

§ 391.40

(b) The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA's *Flood Insurance Rate Map* or the *Flood Hazard Boundary Map* for the following community: _____. This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

(c) Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

(d) The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

- Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.

- At a minimum, flood insurance purchased must cover *the lesser of*:

- (1) The outstanding principal balance of the loan; *or*

- (2) The maximum amount of coverage allowed for the type of property under the NFIP.

(e) Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

- Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community's participation in the NFIP is in accordance with NFIP requirements.

(f) Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

Subpart E—Acquisition of Control of State Savings Associations

§ 391.40 Scope of subpart.

The purpose of this subpart is to implement the provisions of the Change in Bank Control Act, 12 U.S.C. 1817 (j) ("Control Act"), relating to acquisitions and changes in control of State savings associations that are organized in stock form.

§ 391.41 Definitions.

As used in this subpart and in the forms under this subpart, the following definitions apply, unless the context otherwise requires:

Acquire when used in connection with the acquisition of stock of a State savings association means obtaining ownership, control, power to vote, or sole power of disposition of stock, directly or indirectly or through one or more transactions or subsidiaries, through purchase, assignment, transfer, exchange, succession, or other means, including:

- (1) An increase in percentage ownership resulting from a redemption, repurchase, reverse stock split or a similar transaction involving other securities of the same class, and

- (2) The acquisition of stock by a group of persons and/or companies acting in concert which shall be deemed to occur upon formation of such group: *Provided*, That an investment advisor shall not be deemed to acquire the voting stock of its advisee if the advisor:

- (i) Votes the stock only upon instruction from the beneficial owner, and
- (ii) Does not provide the beneficial owner with advice concerning the voting of such stock.

Acquiror means a person or company.

Acting in concert means:

- (1) Knowing participation in a joint activity or interdependent conscious parallel action towards a common goal whether or not pursuant to an express agreement, or

- (2) A combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement or other arrangement, whether written or otherwise.

Federal Deposit Insurance Corporation

§ 391.41

(3) A person or company which acts in concert with another person or company ("other party") shall also be deemed to be acting in concert with any person or company who is also acting in concert with that other party, except that any tax-qualified employee stock benefit plan as defined in 12 CFR 192.25 will not be deemed to be acting in concert with its trustee or a person who serves in a similar capacity solely for the purpose of determining whether stock held by the trustee and stock held by the plan will be aggregated.

Affiliate means any person or company which controls, is controlled by or is under common control with a person, State savings association, or company.

Company means any corporation, partnership, trust, association, joint venture, pool, syndicate, unincorporated organization, joint-stock company or similar organization, as defined in the definition of *similar organization* in this section; but a company does not include:

(1) The FDIC or any Federal Home Loan Bank, or

(2) Any company the majority of shares of which is owned by:

(i) The United States or any State;

(ii) An officer of the United States or any State in his or her official capacity;

(iii) An instrumentality of the United States or any State; or

(iv) A savings and loan holding company registered under section 10(b) of the Home Owners' Loan Act.

Controlling shareholder means any person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of his or her immediate family, owns, controls, or holds with power to vote 10 percent or more of the voting stock of a company or controls in any manner the election or appointment of a majority of the company's board of directors.

Immediate family means a person's spouse, father, mother, children, brothers, sisters and grandchildren; the father, mother, brothers, and sisters of the person's spouse; and the spouse of the person's child, brother or sister.

Management official means any president, chief executive officer, chief oper-

ating officer, vice president, director, partner, or trustee, or any other person who performs or has a representative or nominee performing similar policymaking functions, including executive officers of principal business units or divisions or subsidiaries who perform policymaking functions, for a State savings association or a company, whether or not incorporated.

Person means an individual or a group of individuals acting in concert who do not constitute a *company* as defined in this section.

Repealed Control Act means the Change in Savings and Loan Control Act, 12 U.S.C. 1730(q), as in effect immediately prior to its repeal by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

Similar organization for purposes *company* as defined in this section means a combination of parties with the potential for or practical likelihood of continuing rather than temporary existence, where the parties thereto have knowingly and voluntarily associated for a common purpose pursuant to identifiable and binding relationships which govern the parties with respect to either:

(1) The transferability and voting of any stock or other indicia of participation in another entity, or

(2) Achievement of a common or shared objective, such as to collectively manage or control another entity.

State savings association means a state-chartered savings association, building and loan, savings and loan or homestead association or a cooperative bank (other than a cooperative bank described in 12 U.S.C. 1813(a)(2)) the deposits of which are insured by the FDIC, and any corporation (other than a bank) the deposits of which are insured by the FDIC that the FDIC determines to be operating in substantially the same manner as a State savings association.

Stock means common or preferred stock, general or limited partnership shares or interests, or similar interests.

Uninsured institution means any financial institution the deposits of which are not insured by the FDIC.

Voting stock means:

§ 391.42

12 CFR Ch. III (1–1–14 Edition)

(1) Common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interests, by statute, charter or in any manner, entitle the holder:

(i) To vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing State savings association or company); or

(ii) To vote or to direct the conduct of the operations or other significant policies of the issuer.

(2) Notwithstanding anything in this definition, preferred stock, limited partnership shares or interests, or similar interests are not *voting stock* if:

(i) Voting rights associated with the stock, shares or interests are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preference of the stock, security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the stock, security or interest, the dissolution of the issuer, or the payment of dividends by the issuer when preferred dividends are in arrears;

(ii) The stock, shares or interests represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuer; and

(iii) The stock, shares or interests do not at the time entitle the holder, by statute, charter, or otherwise, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuer;

(3) Notwithstanding anything in this definition, *voting stock* shall be deemed to include stock and other securities that, upon transfer or otherwise, are convertible into voting stock or exercisable to acquire voting stock where the holder of the stock, convertible security or right to acquire voting stock has the preponderant economic risk in the underlying voting stock. Securities immediately convertible into voting stock at the option of the holder without payment of additional consideration shall be deemed to constitute the voting stock into which they are convertible; other convertible securities and rights to acquire voting stock shall

not be deemed to vest the holder with the preponderant economic risk in the underlying voting stock if the holder has paid less than 50 percent of the consideration required to directly acquire the voting stock and has no other economic interest in the underlying voting stock. For purposes of calculating the percentage of voting stock held by a particular acquiror, stock or other securities convertible into voting stock or exercisable to acquire voting stock which are deemed voting stock under this paragraph (3) shall be included in calculating the amount of voting stock held by the acquiror and the total amount of stock outstanding only to the extent of the voting stock obtainable by such acquiror by such conversion or exercise of rights.

