Developments in Indiana Banking Law

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BACKGROUND

Indiana laws regulating the powers and structure of state-chartered financial institutions[1] have undergone profound changes over the past several years. Recent legislative reforms in Indiana are part of an ongoing effort which began in 1985 with the passage of Senate Enrolled Act No. 1 (Senate Bill 1)[2] to revise and improve Title 28 of the Indiana Code. Senate Enrolled Act No. 152 (SEA 152),[3] signed into law by Governor Evan Bayh on May 12, 1991, represents the most recent of these reform efforts.[4] SEA 152, which was in most respects the product of the Interim Study Committee on Financial Institutions and Consumer Credit (Committee) authorized by the 1990 General Assembly,[5] represents the first installment of a systematic effort to completely revise and improve Title 28 of the Indiana Code.[6]

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1. The powers and structure of banks and other financial institutions created pursuant to the laws of the state of Indiana are governed generally by the provisions of Title 28 of the Indiana Code.

2. Pub. L. No. 265-1985. For published summaries of the changes to Title 28 resulting from the 1985 Act, see Susan Barnhizer Rivas & David P. Lewis, *Senate Enrolled Act No. 1: A New Era of Banking Expansion in Indiana,* 19 IND. L. REV. 115 (1986); Jonathan L. Birge, *Senate Bill 1: Impact on Indiana Banking,* 29 RES GESTAE 75 (1985).

3. Pub. L. No. 33-1991. For a brief summary of some of the key changes to Title 28 that resulted from the 1991 Act, see Thomas H. Ristine, *The Title 28 Project: Year One*, HOOSIER BANKER, Aug. 1991, at 24, 24.

4. At the time this Article goes to press, House Enrolled Act No. 1138 was passed by the 1992 Indiana General Assembly and signed into law by the Governor. Bill 1138, *inter alia*, conforms relevant corporate governance provisions of Title 28 to provisions of the Indiana Business Corporations Law, IND. CODE §§ 23-1-17-1 to -54-3 (1988 & Supp. 1991), consolidates and streamlines the law governing the formation of banks and savings associations, eliminates the state lending limits statute and adopts in its place federal law lending limits, eliminates the state law definition of "affiliate" and adopts the federal law definition found in Section 23A of the Federal Reserve Act, and extends the time a bank may hold real estate from five to ten years.

5. S. Con. Res. 19, 106th Gen. Assembly, 2d Sess. 1 (1990).

6. *See* Ristine, *supra* note 3, at 24.

The Committee's objective, as defined by its mission statement, was to consider

> a substantive revision of appropriate portions of Title 28 . . . of the Indiana Code, to include such matters as: repealing state laws in conflict with Federal law, repealing obsolete statutes, meshing state law with Federal law to simplify regulation of state-chartered financial institutions, and, examining statutory functional and geographic restrictions on state-chartered financial institutions which have negative economic consequences, and which can invite Federal pre-emption.[7]

Recognizing that these objectives could not be fully accomplished in the limited period preceding the 1991 legislative session, the Committee directed its Drafting Group (consisting of representatives of the state's Department of Financial Institutions, attorneys from the Legislative Services Agency, and attorneys in private practice) to identify those provisions of Title 28 needing immediate repeal or revision. The efforts of the Committee and Drafting Group resulted in SEA 152, which addressed: (1) "structural" issues (primarily remaining branching and acquisition restrictions); (2) issues concerning the organization and operation of the Department of Financial Institutions; and (3) certain other issues relating to, *inter alia*, state bank parity with national banks, the reduction of regulatory burdens, and changes to state law necessitated by the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA).[8]

This Article reviews several of the significant changes to Title 28 resulting from SEA 152 and related legislation. Part I discusses changes in the permitted "structure" of banking in Indiana that result from the repeal of state law restricting branching and acquisitions. Part II identifies developments in state law that relate to savings associations. Part III reviews significant changes to the laws affecting the organization and operation of the Department of Financial Institutions (DFI). Part IV then analyzes several other notable statutory developments within Title 28. The Article states in conclusion that changes to Title 28 resulting from SEA 152 should mark the beginning of an effort to revise systematically and improve state law governing banks and other financial institutions.

