

103D CONGRESS
1ST SESSION

H. R. 3661

To amend the Federal Deposit Insurance Act to clarify the due process protections applicable to directors and officers of insured depository institutions and other institution-affiliated parties, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 22, 1993

Mr. MCCOLLUM (for himself, Mr. LEWIS of California, Mr. SAM JOHNSON of Texas, Mr. LINDER, Mr. BACHUS of Alabama, Mr. GRAMS, Mr. McCREADY, Mr. THOMAS of Wyoming, Mr. McCANDLESS, and Mr. CASTLE) introduced the following bill; which was referred to the Committee on Banking, Finance and Urban Affairs

A BILL

To amend the Federal Deposit Insurance Act to clarify the due process protections applicable to directors and officers of insured depository institutions and other institution-affiliated parties, and for other purposes.

1 *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Lending Enhancement
5 Through Necessary Due Process Act”.

1 **SEC. 2. FINDINGS.**

2 The Congress hereby finds the following:

3 (1) Excessive and groundless litigation against
4 innocent directors and officers of failed financial in-
5 stitutions is adversely affecting the national economy
6 by creating an environment where bankers are reluc-
7 tant to make loans.

8 (2) The efforts by Federal banking regulators
9 to impose liability on bank officials for good faith
10 business decisions is impeding our banking system
11 by making it difficult for financial institutions to at-
12 tract officers and directors.

13 (3) Since 1989, Federal regulators have used
14 enhanced powers to pursue not only culpable individ-
15 uals but also countless innocent people who are tar-
16 geted because of their financial condition.

17 (4) Tactics used by regulators to induce settle-
18 ments include the threat of attachment of assets and
19 the use of taxpayer-funded outside fee counsel to file
20 lawsuits, the costs of which often bankrupt individ-
21 uals trying to clear their names.

22 (5) Reform of the banking laws are needed to
23 curtail regulatory abuse and to ensure that directors
24 and officers have due process protections and the
25 ability to make good faith lending decisions.

1 **SEC. 3. FACTORS AND STANDARDS FOR CERTAIN ENFORCE-**
2 **MENT PROCEEDINGS.**

3 Section 8(i) of the Federal Deposit Insurance Act (12
4 U.S.C. 1818) is amended by adding at the end the follow-
5 ing new paragraphs:

6 “(5) AFFIRMATIVE DEFENSES APPLICABLE
7 WITH RESPECT TO CERTAIN ADMINISTRATIVE AND
8 JUDICIAL PROCEEDINGS.—In the determination of
9 whether any director, officer, or institution-affiliated
10 party of an insured depository institution has com-
11 mitted any violation or breach of duty for purposes
12 of this section or section 11(k), the following affirm-
13 ative defenses shall be available to the director, offi-
14 cer, or institution-affiliated party in any civil action
15 against the director, officer, or party before a Fed-
16 eral banking agency or a court of jurisdiction:

17 (A) BUSINESS JUDGMENT.—A director, of-
18 ficer, or institution-affiliated party of an in-
19 sured depository institution shall not be deemed
20 to have committed any violation or breach of
21 duty in the making of any business judgment
22 (without regard to whether such business judg-
23 ment is later determined to have been in error),
24 if—

25 (i) in a case in which the director, of-
26 ficer, or institution-affiliated party had an

1 interest in the subject of the business judg-
2 ment, the director, officer, or party—

3 (I) disclosed that interest at or
4 before the time the business judgment
5 was made; or

6 (II) abstained from any vote
7 taken in connection with such busi-
8 ness judgment or from otherwise par-
9 ticipating in making the business
10 judgment;

11 (ii) at or before the time the business
12 judgment was made, the director, officer,
13 or institution-affiliated party made such
14 inquiry about the subject of the business
15 judgment as a reasonably prudent person
16 would have made under the circumstances;

17 (iii) after being put on reasonable no-
18 tice of a need to act, the director, officer,
19 or institution-affiliated party took such ac-
20 tions as a reasonably prudent person would
21 have taken under the circumstances; and

22 (iv) the director, officer, or institu-
23 tion-affiliated party acted in good faith.

24 (B) REGULATORY APPROVAL.—A director,
25 officer, or institution-affiliated party of an in-

1 sured depository institution shall not be deemed
2 to have committed any violation or breach of
3 duty if any examiner or other representative of
4 an appropriate Federal banking agency or State
5 bank supervisor, upon full and accurate disclo-
6 sure of the relevant facts, approved the good
7 faith practice, action, or omission which is al-
8 leged to be the violation or breach, whether or
9 not such approval was communicated to the di-
10 rector, officer, or institution-affiliated party or
11 any other person at such institution.

