157] multiple congressional hearings,[158] the introduction of several legislative proposals by Members of Congress,[159] and calls for congressional action by President Biden.[160]

The Fed Board, SVB's primary federal regulator, conducted a review of SVB's collapse and issued a public report of its findings.[161] The Board reached four broad conclusions: (1) the bank's officers and directors failed to manage effectively interest rate and liquidity risks; (2) the Federal Reserve failed to gauge correctly SVB's stability in the wake of the institution's swift growth in size and complexity in the months preceding its failure; (3) once Federal Reserve supervisors realized SVB's vulnerabilities, they failed to force SVB to rectify its weaknesses quickly enough; and (4) the Federal Reserve's decision to eliminate enhanced prudential regulation of bank holding companies with $100 billion to $250 billion in assets in response to enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) "impeded

[152] FED. DEPOSIT INS. CORP., Statement Concerning the Responsibilities of Bank Directors and Officers 2 (Dec. 3, 1992), https://www.fdic.gov/regulations/laws/rules/responsibilities-bank-directors-officers.pdf.

[153] *Id*.

[154] *Id*. at 3.

[155] *Id*.

[156] *Id*.

[157] FED. RSRV., *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank* (Apr. 28, 2023).

[158] Press Release, H. Comm. on Fin. Servs. and Accountability, Hearing Wrap Up: Silicon Valley Bank Collapse is a 'Case of Failed Supervision' (May 25, 2023), https://oversight.house.gov/release/hearing-wrap-up-silicon-valley-bank-collapse-is-a-case-of-failed-supervision/; Press Release, S. Comm. on Banking, Hous., and Urb. Dev., Brown Advances Bipartisan Bills to Hold Bank Executives Accountable and Curb the Flow of Deadly Fentanyl into Communities (June 21, 2023), https://www.banking.senate.gov/newsroom/majority/brown-advances-bipartisan-bills-hold-bank-executives-accountable-curb-flow-deadly-fentanyl-into-communities.

[159] *See infra* notes 168–73 and surrounding text.

[160] Press Release, White House, FACT SHEET: President Biden Urges Congressional Action to Strengthen Accountability for Senior Bank Executives (Mar. 17, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/fact-sheet-president-biden-urges-congressional-action-to-strengthen-accountability-for-senior-bank-executives/.

[161] FED. RSRV., *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank* (Apr. 28, 2023).

effective supervision [of SVB] by reducing standards, increasing complexity, and promoting a less assertive supervisory approach."[162]

The FDIC conducted a similar review of Signature Bank.[163] The FDIC determined that poor management was the "root cause" of Signature's failure, but that it was precipitated by contagion stemming from the failures of both SVB and Silvergate Bank, another California-based bank that closed two days before SVB.[164] The FDIC noted that it had taken a number of supervisory actions to address potential safety and soundness concerns involving Signature, but that it could have escalated regulatory actions and issued supervisory reports sooner and communicated concerns with bank management more effectively.[165]

Following the release of the FDIC's and Fed Board's reports, the Senate Banking Committee and a subcommittee of the House Financial Services Committee each held hearings on the bank failures. Members expressed concerns about mistakes made by federal bank supervisors,[166] as well as the lack of accountability for officers and directors who were compensated handsomely despite their mismanagement possibly playing a role in the bank failures.[167]

The 118th Congress is considering multiple bills designed to increase bank safety and soundness regulations and to strengthen the FDIC's receivership powers. These bills include the RECOUP Act,[168] the Failed Executives Clawback Act (FECA),[169] the Failed Bank Executives Clawback Act,[170] the Protecting Consumers from Bailouts Act,[171] the Deliver Executive Profits on Seized Institutions to Taxpayers (DEPOSIT) Act,[172] and the Secure Viable Banking (SVB) Act.[173] Many of these bills would strengthen the FDIC's authority to claw back officer and director compensation after a bank failure.[174] Other proposals would impose corporate governance responsibilities on banks and strengthen the FDIC's authority to prohibit bank executives from participating in the business of banking due to misconduct. The Biden Administration has also urged Congress to pass legislation that would make it easier for regulators to hold executives of failed banks accountable.

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162 P.L. 115-174, 132 Stat. 1296 (2018).

163 Fed. Deposit Ins. Corp., *FDIC's Supervision of Signature Bank* (Apr. 28, 2023).

164 *Id*. at 7.

165 *Id*. at 17.

166 Press Release, H. Comm. on Fin. Servs. and Accountability, Hearing Wrap Up: Silicon Valley Bank Collapse is a 'Case of Failed Supervision' (May 25, 2023), https://oversight.house.gov/release/hearing-wrap-up-silicon-valley-bank-collapse-is-a-case-of-failed-supervision/.