I. Branching and Acquisition Developments

A. *Intrastate Activity*

With the passage of Senate Bill 1 in 1985, Indiana state-chartered

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7. Indiana Legislative Council Resolution adopted May 31, 1991 (unpublished document on file with the *Indiana Law Review*).

8. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. 101-73, 103 Stat. 183 (1989).

banks were allowed, subject to certain size[9] and frequency limitations,[10] to establish new branches in the county where the bank's principal office was located and in contiguous counties.[11] Senate Bill 1 also allowed bank holding companies to acquire existing branches located in any county in the state.[12] The acquisition of existing branches by both banks and bank holding companies was restricted, however, to branches which had been in operation for a period of at least five years.[13] The five year rule was created to protect the "franchise value" of branches and to prevent banks from circumventing the contiguous-county-only branching limitation by acquiring newly created branches established solely to permit non-contiguous county branching. These restrictions on branching *de novo* and branching by acquisition[14] reflected a policy determination that banks should be required to buy their way into a new market, except in instances where a new market could be entered by contiguous county expansion.

Under federal law, national banks located in Indiana are permitted to establish and operate branches to the same extent state-chartered institutions are permitted to do so. This branching rule, commonly known as the McFadden Act,[15] is designed to create parity between national

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9. The 1985 Act created a deposit ceiling limiting the amount of Indiana deposits that could be held by any bank or bank holding company. Under the ceiling restriction, no bank or bank holding company was permitted to acquire a bank or bank holding company if, following the acquisition, the bank or group of banks under common control would hold a percentage of total deposits in Indiana greater than 10% if the acquisition occurred prior to July 1, 1986, greater than 11% if the acquisition occurred after June 30, 1986 and before July 1, 1987, and 12% if the acquisition occurred after June 30, 1987. Pub. L. No. 265-1985, §§ 3, 4 (codified at IND. CODE §§ 28-2-13-19(d),(e), 28-1-13-20(c), 28-2-14-11(a),(b) (1988)), *repealed by* Pub. L. No. 33-1991, §§ 57, 61.

10. Under the 1985 Act, the number of branches that a bank could establish within the five year period beginning July 1, 1985 and ending June 30, 1990 in contiguous counties was limited by the amount of the bank's deposits. Pub. L. No. 265-1985, § 3 (codified at IND. CODE § 28-2-13-20(g) (1988)), *repealed by* Pub. L. No. 33-1991, § 57.

11. Pub. L. No. 265-1985, § 3 (codified at IND. CODE §§ 28-1-13-19, 28-2-13-20 (1988)), *repealed in part and amended by* Pub. L. No. 33-1991, §§ 25, 57.

12. Pub. L. No. 265-1985, § 4 (codified at IND. CODE § 28-2-14-10 (1988)), *amended by* Pub. L. No. 33-1991, § 30.

13. Pub. L. No. 265-1985, §§ 3-5 (codified at IND. CODE §§ 28-2-13-20(d), 28-2-14-11(c), 28-2-15-18(c) (1988)), *repealed by* Pub. L. No. 33-1991, § 57; Pub. L. No. 279-1987, § 13.

14. "Branch by acquisition" and "branch de novo" are defined terms under Title 28, added by the 1985 Act. Pub. L. No. 265-1985 § 3 (codified at IND. CODE §§ 28-2-13-8, -9 (1988)).

15. The McFadden Act, ch. 89, § 23, 48 Stat. 189, 190 (1933)(codified at 12 U.S.C. § 36 (1988)), amended the National Bank Act to permit national banks to acquire and establish branches to the same extent allowed state-chartered banks under state law. More artfully stated, the McFadden Act "confers authority on the Comptroller to approve

and state-chartered banks. Although the McFadden Act is designed to promote parity, it has been construed to permit national banks more expansive branching authority than state-chartered banks. This disparity has resulted from the Act's definition of the term "state bank." Under the Act a state bank is any "corporation or institution carrying on the banking business under the authority of State law."[16] Focusing on this definition, the power of national banks to establish new branches in several states has been extended to include not only the power to branch to the same extent as state-chartered commercial banks, but also to branch to the same extent allowed state-chartered savings associations. The Comptroller of the Currency has permitted these expanded branching powers based upon the argument advanced by national banks that because savings associations actually compete with commercial banks for customer deposits and loans they are "carrying on the business of banking." As such, state-chartered savings associations are "state banks" within the meaning of the McFadden Act.