§ 391.42 Acquisition of control of State savings associations.

(a) [Reserved]

(b) *Acquisition by a person or company.* Unless a transaction is exempt from prior notice under paragraph (d) of this section, no person or company (other than certain persons affiliated with a savings and loan holding company who are subject to §10(e)(4) of the Home Owners' Loan Act), shall acquire control, as defined in §391.43 (a) and (b), of a State savings association until written notice has been provided to the FDIC and (1) the FDIC indicates in writing its intent not to disapprove the proposed acquisition or (2) 60 days (or such period of time as the FDIC may specify if the review period has been extended under §391.45(c)(3)) have passed since receipt of a notice deemed sufficient under §391.45(c)(2). Notwithstanding the forgoing, acquisitions by persons or companies by means of a merger with an interim association are not subject to this subpart, but shall be subject to approval under §390.332, and either 12 CFR 152.13 or applicable state law.

(c) *Exempt transactions.* (1) [Reserved]

(2) The following transactions are exempt from the notice requirements of paragraph (b) of this section:

(i)(A) Control of a State savings association acquired by a bank holding company that is registered under and subject to, the Bank Holding Company

Federal Deposit Insurance Corporation

§ 391.42

Act of 1956, or any company controlled by such bank holding company;

(B) Control of a State savings association acquired solely as a result of a pledge or hypothecation of stock to secure a loan contracted for in good faith or the liquidation of a loan contracted for in good faith, in either case where such loan was made in the ordinary course of the business of the lender: *Provided, further*, That acquisition of control pursuant to such pledge, hypothecation or liquidation is reported to the FDIC within 30 days, and *Provided, further*, That the acquiror shall not retain such control for more than one year from the date on which such control was acquired; however, the FDIC may, upon application by an acquiror, extend such one-year period from year to year, for an additional period of time not exceeding three years, if the FDIC finds such extension is warranted and would not be detrimental to the public interest;

(C) Control of a State savings association acquired through a percentage increase in stock ownership following a *pro rata* stock dividend or stock split, if the proportional interests of the recipients remain substantially the same;

(D) Acquisition of additional stock after a non-disapproval under §391.46, or any predecessor provision, has been received: *Provided*, That such acquisition is consistent with any conditions imposed in connection with such approval and with the representations made by the acquirer in its application;

(E) Acquisitions of up to twenty-five percent (25%) of a class of stock by a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25; and

(i) Transactions for which approval is required under the Home Owners' Loan Act;

(ii) Transactions for which approval is required under 12 CFR 152.13 and 390.332;

(iv) Transactions for which a change of control notice must be submitted to the Board of Governors of the Federal Reserve System pursuant to the Change in Bank Control Act, 12 U.S.C. 1817(j);

(v) Acquisition of additional stock of a State savings association by any person who:

(A) Has held power to vote 25 percent or more of any class of voting stock in such association continuously since March 9, 1979; or

(B) Has maintained control of the State savings association continuously since acquiring control in compliance with the Control Act (or the Repealed Control Act) and the regulations thereunder then in effect: *Provided*, That such acquisition is consistent with any conditions imposed in connection with such acquisition of control and with the representations made by the acquiror in its notice; and

(vi) [Reserved]

(3) An acquiror that would be considered to be in control of a State savings association pursuant to §391.43 on December 26, 1985, shall not be subject to this §391.42 unless the acquiror acquires additional stock of the State savings association or obtains a control factor with respect to such association after December 26, 1985: *Provided*, That an acquiror shall not be deemed to have acquired control of a State savings association on the basis of actions taken prior to December 26, 1985, or on the basis of actions taken after December 26, 1985, if such actions are pursuant to and consistent with a materially complete application under the Holding Company Act or notice under the Repealed Control Act filed prior to December 26, 1985, if such acquisition is made pursuant to an application approved under the Holding Company Act or a notice under the Repealed Control Act that was not disapproved.

(d) *Transactions exempt from prior approval or notice.* (1) Subject to the conditions set forth in paragraph (d)(2) of this section, the following transactions are exempt from prior approval and prior notice under §391.42: *Provided*, That the timing of the transaction was not within the control of the acquiror.

(i) Control of a State savings association acquired through *bona fide* gift;

(ii) Control of a State savings association acquired through liquidation of a loan contracted in good faith where the loan was not made in the ordinary course of business of the lender;

(iii) Control of a State savings association acquired through a percentage increase in ownership following a stock

§ 391.43

12 CFR Ch. III (1–1–14 Edition)

split or redemption that was not *pro rata*;

(iv) Control determined pursuant to § 391.43 (a) or (b) as a result of actions by third parties that are not within the control of the acquiror;

(v) Control of a State savings association acquired through testate or intestate succession: *Provided*, That the acquiror transmits written notification of the acquisition to the FDIC within 60 days of the acquisition and provides such additional information as the FDIC may specifically request.