167 Press Release, S. Comm. on Banking, Hous., and Urb. Dev., Brown Advances Bipartisan Bills to Hold Bank Executives Accountable and Curb the Flow of Deadly Fentanyl into Communities (June 21, 2023), https://www.banking.senate.gov/newsroom/majority/brown-advances-bipartisan-bills-hold-bank-executives-accountable-curb-flow-deadly-fentanyl-into-communities. *See also* CRS Legal Sidebar LSB10946, *Silicon Valley Bank's Failure and Potential Director/Officer Liability*, by David H. Carpenter and Jay B. Sykes.

168 S. 2190, 118th Cong. § 2 (2023).

169 S. 1790, 118th Cong. (2023).

170 S. 1045, 118th Cong. (2023).

171 S. 825, 118th Cong. (2023).

172 S. 800, 118th Cong. (2023).

173 S. 817, 118th Cong. (2023).

174 Press Release, White House, FACT SHEET: President Biden Urges Congressional Action to Strengthen Accountability for Senior Bank Executives (Mar. 17, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/fact-sheet-president-biden-urges-congressional-action-to-strengthen-accountability-for-senior-bank-executives/.

The RECOUP Act would, among other things, authorize the FDIC to claw back compensation of senior executives who are responsible for the failed condition of an IDI or IDI holding company with assets of $10 billion or more.[175] The clawback authority would apply to compensation earned in the two years prior to the institution's failure.[176] The RECOUP Act would also require IDIs and their holding companies to adopt governance and accountability standards in their bylaws or other governing documents that promote safety and soundness, responsiveness to supervisory matters, and responsible management.[177] The Act would also add a new civil money penalty for senior executives who recklessly engage in unsafe or unsound practices or certain other covered activity.[178] The Senate Banking Committee favorably reported the RECOUP Act to the full Senate by a 23-2 vote.[179]

FECA would provide the FDIC clawback authority similar to that in the RECOUP Act, but it would provide a longer three-year lookback period[180] and would apply to officers, directors, controlling shareholders, and certain other covered parties who "cause more than a minimal financial loss to, or a significant adverse effect on," an IDI with more than $10 billion in assets.[181]

The Failed Bank Executives Clawback Act would provide the FDIC as receiver the same clawback authority as would be provided by FECA. However, the Failed Bank Executives Clawback Act would also amend the clawback authorities available under the FDIC's Orderly Liquidation Authority (OLA) to apply to IDI receiverships.[182] Title II of the Dodd-Frank Act establishes the FDIC's OLA for resolving nondepository financial companies if certain statutory prerequisites involving systemic risk are satisfied.[183] An OLA provision, codified at 12 U.S.C. § 5390(s), provides the FDIC with the authority to recover compensation paid to senior executives and directors during the prior two years if such persons are determined to be "substantially responsible" for a company's failure. FDIC regulations implementing this authority adopt a rebuttable presumption that certain executives and directors—including a firm's chairman, chief executive officer, president, and chief financial officer—are "substantially responsible" for a firm's failure.[184]

The Protecting Consumers from Bailouts Act would empower the FDIC to claw back any incentive-based compensation paid to an officer of a failed bank in the year preceding the FDIC's appointment as receiver.[185]

Adopting an alternative approach, the DEPOSIT Act would apply a 90% tax rate for bonuses paid to senior executives of a failed bank within the 60 days before the FDIC's appointment as conservator or receiver.[186] The bill would also apply a 100% tax rate on the profits of senior

[175] S. 2190, § 3.

[176] *Id.*

[177] *Id.* § 3.

[178] *Id.* § 5.

[179] *Id.*

[180] *Compare* S. 1790, § 2 *with* S. 2190, § 3.

[181] S. 1790, § 2.

[182] S. 1045, § 3.

[183] 12 U.S.C. § 5383.

[184] 12 C.F.R. § 380.7.

[185] S. 825, § 3.

[186] S. 800, § 3(k). The bill would only apply to senior executives who earned more than $250,000 in gross adjusted income during the taxable year.

executives of a failed bank from any transactions in the bank's securities within the 60 days prior to the FDIC's appointment.[187]

The SVB Act does not contain a clawback provision.[188] Rather, the bill would repeal Title IV of EGRRCPA,[189] which eliminated mandatory enhanced prudential regulations for bank holding companies with assets between $50 billion and $100 billion.[190]

In addition to the policies proposed in the aforementioned bills, Congress could consider strengthening the FDIC's authority under 12 U.S.C. § 1821(k) to obtain damages from officers and directors of failed banks. As discussed, this FIRREA provision establishes a federal floor of gross negligence for FDIC actions seeking damages from bank officers and directors.[191] Less stringent burdens may apply, however, based on governing state law. To respond to accountability concerns raised by recent bank failures, Congress could consider reducing the federal standard from a floor of gross negligence to simple negligence.

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[187] *Id.*

[188] S. 817.

[189] *Id.* § 2.

[190] P.L. 115-174 §§ 401–403.

[191] 12 U.S.C. § 1821(k).