

July 19, 1990

FDIC & RTC LEGAL STAFF COMMENTS ON SUBTITLE B OF S. 2827,
THE LENDER LIABILITY ACT OF 1990

The following are substantive and technical comments on Subtitle B of S. 2827. Where appropriate, we have included revised statutory language.

AGENCY IMMUNITY - Subsection (d)

1. As presently drafted, subsection (d) exempts the FDIC, RTC, and the other listed entities from liability "...under any law imposing strict liability for the release ... of hazardous substances...". To ensure that the term "any law" exempts the listed entities from liability not only under Federal law, but under state and local statutes, as well as common law, we suggest that the term "any law" in subsection (d) be replaced with the following language: "any federal, state or local statute, regulation, rule, ordinance or common law".
2. Subsection (d) provides an exemption from "strict liability...". The term "strict" liability is not defined in Subtitle B nor is it defined or used in the various environmental statutes, including the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA). Accordingly, it could be interpreted to narrow inappropriately the exemption granted under subsection (d). We strongly recommend that the term "strict liability" be replaced with "liability".
3. We suggest that subsection (d) be amended to clarify that the exemption from liability granted to the FDIC, the RTC, and the other listed entities extends to the employees and agents of these entities, as well as to the entities themselves. Inclusion of this clarifying language will resolve questions that may arise as to the scope of the exemption and avoid needless litigation.
4. Subsection (d) as presently drafted contains the phrase, "hazardous substances or similar material". The phrase, "similar material," is ambiguous. It is not defined in Subtitle B or in any federal environmental statute. This phrase also is not a term of art used in the area of hazardous substance liability litigation. As a result, we recommend that it either be defined or deleted.

5. Subsection (d) provides that the listed entities shall not be liable "under any law imposing strict liability for the release, threatened release, use, storage, or disposal of hazardous substances...". While the language used in the foregoing phrase covers most of the bases for liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), it does not precisely refer to all CERCLA bases of liability. As a result, we suggest that the phrase be modified to read:

"...under any law imposing liability for the release, threatened release, use, storage, disposal, treatment, generation or transportation of hazardous substances...".

6. To be consistent with terminology used elsewhere in Subtitle B, we suggest that the term, "Agency Immunity" used in the title of this subsection be replaced by the term, "Agency Exemption". Use of the term, "Agency Exemption" also will avoid potential confusion with statutes and case law dealing with sovereign immunity.

- In summary, we recommend that the beginning of subsection (d) be modified as follows:

(d) Agency Exemption.

"Neither the Corporation, the Resolution Trust Corporation...nor the Farm Credit Administration in any of their capacities shall be liable, nor shall any of their employees and agents be liable, under any federal, state or local statute, regulation, rule, ordinance or common law imposing liability for the release, threatened release, use, storage, disposal, treatment, generation or transportation of hazardous substances from property acquired-- ...".

EXCEPTIONS TO AGENCY IMMUNITY - Subsection (d)

1. Two bases are contained in subsection (d) to deprive the FDIC, RTC, and other listed entities of superfund immunity:

- First, immunity is unavailable if the agency "has caused the release, or threatened release of a hazardous or potentially dangerous substance".

- Second, immunity is unavailable if the agency "had actual knowledge that a hazardous or potentially dangerous substance was located on such property but failed to take all reasonable actions necessary to prevent the release of such substances."

There are a number of problems with the language of these exclusions:

- The term "potentially dangerous substance" used in both exclusions is neither defined in Subtitle B nor in any federal environmental statute. In addition, the term is not used in the grant of immunity contained in subsection (d) As a result, it should either be deleted from this subsection or defined in the Subtitle.
- The use of the term "release" in conjunction with causation as the basis for removing agency immunity under the first exclusion is extremely problematic. The term "release" is defined in Superfund as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment...". 42 U.S.C. section 9601(22).