This argument was first made successfully by Deposit Guaranty National Bank of Jackson, Mississippi. In *Department of Banking & Consumer Finance v. Clarke* (*Deposit Guaranty*),[17] the Fifth Circuit Court of Appeals found, based on the definition of state bank contained in the McFadden Act and a Mississippi law that permitted savings associations to establish and operate branches throughout the state,[18] that the Comptroller had properly found that Deposit Guaranty could establish and operate branch offices without being subject to the state's bank branching restrictions.[19]

Based on the result reached in the *Deposit Guaranty* case, INB National Bank of Indianapolis, Marion County, Indiana in June of 1987, filed an application with the Comptroller of the Currency seeking to establish a branch in Bloomington, Monroe County, Indiana. Although under then existing Indiana branching restrictions for state-chartered banks, INB would not have been permitted to establish branches in Bloomington;[20] like Mississippi law, Indiana law permitted building and

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national bank branches to the extent allowed by state branching restrictions." Colorado State Banking Bd. v. Resolution Trust Corp., 926 F.2d 931, 945 (10th Cir. 1991).

16. 12 U.S.C. § 36(h) (1988).

17. 809 F.2d 266 (5th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

18. MISS. CODE ANN. § 81-12-175 (1973).

19. *Deposit Guaranty*, 809 F.2d at 271. Commercial banks in Mississippi were permitted to establish and operate branches only in the county where the bank's principal office was located or within a one-hundred mile radius of such office. MISS. CODE ANN. § 81-7-7 (1973).

20. A branch located in Bloomington, Monroe County, would not have been contiguous to Marion County, INB's principal place of business, and therefore would have violated then existing branching rules contained in the Indiana Code. *See* IND. CODE §§ 28-2-13-1 to -25 (1988 & Supp. 1991).

loan associations[21] to branch statewide. The Comptroller approved INB's application and, as in the *Deposit Guaranty* case, the Comptroller's decision was challenged in federal court by the state bank regulator, the Department of Financial Institutions. The federal district court, in a decision handed down only a few weeks prior to the beginning of the 1991 legislative session,[22] determined, based on *Deposit Guaranty* and subsequent cases,[23] that INB was not subject to the state-chartered bank branching restrictions, but instead could establish and operate branches on a statewide basis, based on the authority of building and loan associations to branch statewide.[24]

In response to the INB case, the DFI, the Community Bankers Association, the Indiana Bankers Association, and others sought the repeal of the state's restrictions on statewide *de novo* branching by state-chartered banks to provide for state-chartered banks the same power to establish branches as possessed by national banks. The repeal was accomplished by SEA 152 which removed, effective May 12, 1991, the contiguous-county-only restriction on branching.[25] SEA 152 also repealed the five year rule with respect to branching by acquisition in connection with intrastate acquisitions,[26] but left the five year rule intact in the context of interstate acquisitions.[27] As a result of these changes, an Indiana state-chartered bank can branch statewide, either *de novo* or by acquisition.

In addition to permitting Indiana state-chartered banks to branch into contiguous counties, the 1985 legislation permitted Indiana banks, regardless of their location in the state, to affiliate under multi-bank holding companies.[28] Branching by acquisition, either by direct bank acquisitions or indirectly through the acquisition of a holding company, was permitted on a statewide basis by Senate Bill 1. Such acquisitions, while not limited by geography, were subject to certain other limitations,

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21. Building and loan associations were permitted to open and establish branch offices statewide as a result of amendments to Indiana Code § 28-4-3-2(a) in 1987 which eliminated prior restrictions permitting branching only within the limits of the county in which the association's principal office was located and within 100 miles of the principal office. Pub. L. No. 277-1987, § 6.