(2) The exemptions provided by paragraphs (d)(1)(i) through (d)(1)(iv) of this section are subject to the following conditions:

(i) The acquiror shall file a notice or rebuttal, as appropriate, with the FDIC within 90 days of acquisition of control;

(ii) The acquiror shall not take any action to direct the management or policies of the State savings association or which are designed to effect a change in the business plan of the State savings association other than voting on matters that may be presented to stockholders by management of the State savings association until the FDIC has acted favorably upon the acquiror's notice or rebuttal, and the FDIC may require that the acquiror take such steps as the FDIC deems necessary to insure that control is not exercised; and

(iii) If the FDIC disapproves the acquiror's notice or rebuttal, the acquiror shall divest such portion of the stock held by the acquiror so as to cause the acquiror not to be determined to be in control of the State savings association under § 391.43, within one year or such shorter period of time and in the manner that the FDIC may order.

§ 391.43 Control.

(a) *Conclusive control.* (1) An acquiror shall be deemed to have acquired control of a State savings association, other than a savings and loan holding company, if the acquiror directly or indirectly, through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(i) Acquires 25 percent or more of any class of voting stock of the State savings association; or

(ii) Acquires irrevocable proxies representing 25 percent or more of any class of voting stock of the State savings association; or

(iii) Acquires any combination of voting stock and irrevocable proxies representing 25 percent or more of any class of voting stock of a State savings association; or

(iv) [Reserved]

(2) [Reserved]

(4) A person or company shall be deemed to control a State savings association if the FDIC determines that such person has the power to direct the management or policies of the State savings association.

(b) *Rebuttable control determinations.*

(1) An acquiror shall be determined, subject to rebuttal, to have acquired control of a State savings association, if the acquiror directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(i) Acquires more than 10 percent of any class of voting stock of the State savings association and is subject to any control factor, as defined in paragraph (c) of this section;

(ii) Acquires 25 percent or more of any class of stock of the State savings association and is subject to any control factor, as defined in paragraph (c) of this section.

(2) An acquiror shall be determined, subject to rebuttal, to have acquired control of a State savings association, if the acquiror directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies, holds any combination of voting stock and revocable and/or irrevocable proxies, representing 25 percent or more of any class of voting stock of a State savings association, excluding such proxies held in connection with a solicitation by, or in opposition to, a solicitation on behalf of management of the State savings association, but including a solicitation in connection with an election of directors, and such proxies would enable the acquiror to:

Federal Deposit Insurance Corporation

§ 391.43

(i) Elect one-third or more of the State savings association's board of directors, including nominees or representatives of the acquiror currently serving on such board;

(ii) Cause the State savings association's stockholders to approve the acquisition or corporate reorganization of the State savings association; or

(iii) Exert a continuing influence on a material aspect of the business operations of the State savings association.

(c) *Control factors.* For purposes of paragraph (b)(1) of this section, the following constitute control factors. References to the acquiror include actions taken directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(1) The acquiror would be one of the two largest holders of any class of voting stock of the State savings association.

(2) The acquiror would hold 25 percent or more of the total stockholders' equity of the State savings association.

(3) The acquiror would hold more than 35 percent of the combined debt securities and stockholders' equity of the State savings association.

(4) The acquiror is party to any agreement:

(i) Pursuant to which the acquiror possesses a material economic stake in the State savings association resulting from a profit-sharing arrangement, use of common names, facilities or personnel, or the provision of essential services to the State savings association; or

(ii) That enables the acquiror to influence a material aspect of the management or policies of the State savings association, other than agreements to which the State savings association is a party where the restrictions are customary under the circumstances and in the case of an acquisition agreement, which apply only during the period when the acquiror is seeking the FDIC's approval to acquire the State savings association, the agreement prohibits transactions between the acquiror and the State savings association and their respective affiliates without approval by the appropriate Regional Director during the pendency of the notice process, and the

agreement contains no material forfeiture provisions applicable to the State savings association in the event the acquisition is not approved or not approved by a specified date.

(5) The acquiror would have the ability, other than through the holding of revocable proxies, to direct the votes of 25 percent or more of a class of the State savings association's voting stock or to vote 25 percent or more of a class of the State savings association's voting stock in the future upon the occurrence of a future event.

(6) The acquiror would have the power to direct the disposition of 25 percent or more of a class of the State savings association's voting stock in a manner other than a widely dispersed or public offering.

(7) The acquiror and/or the acquiror's representatives or nominees would constitute more than one member of the State savings association's board of directors.

(8) The acquiror or a nominee or management official of the acquiror would serve as the chairman of the board of directors, chairman of the executive committee, chief executive officer, chief operating officer, chief financial officer or in any position with similar policymaking authority in the State savings association.

(d) *Rebuttable presumptions of concerted action.* An acquiror will be presumed to be acting in concert with the following persons and companies:

(1) A company will be presumed to be acting in concert with a controlling shareholder, partner, trustee or management official of such company with respect to the acquisition of stock of a State savings association, if

(i) Both the company and the person own stock in the State savings association,

(ii) The company provides credit to the person to purchase the State savings association's stock, or

(iii) The company pledges its assets or otherwise is instrumental in obtaining financing for the person to acquire stock of the State savings association;

(2) A person will be presumed to be acting in concert with members of the person's immediate family;

§ 391.43

12 CFR Ch. III (1–1–14 Edition)

(3) Persons will be presumed to be acting in concert with each other where

(i) Both own stock in a State savings association and both are also management officials, controlling shareholders, partners, or trustees of another company, or

(ii) One person provides credit to another person or is instrumental in obtaining financing for another person to purchase stock of the State savings association;

(4) A company controlling or controlled by another company and companies under common control will be presumed to be acting in concert;

(5) Persons or companies will be presumed to be acting in concert where they constitute a group under the beneficial ownership reporting rules under section 13 or the proxy rules under section 14 of the Securities Exchange Act of 1934, promulgated by the Securities and Exchange Commission.

(6) A person or company will be presumed to be acting in concert with any trust for which such person or company serves as trustee, except that a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25 shall not be presumed to be acting in concert with its trustee or person acting in a similar fiduciary capacity solely for the purposes of determining whether to combine the holdings of a plan and its trustee or fiduciary.

