

Federal Deposit Insurance Corporation

§ 391.43

(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are pursuant to and consistent with a materially complete application under the Holding Company Act or notice under the Repealed Control Act filed prior to December 26, 1985, if such acquisition is made pursuant to an application approved under the Holding Company Act or a notice under the Repealed Control Act that was not disapproved.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 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:

(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.

Federal Deposit Insurance Corporation

§ 391.43

(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;

(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 sec-

tion 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 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.

Federal Deposit Insurance Corporation

§ 391.45

(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.

(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 conformed. 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