22. Community Bankers Ass'n v. Clarke, 766 F. Supp. 1519 (S.D. Ind. 1990).

23. Independent Bankers Ass'n v. Clarke, 917 F.2d 1126 (8th Cir. 1990); Texas v. Clarke, 690 F. Supp. 573 (W.D. Tex. 1988); Volunteer State Bank v. National Bank of Commerce, 684 F. Supp. 964 (M.D. Tenn. 1988).

24. *Community Bankers Ass'n*, 766 F. Supp. at 1529.

25. Pub. L. No. 33-1991, §§ 57, 58.

26. *Id.* § 57.

27. *See* IND. CODE § 28-2-15-18(a)(2) (Supp. 1991) (five year rule for regional bank holding companies); IND. CODE § 28-2-16-16(a)(2) (Supp. 1991) (five year rule for foreign bank holding companies).

28. Pub. L. No. 265-1985, § 4 (codified as amended at IND. CODE § 28-2-14-10 (1988)).

including a deposit ceiling.[29] The deposit ceiling contained in the 1985 legislation prohibited a transaction if the surviving entity would hold more than a designated percentage of the total deposits in Indiana.[30] In anticipation of the effective date of statutory provisions permitting foreign holding companies, regardless of their principal place of business, to acquire Indiana banks,[31] the general assembly included in SEA 152 a repeal of the deposit ceiling.[32] Although limitations on concentration may arise from other laws, with the repeal of the state's deposit ceiling, Title 28 no longer directly limits the size of banking entities.

With SEA 152's repeal of the contiguous-county-only branching restriction, the elimination of the five year rule for intrastate acquisitions, and the removal of the deposit ceiling, the only remaining general state-law restrictions are those relating to interstate acquisitions. For interstate acquisitions, the five year rule and certain other restrictions remain in place.

B. Interstate Activity

The Douglas Amendment to the Bank Holding Company Act[33] prohibits the Federal Reserve Board "from approving an application of a bank holding company or bank located in one State to acquire a bank located in another State . . . unless the acquisition is specifically authorized by the statute laws of the State in which such Bank is located."[34] Restated, the Douglas Amendment prohibits bank acquisitions outside of the state in which the acquiror's principal operations are conducted, unless the acquisition is specifically authorized by the laws of the state in which the target bank is located.

Beginning with Massachusetts in 1982, several states adopted legislation "lifting the Douglas Amendment ban on interstate acquisitions on a reciprocal basis within their geographic regions."[35] The constitutionality of these state reciprocity laws was the subject of the United States Supreme Court decision in *Northeast Bancorp, Inc. v. Board of Governors*.[36] In *Northeast Bancorp*, the Court upheld the constitutionality of Massachusetts's and Connecticut's reciprocity laws allowing out-of-

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29. *See supra* note 9.

30. *See supra* note 9.

31. Pub. L. No. 279-1987, § 9 (codified at IND. CODE § 28-2-16-1 to -25 (1988 & Supp. 1991)) (effective July 1, 1992).

32. *See supra* note 9.

33. Bank Holding Company Act of 1956, ch. 240, § 3(d), 70 Stat. 133 (1956) (codified at 12 U.S.C. § 1842(d) (1988)).

34. *See* Northeast Bancorp., Inc. v. Board of Governors, 472 U.S. 159, 163 (1985).

35. *Id.* at 164.

36. 472 U.S. 159 (1985).

state holding companies with their principal places of business in another New England state to acquire an in-state bank provided that the state of the acquiror's principal place of business accorded equivalent reciprocal privileges.[37] Since the *Northeast Bancorp* decision was handed down, all but a few states have adopted legislation which permits some form of interstate banking.[38]

Indiana has permitted to a limited extent regional bank acquisitions since the passage of Senate Bill 1 in 1985.[39] Senate Bill 1 permitted bank holding companies located in Kentucky, Illinois, Michigan, and Ohio to acquire Indiana banks if the respective laws of these surrounding states permitted Indiana holding companies to acquire banks in these states, i.e., if there is reciprocity.[40] Because interstate branching remains prohibited, entry into the Indiana banking market continues to be only by acquisition. The five year rule, which bars a holding company from acquiring a bank that is not at least five years old, will remain in effect for interstate holding company acquisitions.[41]