(7) Persons or companies will be presumed to be acting in concert with each other and with any other person or company with which they also are presumed to act in concert.

(e) *Procedures for rebuttal*—(1) *Rebuttal of control determination.* An acquiror attempting to rebut a determination of control that would arise under paragraph (b) of this section shall file a submission with the FDIC setting forth the facts and circumstances which support the acquiror's contention that no control relationship would exist if the acquiror acquires stock or obtains a control factor with respect to a State savings association. The rebuttal must be filed and accepted in accordance with this section before the acquiror acquires such stock or control factor.

(i) An acquiror seeking to rebut the determination of control arising under

paragraph (b)(1) of this section shall submit to the FDIC an executed agreement materially conforming to the agreement set forth at §391.48. Unless agreed to by the FDIC in writing, no other agreement or filing shall be deemed to rebut the determination of control arising under paragraph (b)(1) of this section. If accepted by the FDIC the acquiror shall furnish a copy of the executed agreement to the association to which the rebuttal pertains.

(ii) An acquiror seeking to rebut the determination of control with respect to holding of proxies arising under paragraph (b)(2) of this section shall be subject to the requirements of paragraph (e)(1) of this section, except that in the case of a rebuttal of the presumption of control arising under paragraph (b)(2) of this section, the FDIC may require the acquiror to furnish information in response to a specific request for information and depending upon the particular facts and circumstances, to provide an executed rebuttal agreement materially conforming to the agreement set forth at §391.48, with any modifications deemed necessary by the FDIC.

(2) *Presumptions of concerted action.* An acquiror attempting to rebut the presumption of concerted action arising under paragraph (d) of this section shall file a submission with the FDIC setting forth facts and circumstances which clearly and convincingly demonstrate the acquiror's contention that no action in concert exists. Such a statement must be accompanied by an affidavit, in form and content satisfactory to the FDIC, executed by each person or company presumed to be acting in concert, stating that such person or company does not and shall not, without having made necessary filings and obtained approval or clearance thereof under the Holding Company Act or the Control Act, as applicable, have any agreements or understandings, written or tacit, with respect to the exercise of control, directly or indirectly, over the management or policies of the State savings association, including agreements relating to voting, acquisition or disposition of the State savings association's stock. The affidavit shall also recite that the signatory is aware that the filing of a false affidavit may

Federal Deposit Insurance Corporation

§ 391.44

subject the person or company to criminal sanctions, would constitute a violation of the FDIC's regulations at §390.355(b) and would be considered a "presumptive disqualifier" under 12 CFR 391.46(g)(1)(v).

(3) *Determination.* A rebuttal filed pursuant to paragraph (e) of this section shall not be deemed sufficient unless it includes all the information, agreements, and affidavits required by the FDIC and this subpart, as well as any additional relevant information as the FDIC may require by written request to the acquiror. Within 20 calendar days after proper filing of a rebuttal submission, the FDIC will provide written notification of its determination to accept or reject the submission; request additional information in connection with the submission; or return the submission to the acquiror as materially deficient. Within 15 calendar days after proper filing of any additional information furnished in response to a specific request by the FDIC, the FDIC shall notify the acquiror in writing as to whether the rebuttal is thereby deemed to be sufficient. If the FDIC fails to notify an acquiror within such time, the rebuttal shall be deemed to be accepted. The FDIC may reject any rebuttal which is inconsistent with facts and circumstances known to it or where the rebuttal does not clearly and convincingly refute the rebuttable determination of control or presumption of action in concert, and may determine to reject a submission solely on such bases.

(f) *Safe harbor.* Notwithstanding any other provision of this section, where an acquiror has no intention to participate in or to seek to exercise control over a State savings association's management or policies, the acquiror may seek to qualify for a safe harbor with respect to its ownership of stock of a State savings association.

(1) In order to qualify for the safe harbor, an acquiror must submit a certification to the FDIC that shall be signed by the acquiror or an authorized representative thereof and shall read as follows:

The undersigned makes this submission pursuant to §391.43(f) with respect to [name

of State savings association] and hereby certifies to the FDIC the following:

The undersigned is not in control of [name of State savings association] under §391.43(a);

The undersigned is not subject to any control factor as enumerated in §391.43(c) with respect to the [name of State savings association];

The undersigned will not solicit proxies relating to the voting stock of [name of State savings association];

Before any change in status occurs that would bring the undersigned within the scope of §391.43(a) or (b), the undersigned will file and obtain approval of a rebuttal, or non-disapproval of a notice, or holding company application, as appropriate.

The undersigned has not acquired stock of [name of State savings association] for the purpose or effect of changing or influencing the control of [name of State savings association] or in connection with or as a participant in any transaction having such purpose or effect.

(2) An acquiror claiming safe-harbor status may vote freely and dissent with respect to its own stock. Certifications provided for in this paragraph must be filed with FDIC in accordance with §§390.106 and 390.108.

§ 391.44 Certifications of ownership.

(a) *Acquisition of stock.* (1) Upon the acquisition of beneficial ownership that exceeds, in the aggregate, 10 percent of any class of stock of a State savings association or additional stock above 10 percent of the stock of a State savings association occurring after December 26, 1985, an acquiror shall file with the FDIC a certification as described in this section.

(2) The certification filed pursuant to this section shall be signed by the acquiror or an authorized representative thereof and shall read as follows:

The undersigned is the beneficial owner of 10 percent or more of a class of stock of [name of State savings association]. The undersigned is not in control of such association, as defined in 12 CFR 391.43(a), and is not subject to a rebuttable determination of control under §391.43(b), and will take no action that would result in a determination of control or a rebuttable determination of control without first filing and obtaining approval of an application under the Savings and Loan Holding Company Act, 12 U.S.C. 1467a, or a notice under the Change in Bank Control Act, 12 U.S.C. 1817(j), or filing and obtaining acceptance by the FDIC of a rebuttal of the rebuttable determination of control.

