

105TH CONGRESS  
1ST SESSION

# H. R. 220

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.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 7, 1997

Mr. McCOLLUM introduced the following bill; which was referred to the  
Committee on Banking and Financial Services

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## 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 Representa-*  
2       *tives 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”.

6       **SEC. 2. FINDINGS.**

7       The Congress hereby finds the following:

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

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

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

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

20          (5) Reform of the banking laws are needed to  
21          curtail regulatory abuse and to ensure that directors  
22          and officers have due process protections and the  
23          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,  
18 officer, 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,  
26 officer, or institution-affiliated party had

1 an interest in the subject of the business  
2 judgment, 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 busi-  
12 ness judgment was made, the director, offi-  
13 cer, or institution-affiliated party made  
14 such inquiry about the subject of the busi-  
15 ness judgment as a reasonably prudent  
16 person would have made under the cir-  
17 cumstances;

18 “(iii) after being put on reasonable  
19 notice of a need to act, the director, offi-  
20 cer, or institution-affiliated party took such  
21 actions as a reasonably prudent person  
22 would have taken under the circumstances;  
23 and

24 “(iv) the director, officer, or institu-  
25 tion-affiliated party acted in good faith.

1           “(B) REGULATORY APPROVAL.—A direc-  
2           tor, officer, or institution-affiliated party of an  
3           insured depository institution shall not be  
4           deemed to have committed any violation or  
5           breach of duty if any examiner or other rep-  
6           resentative of an appropriate Federal banking  
7           agency or State bank supervisor, upon full and  
8           accurate disclosure of the relevant facts, ap-  
9           proved the good faith practice, action, or omis-  
10          sion which is alleged to be the violation or  
11          breach, whether or not such approval was com-  
12          municated to the director, officer, or institution-  
13          affiliated party or any other person at such in-  
14          stitution.

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

20                 “(i) unforeseeable economic condi-  
21                 tions, which develop after the occurrence of  
22                 the practice, action, or omission which is  
23                 alleged to be a violation or breach, were  
24                 the proximate cause of any loss experi-  
25                 enced by the institution; and

1 “(ii) the director, officer, or institu-  
2 tion-affiliated party acted in good faith.

3 “(6) MINIMUM STANDARD FOR ORDER OF PRO-  
4 Duction OF PERSONAL FINANCIAL INFORMATION.—

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

22 “(i) the person whose records are  
23 being sought has committed a violation for  
24 which a civil penalty may be imposed  
25 under paragraph (2) or has breached a

1 duty owed to an insured depository institu-  
 2 tion; and

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

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

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

15 “(ii) after an administrative or judi-  
 16 cial determination, on a record after oppor-  
 17 tunity for agency hearing, that the person  
 18 has committed a violation for which a civil  
 19 penalty may be assessed under paragraph  
 20 (2).”.

21 **SEC. 4. DUE PROCESS PROTECTIONS RELATING TO AT-**  
 22 **TACHMENT OF ASSETS.**

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

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

3                   “(B) STANDARD.—

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

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

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

20                   “(11) STANDARD FOR CERTAIN ORDERS.—No  
21                   authority under this subsection or subsection (c) to  
22                   prohibit any institution-affiliated party from with-  
23                   drawing, transferring, removing, dissipating, or dis-  
24                   posing of any funds, assets, or other property may



1 be exercised unless the agency meets the standards  
2 of Rule 65 of the Federal Rules of Civil Procedure.”.

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

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