Indiana's laws regulating "regional bank holding companies" were supplanted by the general assembly in 1987 with provisions regulating "foreign bank holding companies."[42] The 1987 legislation created a "reciprocal national trigger" which allows foreign bank holding companies to acquire Indiana banks, provided that the laws of the state of the foreign holding company's principal place of business permit an Indiana holding company to acquire a bank in that state.[43] The 1987 legislation permitting interstate banking nationally (subject to reciprocity) takes effect July 1, 1992.[44]

II. Savings Associations

In addition to revising bank branching and acquisition rules, SEA 152 permits state-chartered banks to establish branches through certain transactions with savings associations.[45] Additions to Title 28's bank branching chapter by SEA 152 provide that state-chartered banks may, upon receiving the necessary regulatory approvals, establish branches

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37. *Id.* at 178.

38. *See Oregon's Trigger Gets Pulled*, Banking Expansion Rep., Oct. 2, 1989, at 2 (containing table categorizing and listing various state laws concerning interstate banking).

39. Pub. L. No. 265-1985, § 4 (codified at Ind. Code §§ 28-2-15-1 to -29 (1988)), *repealed by* Pub. L. No 279-1987, § 13 (effective July 1, 1992).

40. Ind. Code § 28-2-15-18(e) (Supp. 1991) (repealed effective July 1, 1992).

41. *Id* § 28-2-16-16(a)(2) (effective July 1, 1992).

42. Pub. L. No. 279-1987, §§ 9, 13.

43. Ind. Code § 28-2-16-16(b) (Supp. 1991) (effective July 1, 1992).

44. Pub. L. No. 279-1987, § 15.

45. Pub. L. No. 33-1991, § 61 (codified at Ind. Code § 28-2-13-20.5 (Supp. 1991)).

through transactions with savings associations if the transactions are identified in section 5(d)(2)(C) or (d)(3) of the Federal Deposit Insurance Act.[46] Subsections 5(d)(2)(C) and (d)(3), in turn, identify exceptions to FIRREA's five year moratorium on the conversion of savings institutions to banks and vice versa.[47]

Section 5(d)(2)(C) provides that the Federal Deposit Insurance Corporation (FDIC) may approve a conversion transaction between a savings association and a bank if the transaction: (i) affects an insubstantial portion of the deposits of each depository institution to the transaction;[48] (ii) occurs in connection with a troubled savings association;[49] or (iii) occurs in connection with a troubled bank.[50] Section 5(d)(3) contains the "Oakar Transaction"[51] exception to the moratorium which permits a bank holding company which controls a savings association to merge the savings institution into a subsidiary commercial bank with appropriate regulatory approval.[52]

Like many changes to Title 28, this addition to the chapter on branching is designed to promote competitive equality between state-chartered banks and national banks by permitting state-chartered banks to establish branches through conversion transactions with savings associations to the same extent allowed national banks under federal law.

In addition to amending Title 28 to permit certain conversion transactions, SEA 152 also amended Title 28 to make Indiana law consistent with federal law concerning the use of the term "bank" in the corporate name of savings associations.[53] These statutory changes, like those concerning branching, were designed to create parity between state and federally chartered institutions.

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46. 12 U.S.C. § 1815 (1988 & Supp. I 1989).

47. Pub. L. No. 101-73, § 206(a)(7), 103 Stat. 183, 196 (1989) (codified at 12 U.S.C. § 1815(d)(2)(A)(ii) (1988 & Supp. I 1989)) (imposing five year moratorium on conversion transactions between institutions insured by the Savings Association Insurance Fund (SAIF), 12 U.S.C. § 1821(a)(6) (1988 & Supp. I 1989), and institutions insured by the Bank Insurance Fund (BIF), 12 U.S.C.A. § 1821(a)(5) (1988 & Supp. I 1989)).