§ 391.45

12 CFR Ch. III (1–1–14 Edition)

(3) Notwithstanding anything contained in this paragraph (a), an acquiror is not required to file a certification if—

(i) The FDIC has issued a notice of non-disapproval of the acquisition of the State savings association; or

(ii) The acquiror has filed a materially complete notice pursuant to § 391.42.

(b) *Privacy.* All certifications filed under this § 391.44 shall be for the information of the FDIC in connection with its examination functions and shall be provided confidential treatment by the FDIC.

§ 391.45 Procedural requirements.

(a) *Form of application or notice.* A notice required by § 391.42 shall be filed on the form indicated below. An acquiror may request confidential treatment of portions of a notice only by complying with the requirements of paragraph (f) of this section.

(a)(1)–(5) [Reserved]

(6) *Notice Form 1393, parts A and B.* This form shall be used for all notices filed under § 391.42(b) regarding the acquisition of control of a State savings association by any person or persons not constituting a company.

(b) *Filing requirements—(1) Notices and rebuttals.* (i) Complete copies including exhibits and all other pertinent documents of notices, and rebuttal submissions shall be filed with the appropriate Regional Director in the region in which the State savings association or associations involved in the transaction have their home office or offices. Unsigned copies shall be conforming. Each copy shall include a summary of the proposed transaction.

(ii) Any person or company may amend a notice or rebuttal submission, or file additional information, upon request of the FDIC or, in the case of the party filing a notice or rebuttal, upon such party's own initiative.

(2) [Reserved]

(c) *Sufficiency and waiver.* (1) Except as provided in § 391.45(c)(5), a notice filed pursuant to § 391.42(b) shall not be deemed sufficient unless it includes all of the information required by the form prescribed by the FDIC and this section, including a complete description of the acquiror's proposed plan for

acquisition of control whether pursuant to one or more transactions, and any additional relevant information as the FDIC may require by written request to the acquiror. Unless a notice specifically indicates otherwise, the notice shall be considered to pertain to acquisition of 100 percent of a State savings association's voting stock. Where a notice pertains to a lesser amount of stock, the FDIC may condition its non-disapproval to apply only to such amount, in which case additional acquisitions may be made only by amendment to the acquiror's notice and the FDIC's approval or non-disapproval thereof. Failure by an applicant to respond completely to a written request by the FDIC for additional information within 30 calendar days of the date of such request may be deemed to constitute withdrawal of the notice or rebuttal filing or may be treated as grounds for issuance of a notice of disapproval of a notice or rejection of a rebuttal.

(2) The period for the FDIC's review of any proposed acquisition will commence upon receipt by the FDIC of a notice deemed sufficient under paragraph (c)(1) of this section. The FDIC shall notify an acquiror in writing within 30 calendar days after proper filing of a notice as to whether the notice—

(i) Is sufficient;

(ii) Is insufficient, and what additional information is requested in order to render the application or notice sufficient; or

(iii) Is materially deficient and will not be processed. The FDIC shall also notify an acquiror in writing within 15 calendar days after proper filing of any additional information furnished in response to a specific request by the FDIC as to whether the notice is thereby deemed to be sufficient. If the FDIC fails to so notify an acquiror within such time, the application or notice shall be deemed to be sufficient as of the expiration of the applicable period.

(3) After additional information has been requested and supplied, the FDIC may request additional information only with respect to matters derived from or prompted by information already furnished, or information of a

material nature that was not reasonably available from the acquiror, was concealed, or pertains to developments subsequent to the time of the FDIC's initial request for additional information. With regard to information of a material nature that was not reasonably available from the acquiror or was concealed at the time a notice was deemed to be sufficient or which pertains to developments subsequent to the time a notice was deemed to be sufficient, the FDIC, at its option, may request such additional information as it considers necessary, or may deem the notice not to be sufficient until such additional information is furnished and cause the review period to commence again in its entirety upon receipt of such additional information.

(i) The 60-day period for the FDIC's review of a notice deemed to be sufficient also may be extended by the FDIC for up to an additional 30 days.

(ii) The period for the FDIC's review of a notice may be further extended not to exceed two additional times for not more than 45 days each time if—

(A) The FDIC determines that any acquiring party has not furnished all the information required under this subpart;

(B) In the FDIC's judgment, any material information submitted is substantially inaccurate;

(C) The FDIC has been unable to complete an investigation of each acquiror because of any delay caused by, or the inadequate cooperation of, such acquiror; or

(D) The FDIC determines that additional time is needed to investigate and determine that no acquiring party has a record of failing to comply with the requirements of subchapter II of chapter 53 of title 31 of the United States Code.

(4) [Reserved]

(5) The FDIC may waive any requirements of this paragraph (c) determined to be unnecessary by the FDIC, upon its own initiative, upon the written request of an acquiring person, or in a supervisory case.

(d) *Public notice.* (1) The acquiror must publish a public notice of a notice under § 391.42(b), in accordance with the procedures in §§ 390.111 through 390.115. Promptly after publication, the

acquiror must transmit copies of the public notice and the publisher's affidavit to FDIC.

(2) The acquiror must provide a copy of the public notice to the State savings association whose stock is sought to be acquired, and may provide a copy of the public notice to any other person who may have an interest in the notice.

(3) The FDIC will notify the appropriate state supervisor and will notify persons whose requests for announcements, as described in 12 CFR 163e, appendix B, have been received in time for the notification. The FDIC may also notify any other persons who may have an interest in the notice.

(e) *Submission of comments.* Commenters may submit comments on the notice in accordance with the procedures in §§ 390.116 through 390.120.

(f) *Disclosure.* (1) Any notice, other filings, public comment, or portion thereof, made pursuant to this subpart for which confidential treatment is not requested in accordance with this paragraph (f), shall be immediately available to the public and not subject to the procedures set forth herein. Public disclosure shall be made of other portions of a notice, other filing or public comment in accordance with paragraph (f)(2) of this section, the provisions of the Freedom of Information Act (5 U.S.C. 552a) and parts 309 and 310. Applicants and other submitters should provide confidential and non-confidential versions of their filings, as described in § 391.45(f)(2) and (3) in order to facilitate this process.