12 (C) UNFORESEEABLE ECONOMIC CONDI-
13 TIONS.—A director, officer, or institution-affili-
14 ated party of an insured depository institution
15 shall not be deemed to have committed any vio-
16 lation or breach of duty if—

- 17 (i) unforeseeable economic conditions,
18 which develop after the occurrence of the
19 practice, action, or omission which is al-
20 leged to be a violation or breach, were the
21 proximate cause of any loss experienced by
22 the institution; and
- 23 (ii) the director, officer, or institution-
24 affiliated party acted in good faith.

1 “(6) MINIMUM STANDARD FOR ORDER OF PRO-
2 DUCTION OF PERSONAL FINANCIAL INFORMATION.—

3 “(A) IN GENERAL.—Except as provided in
4 subparagraph (B), a Federal banking agency,
5 including the Resolution Trust Corporation in
6 such corporation’s capacity as conservator or
7 receiver of an insured depository institution,
8 may not seek to obtain, directly or indirectly,
9 and no court (with respect to any request from
10 any such agency or corporation) may order the
11 production of, the personal financial records of
12 any person for the agency unless the head of
13 the agency or corporation (or the designee of
14 the head of the agency or corporation), submits
15 a written finding which is disclosed to such per-
16 son and certified to an appropriate court of ju-
17 risdiction, and the court through a de novo
18 finding determines, that the agency has reason-
19 able cause to believe that—

20 “(i) the person whose records are
21 being sought has committed a violation for
22 which a civil penalty may be imposed
23 under paragraph (2) or has breached a
24 duty owed to an insured depository institu-
25 tion; and

1 “(ii) the person’s financial condition is
2 undergoing or is likely, within 6 months of
3 the date of the request for the production
4 of financial records, to undergo a material
5 change.

6 “(B) EXCEPTION.—Subparagraph (A)
7 shall not apply with respect to a request for the
8 production of financial records by an appro-
9 priate Federal banking agency of any person—

10 “(i) in connection with an investiga-
11 tion of the person by the agency pursuant
12 to section 7(j); or

13 “(ii) after an administrative or judi-
14 cial determination, on a record after oppor-
15 tunity for agency hearing, that the person
16 has committed a violation for which a civil
17 penalty may be assessed under paragraph
18 (2).”.

19 **SEC. 4. DUE PROCESS PROTECTIONS RELATING TO AT-**
20 **TACHMENT OF ASSETS.**

21 Section 8 of the Federal Deposit Insurance Act (12
22 U.S.C. 1818) is amended—

23 (1) by striking subsection (i)(4)(B) and insert-
24 ing the following new subparagraph:

25 “(B) STANDARD.—

1 “(i) SHOWING.—Rule 65 of the Fed-
2 eral Rules of Civil Procedure shall apply
3 with respect to any proceeding under sub-
4 paragraph (A).

5 “(ii) STATE PROCEEDING.—If, in the
6 case of any proceeding in a State court,
7 the court determines that rules of civil pro-
8 cedure available under the laws of such
9 State provide substantially similar protec-
10 tions to such party’s right to due process
11 as Rule 65 of the Federal Rules of Civil
12 Procedure, the relief sought under sub-
13 paragraph (A) may be requested under the
14 laws of such State.”; and

15 (2) in subsection (b), by adding at the end the
16 following new paragraph:

17 “(10) STANDARD FOR CERTAIN ORDERS.—No
18 authority under this subsection or subsection (c) to
19 prohibit any institution-affiliated party from with-
20 drawing, transferring, removing, dissipating, or dis-
21 posing of any funds, assets, or other property may
22 be exercised unless the agency meets the standards
23 of Rule 65 of the Federal Rules of Civil Procedure.”.

1 **SEC. 5. DIRECTOR AND OFFICER LIABILITY.**

2 Section 11(k) of the Federal Deposit Insurance Act
3 (12 U.S.C. 1821(k)) is amended by adding at the end the
4 following new sentence: “Notwithstanding the preceding
5 sentence, a civil action for monetary damages for losses
6 due to a disregard of a duty of care may not be brought
7 against any director or officer of any insured depository
8 institution by the Corporation in any capacity described
9 in clause (1), (2), or (3) of the 1st sentence of this sub-
10 section under any provision of State law, unless the stand-
11 ard of disregard required to be demonstrated under such
12 provision of law is as great or greater than the standard
13 described in the 1st sentence.”.