48. 12 U.S.C. § 1815(d)(2)(C)(i) (1988 & Supp. I 1989). For purposes of subsection 5(d)(2)(C)(i), an insubstantial portion of deposits is less than 35% of the lesser of (i) total deposits on hand on May 1, 1989 and net interest on such deposits from May 1, 1989 to the date of conversion or (ii) total deposits on the date of a transfer of deposits as a result of conversion. *Id.* § 1815(d)(2)(D).

49. *Id.* § 1815(d)(2)(C)(ii) (requiring findings by FDIC and Resolution Trust Corporation (RTC) that SAIF member institution is in default or in danger of default and that estimated financial benefits exceed costs).

50. *Id.* § 1815(d)(2)(C)(iii) (requiring FDIC finding with respect to BIF institutions similar to that required by FDIC and RTC for SAIF institutions under subsection (C)(ii)).

51. The provision which is now § 5(d)(3) is the result of an amendment to FIRREA sponsored by Representative Oakar of Ohio.

52. 12 U.S.C. § 1815(d)(3) (1988 & Supp. I 1989).

53. Pub. L. No. 33-1991, § 19 (amending IND. CODE § 28-1-20-4 (1988).

III. Department of Financial Institutions Developments

One of the most prominent features of SEA 152 is its addition of Article 11 to Title 28.[54] The new Article is in large part a collection of several predecessor sections of Title 28 describing the organization, operation, and authority of the Department of Financial Institutions. The new Article does, however, change prior law in several respects.

The most notable changes resulting from new Article 11 are those relating to the DFI's enforcement powers. SEA 152 adds a chapter outlining the enforcement powers of the DFI.[55] The chapter contains its own "due process" provisions that exempt the DFI from other provisions of the Indiana Code which apply to administrative actions generally.[56] Enforcement powers can be invoked by the DFI by bringing notice of charges against either a financial institution or its officers or directors.[57] Orders can require an institution, its officers, directors, employees, and agents to cease and desist from certain practices or violations and, in appropriate circumstances, to take affirmative action to correct conditions resulting from prior practices and violations.[58] The chapter also grants to the DFI the power to impose civil penalties upon officers and directors of an institution for violations of final orders issued by the DFI.[59] Both the civil penalty provisions and the ability of the DFI to issue orders requiring affirmative action parallel relatively recent changes made to federal banking law by FIRREA.[60]

Another notable change to Title 28 resulting from SEA 152 is expansion of the DFI's power to examine bank "affiliates." Prior to the adoption of SEA 152, transactions between affiliates of state-chartered banks or trust companies were governed by Indiana Code chapter 28-

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54. *Id.* § 56 (codified at Ind. Code §§ 28-11-1-1 to -4-1 (Supp. 1991)).

55. Ind. Code §§ 28-11-4-1 to -9 (Supp. 1991).

56. Indiana Code § 28-11-4-1 exempts the DFI from the requirements of Indiana Code art. 4-21.5, except with respect to judicial review of a final order of the DFI.

57. Ind. Code § 28-11-4-2 (Supp. 1991) (as added by Pub. L. No. 33-1991, § 56) (notice of charges against a financial institution); *id.* § 28-11-4-3 (notice of charges against a director or officer).

58. *Id.* § 28-11-4-6 (temporary order); *id.* § 28-11-4-7 (as added by Pub. L. No. 33-1991, § 56) (final order).

59. *Id.* § 28-11-4-9 (as added by Pub. L. No. 33-1991, § 56).

60. Section 204 of FIRREA, Pub. L. No. 101-73, 103 Stat. 193 (1989), added the new term "institution-affiliated party" to 12 U.S.C. § 1813(u) and substituted the term throughout the Federal Deposit Insurance Act for the terms that had previously been used to designate parties subject to agency enforcement orders and against whom civil money penalties for violations of federal banking laws and other "unsafe and unsound practices" could be assessed. An "institution-affiliated party," like any federally insured financial institution, is subject to the full range of federal bank regulatory powers. Such powers were expanded significantly by FIRREA and allow regulators to, *inter alia*, assess civil