(2) Any person who submits any information or causes or permits any information to be submitted to the FDIC pursuant to this subpart may request that the FDIC afford confidential treatment under the Freedom of Information Act to such information for reasons of personal privacy or business confidentiality, which shall include such information that would be deemed to result in the commencement of a tender offer under § 240.14d-2 of title 17 of the Code of Federal Regulations, or for any other reason permitted by Federal law. Such request for confidentiality must be made and justified in accordance with paragraph (f)(5) of this section at the time of filing, and must,

to the extent practicable, identify with specificity the information for which confidential treatment may be available and not merely indicate portions of documents or entire documents in which such information is contained. Failure to specifically identify information for which confidential treatment is requested, failure to specifically justify the bases upon which confidentiality is claimed in accordance with paragraph (f)(5) of this section, or overbroad and indiscriminate claims for confidential treatment, may be bases for denial of the request. In addition, the filing party should take all steps reasonably necessary to ensure, as nearly as practicable, that at the time the information is first received by the FDIC it is supplied segregated from information for which confidential treatment is not being requested, it is appropriately marked as confidential, and it is accompanied by a written request for confidential treatment which identifies with specificity the information as to which confidential treatment is requested. Any such request must be substantiated in accordance with paragraph (f)(5) of this section.

(3) All documents which contain information for which a request for confidential treatment is made or the appropriate segregable portions thereof shall be marked by the person submitting the records with a prominent stamp, typed legend, or other suitable form of notice on each page or segregable portion of each page, stating “Confidential Treatment Requested by [name].” If such marking is impracticable under the circumstances, a cover sheet prominently marked “Confidential Treatment Requested by [name]” should be securely attached to each group of records submitted for which confidential treatment is requested. Each of the records transmitted in this manner should be individually marked with an identifying number and code so that they are separately identifiable.

(4) A determination as to the validity of any request for confidential treatment may be made when a request for disclosure of the information under the Freedom of Information Act is received, or at any time prior thereto. If the FDIC receives a request for the in-

formation under the Freedom of Information Act, FDIC will advise the filing party before it discloses material for which confidential treatment has been requested.

(5) Substantiation of a request for confidential treatment shall consist of a statement setting forth, to the extent appropriate or necessary for the determination of the request for confidential treatment, the following information regarding the request:

(i) The reasons, concisely stated and referring to specific exemptive provisions of the Freedom of Information Act, why the information should be withheld from access under the Freedom of Information Act;

(ii) The applicability of any specific statutory or regulatory provisions which govern or may govern the treatment of the information;

(iii) The existence and applicability of any prior determination by the FDIC, other Federal agencies, or a court, concerning confidential treatment of the information;

(iv) The adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business’ competitive position;

(v) The measures taken by the business to protect the confidentiality of the commercial or financial information in question and of similar information, prior to, and after, its submission to the FDIC;

(vi) The ease or difficulty of a competitor’s obtaining or compiling the commercial or financial information;

(vii) Whether commercial or financial information was voluntarily submitted to the FDIC, and, if so, whether and how disclosure of the information would tend to impede the availability of similar information to the FDIC;

(viii) The extent, if any, to which portions of the substantiation of the request for confidential treatment should be afforded confidential treatment;

(ix) The amount of time after the consummation of the proposed acquisition for which the information should remain confidential and a justification thereof;

Federal Deposit Insurance Corporation

§ 391.46

(x) Such additional facts and such legal and other authorities as the requesting person may consider appropriate.

(6) Any person requesting access to a notice, other filing, or public comment made pursuant to this subpart for purposes of commenting on a pending submission may prominently label such request: "Request for Disclosure of Filing(s) Made Under Subpart E of Part 391/Priority Treatment Requested."

(g) *Supervisory cases.* The provisions of paragraphs (d), (e), and (f) of this section may be waived by the FDIC in connection with a transaction approved by the FDIC for supervisory reasons.

(h) *Notification of State supervisor.* Upon receiving a notice relating to an acquisition of control of a State savings association, the FDIC shall forward a copy of the notice to the appropriate state savings and loan association supervisory agency, and shall allow 30 days within which the views and recommendations of such state supervisory agency may be submitted. The FDIC shall give due consideration to the views and recommendations of such state agency in determining whether to disapprove any proposed acquisition. Notwithstanding the provisions of this paragraph (h), if the FDIC determines that it must act immediately upon any notice of a proposed acquisition in order to prevent the default of the association involved in the proposed acquisition, the FDIC may dispense with the requirement of this paragraph (h) or, if a copy of the notice is forwarded to the state supervisory agency, the FDIC may request that the views and recommendations of such state supervisory agency be submitted immediately in any form or by any means acceptable to the FDIC.

(i) *Additional procedures for acquisitions involving mergers.* Acquisitions of control involving mergers (including mergers with an interim association) shall also be subject to the procedures set forth in §390.332 to the extent applicable, except as provided in paragraph (a) of this section.

(j) *Additional procedures for acquisitions of recently converted State savings associations.* Notices and rebuttals involving acquisitions of the stock of a

recently converted State savings association under 12 CFR 192.3(i)(3) shall also address the criteria for approval set forth at 12 CFR 192.3(i)(5).

§ 391.46 Determination by the FDIC.