Many of the actions listed in the definition of "release" such as "leaking" and "leaching" may purely be the result of prior owners' actions and resultant chemical reactions. Furthermore, some of the actions included in the definition of "release" may be extremely difficult to pinpoint as to the time of the "release" with any accuracy. Should it be argued that a "release" occurred while the FDIC or RTC owned a property, it may be extremely difficult to produce evidence to prove that no "release" of hazardous substances occurred while the property was in the hands of the FDIC or RTC.

In view of the foregoing, this exclusion from immunity should be clarified, narrowed or deleted. We suggest that the bill provide that the FDIC or RTC must be the "sole cause" of, or the agent that initially caused, the release or threatened release of the hazardous substance. Absent such clarification, we believe that the goals of S. 2827 will be significantly frustrated and the deposit insurance funds and RTC may again be endangered.

- The phrases, "actual knowledge" and "all reasonable actions necessary" contained in the second exclusion are extremely broad and ambiguous. Consequently, they are likely to subject the FDIC and RTC to expensive and unnecessary litigation.
- Furthermore, the phrase "all reasonable actions necessary", if interpreted broadly by the courts, would eviscerate the basic purpose of this legislation, which is to grant an exception from Superfund liability for the FDIC, RTC, and the other listed entities. We suggest that the term be defined or narrowed.

The FDIC and RTC must act quickly to resolve failed financial institutions and, consequently, may not have "actual knowledge" of problems associated with properties at the time of their acquisition. Nonetheless, litigants will undoubtedly argue that we had "actual knowledge" of a problem when they seek to deprive the FDIC and RTC of immunity under subsection (d). Accordingly, the FDIC and RTC will be placed once again at risk of liability and forced to incur substantial attorneys fees. We suggest that this phrase be deleted.

2. As a technical drafting matter, we suggest that the exceptions to agency immunity be moved to a separate subsection, rather than simply being a part of subsection (d).

MATTERS NOT ADDRESSED IN S. 2827

1. Transferal of immunity. Language should be included to clarify that the immunity granted the FDIC and RTC extends to those who purchase contaminated property from the FDIC and RTC. The bill as presently drafted is ambiguous on this point. Absent such a provision, the ability of the FDIC and RTC to sell properties would be greatly impaired.

Such an amendment is consistent with the goal of requiring those who created the hazardous substance problem to pay for its clean up. The cost of remediating environmental problems should lie with Superfund, not the deposit insurance funds or the RTC. By extending the immunity afforded by S. 2827 to the FDIC's and RTC's buyers, the values of properties sold by the FDIC and RTC will be enhanced and, thus, the deposit insurance funds will be protected and the cost of the savings and loan bailout reduced.

2. Exemption from liability to purchasers under 42 U.S.C. 9620(h). S. 2827 does not address its relationship with 42 U.S.C. 9620(h), which requires federal agencies to provide certain covenants or warranties to buyers when they sell properties. Under 42 U.S.C. 9620(h), a federal agency must warrant (1) that it has cleaned up hazardous substances on the property transferred; and (2) that it will pay for any clean up costs which arise in the future. While S. 2827 would exempt the FDIC and RTC from hazardous substance liability per se, the risks associated with the warranties required by 42 U.S.C. 9620(h) remain.

To resolve this dilemma, S. 2827 should be amended to provide that the entities covered by subsection (d) are exempt from providing the warranties identified in 42 U.S.C. section 9620(h). This recommended exemption is consistent with our prior suggestion that the immunity granted the FDIC and RTC under subsection (d) be extended to those who buy properties from us.

3. Impact of 42 U.S.C. 9607(1). The bill does not appear to contemplate the impact of 42 U.S.C. 9607(1) on the immunity provided the agencies under subsection (d) of Subtitle B. Section 9607(1) of Title 42 imposes a federal lien on property that has benefited from a clean up funded by the federal government through Superfund. In the event a lien is imposed under Section 9607(1) or an analogous state statute on property acquired by the FDIC or RTC, the protection afforded the deposit insurance funds and the RTC may be greatly diminished and the value of that property to the FDIC or RTC would be greatly reduced. We suggest that S. 2827 be amended to provide an exemption from 42 U.S.C. 9607(1) for the entities granted immunity under subsection (d) of Subtitle B.