1-18.1. This chapter overlapped and conflicted with sections 23A and 23B of the Federal Reserve Act, the federal law regulating transactions among affiliates.[61] To avoid having state-chartered institutions subject to overlapping and, in some respects, conflicting laws, chapter 18.1 was repealed and replaced with new chapter 18.2.[62] The new chapter carries over certain provisions of prior law and provides that violations of sections 23A and 23B of the Federal Reserve Act by non-Federal Reserve member banks constitute violations of state law for which DFI enforcement action may be appropriate. The new chapter includes the definition of "affiliate" contained in the old chapter[63] and grants to the DFI the same power to examine "affiliates" as exists for the examination of the affairs of banks or trust companies.[64]

IV. Other Developments

Along with making important changes to Indiana banking law in the areas of branching, acquisitions, and regulatory enforcement, SEA 152 made several other significant changes to Title 28. These other changes included new and revised Indiana Code provisions regarding the chartering of new institutions, changes in bank control, office relocations and real estate lending, as well as technical amendments throughout Title 28 conforming state law to recent changes in federal banking law.

Prior to SEA 152, Title 28 required that the DFI find "public necessity" before chartering a new financial institution and that it hold a hearing in connection with each new charter application. Prior law also contained minimum capital guidelines based on the size of the community where the new institution was to operate. SEA 152 eliminates each of these requirements. In place of the "public necessity" requirement for new institutions, SEA 152 requires that the DFI consider only the "convenience, needs, and future earnings prospects for the [new] financial institution."[65] SEA 152 also eliminated the mandatory hearing require-

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money penalties and issue cease and desist orders requiring affirmative actions to be taken by an institution as well as its institution-affiliated parties. For an overview of the enhanced enforcement powers granted to federal regulators by FIRREA, see Daniel B. Gail & Joseph J. Norton, *A Decade's Journey from "Deregulation" to "Supervisory Reregulation": The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 Bus. Law. 1103, 1188-1206 (1990).

61. 12 U.S.C. §§ 371c, 371c-1 (1988).

62. Pub. L. No. 33-1991, §§ 18, 57.

63. *Cf.* Ind. Code § 28-1-18.1-1 (1988) (repealed effective May 12, 1991); Ind. Code § 28-1-18.2-1 (Supp. 1991) (effective May 12, 1991).

64. Ind. Code § 28-1-18.2-4(a) (Supp. 1991) (as added by Pub. Law No. 33-1991, § 18).

65. Ind. Code § 28-1-2-26 (Supp. 1991) (as amended by Pub. L. No. 33-1991, § 7).

ment; the DFI "may" hold a hearing.[66] Minimum capital guidelines for banks were also eliminated, but such guidelines remain in effect for state-chartered savings associations.[67] Under the new law the "minimum amount of the capital stock" of a new bank or trust company is to be determined "by the department after giving consideration to the potential deposit liability."[68]

In addition to revising statutes governing the chartering of new institutions, SEA 152 amended laws governing changes in control of existing institutions. Under the federal Change in Bank Control Act[69] a person or a group of persons acting in concert must give notice to the Federal Deposit Insurance Corporation before acquiring more than twenty-five percent of the voting shares of a federally insured depository institution. Prior to SEA 152, the corresponding state law provisions required DFI pre-approval of changes in control of state banks and trust companies—defined as the acquisition of a majority of outstanding capital stock of an institution. SEA 152 brings state law closer into conformity with federal law by lowering the threshold for a change-in-control from fifty percent to twenty-five percent, establishing time frames for the DFI's approval process and identifying factors the DFI should consider in approving an application.[70]

State laws governing the location of an institution's principal office were also altered by SEA 152. Prior to the removal of restrictions on statewide branching by SEA 152, the DFI took the position that a state-chartered financial institution could not move its "principal office" outside of its home county.[71] All relocations were also subject to DFI approval.[72] This was inconsistent with the law applicable to national banks which permitted the relocation of a bank's main office, provided that it did not involve moving the main office more than thirty miles from the borders of the bank's hometown.[73] In 1990, the DFI retreated from its position that main office relocations could not occur outside of a bank's home county by allowing Fifth Third Bank of Central Indiana to relocate its main office from Hancock County to Marion

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66. *Id.* § 28-1-2-22 (as amended by Pub. L. No. 33-1991, § 3).