(a)–(c) [Reserved]

(d) *Notice criteria.* In making its determination whether to disapprove a notice, the FDIC may disapprove any proposed acquisition, if the FDIC determines that:

(1) The proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the banking business in any part of the United States;

(2) The effect of the proposed acquisition of control in any section of the country may be substantially to lessen competition or to tend to create a monopoly or the proposed acquisition of control would in any other manner be in restraint of trade, and the anti-competitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(3) The financial condition of the acquiring person is such as might jeopardize the financial stability of the association or prejudice the interests of the depositors of the State savings association;

(4) The competence, experience, or integrity of the acquiring person or any of the proposed management personnel indicates that it would not be in the interests of the depositors of the State savings association, the FDIC, or the public to permit such person to control the State savings association;

(5) The acquiring person fails or refuses to furnish information requested by the FDIC; or

(6) The FDIC determines that the proposed acquisition would have an adverse effect on the Deposit Insurance Fund.

(e) *Failure to disapprove a notice.* If, upon expiration of the 60-day review period of any notice deemed to be sufficient filed pursuant to §391.45(c), or extension thereof, the FDIC has failed to disapprove such notice, the proposed

acquisition may take place: *Provided*, That it is consummated within one year and in accordance with the terms and representations in the notice and that there is no material change in circumstances prior to the acquisition.

(f) [Reserved]

(g) *Presumptive disqualifiers*—(1) *Integrity factors*. The following factors shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the integrity test of paragraph (d)(4) of this section:

(i) During the 10-year period immediately preceding filing the notice, criminal, civil or administrative judgments, consents or orders, and any indictments, formal investigations, examinations, or civil or administrative proceedings (excluding routine or customary audits, inspections and investigations) that terminated in any agreements, undertakings, consents or orders, issued against, entered into by, or involving the acquiror or affiliates of the acquiror by any federal or state court, any department, agency, or commission of the U.S. Government, any state or municipality, any Federal Home Loan Bank, any self-regulatory trade or professional organization, or any foreign government or governmental entity, which involve:

(A) Fraud, moral turpitude, dishonesty, breach of trust or fiduciary duties, organized crime or racketeering;

(B) Violation of securities or commodities laws or regulations;

(C) Violation of depository institution laws or regulations;

(D) Violation of housing authority laws or regulations; or

(E) Violation of the rules, regulations, codes of conduct or ethics of a self-regulatory trade or professional organization;

(ii) Denial, or withdrawal after receipt of formal or informal notice of an intent to deny, by the acquiror or affiliates of the acquiror, of

(A) Any application relating to the organization of a financial institution,

(B) An application to acquire any financial institution or holding company thereof under the Holding Company Act or the Bank Holding Company Act or otherwise,

(C) A notice relating to a change in control of any of the foregoing under

the Control Act or the Repealed Control Act; or

(D) An application or notice under a state holding company or change in control statute;

(iii) The acquiror or affiliates of the acquiror were placed in receivership or conservatorship during the preceding 10 years, or any management official of the acquiror was a management official or director (other than an official or director serving at the request of the FDIC, the former Resolution Trust Corporation, or the former Federal Savings and Loan Insurance Corporation) or controlling shareholder of a company or savings association that was placed into receivership, conservatorship, or a management consignment program, or was liquidated during his or her tenure or control or within two years thereafter;

(iv) Felony conviction of the acquiror, an affiliate of the acquiror or a management official of the acquiror or an affiliate of the acquiror;

(v) Knowingly making any written or oral statement to the FDIC or any predecessor agency (or its delegate) in connection with a notice or other filing under this subpart that is false or misleading with respect to a material fact or omits to state a material fact with respect to information furnished or requested in connection with such notice or other filing;

(vi) Acquisition and retention at the time of submission of a notice, of stock in the State savings association by the acquiror in violation of § 391.42 or its predecessor sections.

(2) *Financial factors*. The following shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the financial condition test of paragraph (d)(3) of this section:

(i) Liability for amounts of debt which, in the opinion of the FDIC, create excessive risks of default and pressure on the State savings association to be acquired; or

(ii) Failure to furnish a business plan or furnishing a business plan projecting activities which are inconsistent with economical home financing.

Federal Deposit Insurance Corporation

§ 391.48

§ 391.47 [Reserved]

§ 391.48 Rebuttal of control agreement.

Agreement
Rebuttal of Rebuttable Determination Of Control Under Subpart A

I. WHEREAS

A. [] is the owner of [] shares (the "Shares") of the [] stock (the "Stock") of [name and address of State savings association], which Shares represent [] percent of a class of "voting stock" of [] as defined under the Acquisition of Control Regulations ("Regulations") of the FDIC, Subpart A of Part 391 ("Voting Stock");

B. [] is a "State savings association" within the meaning of the Regulations;

C. [] seeks to acquire additional shares of stock of [] ("Additional Shares"), such that []'s ownership thereof will represent 10 percent or more of a class of Voting Stock but will not represent 25 percent or more of any class of Voting Stock of []; [and/or] [] seeks to [], which would constitute the acquisition of a "control factor" as defined in the Regulations ("Control Factor");

D. [] does not seek to acquire the [Additional Shares or Control Factor] for the purpose or effect of changing the control of [] or in connection with or as a participant in any transaction having such purpose or effect;

E. The Regulations require a company or a person who intends to hold 10 percent or more but not 25 percent or more of any class of Voting Stock of a State savings association or holding company thereof and that also would possess any of the Control Factors specified in the Regulations, to file and obtain clearance of a notice ("Notice") under the Change in Control Act ("Control Act"), 12 U.S.C. 1817(j), prior to acquiring such amount of stock and a Control Factor unless the rebuttable determination of control has been rebutted.

F. Under the Regulations, [] would be determined to be in control, subject to rebuttal, of [] upon acquisition of the [Additional Shares or Control Factor];

G. [] has no intention to manage or control, directly or indirectly, [];

H. [] has filed on [], a written statement seeking to rebut the determination of control, attached hereto and incorporated by reference herein, (this submission referred to as the "Rebuttal");

I. In order to rebut the rebuttable determination of control, [] agrees to offer this Agreement as evidence that the acquisition of the [Additional Shares or Control Factor] as proposed would not constitute an acquisition of control under the Regulations.