67. *Id.* § 28-1-4-12 (as amended by Pub. L. No. 33-1991, § 11).

68. *Id.*

69. Pub. L. No. 95-630, § 602 (codified as amended at 12 U.S.C. § 1817(j) (1988)).

70. IND. CODE § 28-1-2-23 (Supp. 1991) (as amended by Pub. L. No. 33-1991, § 4).

71. This position was based on the DFI's interpretation of Indiana Code § 28-1-5-3 (1988), which provided (prior to SEA 152) that "[e]very corporation shall maintain an office or place of business in this state, which shall be known as the 'principal office,' and which shall be located in the county in which such corporation conducts business."

72. *See supra* note 71.

73. 12 U.S.C. § 30(b) (1988).

County. This change in policy was carried over into amendments to Title 28's provisions concerning an institution's principal office.[74] Under the revised provisions, Indiana law provides that an institution's principal office can be located in any county in the state where the institution conducts business.[75] Like prior law, however, DFI approval of any principal office relocation is required.[76]

Prior to the passage of SEA 152 state-chartered banks periodically had been criticized by the DFI for non-compliance with Code provisions concerning loans secured by real estate. SEA 152 repealed these provisions and added new provisions under which a state bank may make any loan secured by real estate that a national bank can make.[77] SEA 152 also expanded real estate lending powers of state-chartered savings banks by permitting such banks to engage in real estate lending to the same extent as that permitted for commercial banks.[78] Rollover mortgages are also specifically authorized, but are subject to statutorily prescribed requirements and restrictions.[79]

In addition to the revisions to Title 28 by SEA 152, the 1991 General Assembly also passed Senate Enrolled Act No. 153 (SEA 153)[80] which made numerous technical amendments to a variety of statutes. These amendments consisted almost entirely of revising existing statutes to reflect changes in federal law. Revisions resulting from SEA 153 include the elimination of references to the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board (FHLBB), the addition of appropriate references to the Office of Thrift Supervision (OTS), the FDIC and the FDIC's Savings Association Insurance Fund (SAIF) and Bank Insurance Fund (BIF), and stylistic and technical changes necessitated by the new references.

V. Conclusion

To continue the systematic revision of Title 28 begun by the Interim Study Committee on Financial Institutions and Consumer Credit ap-

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74. *See* Ind. Code § 28-1-5-3 (Supp. 1991).

75. *Id.*

76. *Id.*

77. Pub. L. No. 33-1991, §§ 16, 57 (repealing Ind. Code § 28-1-13-7 (1988) and adding Ind. Code § 28-1-13-7.1 (Supp. 1991)). National banks, pursuant to § 24 of the Federal Reserve Act, 12 U.S.C. § 371 (1988), are permitted to "make, arrange, purchase, or sell" loans secured by real estate "subject to such terms, conditions, and limitations as may be prescribed by the Comptroller."

78. Ind. Code § 28-1-13-7.1(c) (Supp. 1991).

79. *Id.* § 28-1-13-7.1(e). The term "roll over mortgage" (ROM) as used in § 28-1-13-7.1 refers to a loan secured by a first mortgage on real property improved by a one to four family dwelling that can be refinanced at regularly scheduled times.

80. Pub. L. No. 8-1991.

pointed by the 1990 General Assembly, the 1991 General Assembly established, through House Enrolled Act No. 1141,[81] a Financial Institutions Study Commission. The Commission is charged with an obligation to study, *inter alia*, the competitive position of Indiana financial institutions (with respect to both domestic and foreign competition), the role of such institutions in the Indiana economy, remaining legal restrictions on Indiana financial institutions that have a negative economic effect and which invite federal preemption, and proposals to revise and simplify Indiana law governing financial institutions.[82] The creation of the Commission suggests that recent efforts to revise and improve Title 28 mark the beginning of an ongoing process to systematically reform Indiana laws regulating state-chartered financial institutions. The result of this should be continued and significant revision of state laws which define bank powers and affect the structure of banking in Indiana.

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81. Pub. L. No. 239-1991.
82. *Id.* § 1(f).