II. The FDIC has determined, and hereby agrees, to act favorably on the Rebuttal, and in consideration of such a determination and

agreement by the FDIC to act favorably on the Rebuttal, [] and any other existing, resulting or successor entities of [] agree with the FDIC that:

A. Unless [] shall have filed a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and shall have obtained clearance of the Notice in accordance with the Regulations, [] will not, except as expressly permitted otherwise herein or pursuant to an amendment to this Rebuttal Agreement:

1. Seek or accept representation of more than one member of the board of directors of [insert name of State savings association and any holding company thereof];

2. Have or seek to have any representative serve as the chairman of the board of directors, or chairman of an executive or similar committee of [insert name of State savings association and any holding company thereof]'s board of directors or as president or chief executive officer of [insert name of State savings association and any holding company thereof];

3. Engage in any intercompany transaction with [] or []'s affiliates;

4. Propose a director in opposition to nominees proposed by the management of [insert name of State savings association and any holding company thereof] for the board of directors of [insert name of State savings association and any holding company thereof] other than as permitted in paragraph A-1;

5. Solicit proxies or participate in any solicitation of proxies with respect to any matter presented to the stockholders [] other than in support of, or in opposition to, a solicitation conducted on behalf of management of [];

6. Do any of the following, except as necessary solely in connection with []'s performance of duties as a member of []'s board of directors:

(a) Influence or attempt to influence in any respect the loan and credit decisions or policies of [], the pricing of services, any personnel decisions, the location of any offices, branching, the hours of operation or similar activities of [];

(b) Influence or attempt to influence the dividend policies and practices of [] or any decisions or policies of [] as to the offering or exchange of any securities;

(c) Seek to amend, or otherwise take action to change, the bylaws, articles of incorporation, or charter of [];

(d) Exercise, or attempt to exercise, directly or indirectly, control or a controlling influence over the management, policies or business operations of []; or

(e) Seek or accept access to any non-public information concerning [].

B. [] is not a party to any agreement with [].

C. [] shall not assist, aid or abet any of []'s affiliates or associates that are not parties to this Agreement to act, or act in concert with any person or company, in a manner which is inconsistent with the terms hereof or which constitutes an attempt to evade the requirements of this Agreement.

D. Any amendment to this Agreement shall only be proposed in connection with an amended rebuttal filed by [] with the FDIC for its determination;

E. Prior to acquisition of any shares of "Voting Stock" of [] as defined in the Regulations in excess of the Additional Shares, any required filing will be made by [] under the Control Act or the Holding Company Act and either approval of the acquisition under the Holding Company Act shall be obtained or any Notice filed under the Control Act shall be cleared in accordance with the Regulations;

F. At any time during which 10 percent or more of any class of Voting Stock of [] is owned or controlled by [], no action which is inconsistent with the provisions of this Agreement shall be taken by [] until [] files and either obtains from the FDIC a favorable determination with respect to either an amended rebuttal or clearance of a Notice under the Control Act, in accordance with the Regulations;

G. Where any amended rebuttal filed by [] is denied or disapproved, [] shall take no action which is inconsistent with the terms of this Agreement, except after either (1) reducing the amount of shares of Voting Stock of [] owned or controlled by [] to an amount under 10 percent of a class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations; or (2) filing a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and either obtaining approval of the Application or clearance of the Notice, in accordance with the Regulations;

H. Where any Notice filed by [] is disapproved, [] shall take no action which is inconsistent with the terms of this Agreement, except after reducing the amount of shares of Voting Stock of [] owned or controlled by [] to an amount under 10 percent of any class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

I. Should circumstances beyond []'s control result in [] being placed in a position to direct the management or policies of [], then [] shall either (1) promptly file a Notice under the Control Act or an Application under the Holding Company Act, as appropriate, and take no affirmative steps to enlarge that control pending either a final determination with respect to the Application or Notice, or (2) promptly reduce the amount

of shares of [] Voting Stock owned or controlled by [] to an amount under 10 percent of any class of Voting Stock or immediately cease any actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

J. By entering into this Agreement and by offering it for reliance in reaching a decision on the request to rebut the presumption of control under the Regulations, as long as 10 percent or more of any class of Voting Stock of [] is owned or controlled, directly or indirectly, by [], and [] possesses any Control Factor as defined in the Regulations, [] will submit to the jurisdiction of the Regulations, including (1) the filing of an amended rebuttal or Notice for any proposed action which is prohibited by this Agreement, and (2) the provisions relating to a penalty for any person who willfully violates or with reckless disregard for the safety or soundness of a State savings association participates in a violation of the Control Act and the Regulations thereunder, and any regulation or order issued by the FDIC.

K. Any violation of this Agreement shall be deemed to be a violation of the [Control Act or Holding Company Act] and the Regulations, and shall be subject to such remedies and procedures as are provided in the [Control Act or Holding Company Act] and the Regulations for a violation thereunder and in addition shall be subject to any such additional remedies and procedures as are provided under any other applicable statutes or regulations for a violation, willful or otherwise, of any agreement entered into with the FDIC.

III. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which counterparts collectively shall constitute one instrument representing the Agreement among the parties thereto. It shall not be necessary that any one counterpart be signed by all of the parties hereto as long as each of the parties has signed at least one counterpart.

IV. This Agreement shall be interpreted in a manner consistent with the provisions of the Rules and Regulations of the FDIC.

V. This Agreement shall terminate upon (i) clearance by the FDIC of []'s Notice under the Control Act to acquire [], and consummation of the transaction as described in Notice, (ii) in the disposition by [] of a sufficient number of shares of [], or (iii) the taking of such other action that thereafter [] is not in control and would not be determined to be in control of [] under the Control Act or the Regulations of the FDIC as in effect at that time.

VI. *In Witness Whereof*, the parties thereto have executed this Agreement by their duly authorized officer.

[Acquiror]

Federal Deposit Insurance Corporation

§ 391.48

Federal Deposit Insurance Corporation.