

June 29, 2012

2012 Legislative Amendments to the Indiana Code Relating to Banks, Trust Companies, Thrifts, Credit Unions, Holding Companies and Corporate Fiduciaries

Effective July 1, 2012 (except as otherwise indicated)

Questions, Answers, and Administrative Interpretations: This document contains a Q&A relating to amendments to the Indiana Financial Institutions Act (IC 28 *et seq.*) (the “Act”) adopted by the 2012 General Assembly affecting the depository institutions regulated by the Department of Financial Institutions (“DFI” or the “Department”). House Enrolled Act 1239 (“HEA 1239”) is comprised of a number of provisions assembled by the DFI staff during the preceding year consisting of corrections and improvements to the Act as well as several substantive provisions, largely the result of actions by Congress in the adoption of Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). HEA 1239, commonly known as the DFI Omnibus Bill, can be found in its entirety at the following link:
<http://www.in.gov/legislative/bills/2012/HE/HE1239.1.html>.

CHANGES IN CONTROL:

1. What are the obligations of a person who inherits or receives a gift of voting securities in an Indiana-chartered bank?

IC 28-1-2-23 has been amended to add a new subsection (i) to address the acquisition of voting shares of an Indiana-chartered financial institution through inheritance or a bona fide gift as well as in satisfaction of a debt previously contract in good faith (other than the acquisition of a defaulted loan secured by a controlling amount of the voting securities in a financial institution). In such cases, a person who acquires voting shares of a financial institution through one of these transactions is required to use best efforts to comply with the change of control provisions of IC 28-1-2-23, including filing an application for change of control with the department. Because these circumstances may come about due to unforeseen or unforeseeable circumstances, these provisions specifically state that “it is not a violation . . . if the acquiring person is not able to satisfy the requirements of [IC 28-1-2-23] and notifies the department of the acquisition not later than 30 calendar days after the acquisition and provides any relevant information requested by the department.” IC 28-1-2-23(i).

2. When is the president or other chief executive officer of a financial institution required to report to the DFI a transfer or sale of at least 10% of the outstanding stock of a financial institution?

IC 28-1-2-23(g) requires the president or other chief executive officer to file a report on the transfer or sale of at least 10% of the outstanding stock not later than 10 days after the transfer on the books of a financial institution or holding company. To avoid inadvertent violations of these

provisions subsection (g) has been amended to provide that the report filed not later than 10 days after “the president or other chief executive officer *becomes aware* of the transfer of the shares of stock on the books of the financial institution or holding company.” [Emphasis added.] IC 28-1-2-23(g).

MERGERS AND ASSET SALES:

3. What changes have been made to the chapter governing mergers involving Indiana financial institutions (IC 28-1-7 et seq.)?

The chapter relating to mergers (IC 28-1-7 *et seq.*) has been amended to clarify that if a merger involves a mutual savings bank or mutual savings association the term “shareholder” as used in IC 28-1-7 *et seq.* refers to a member of the mutual entity. Further, members of these mutual entities do not have dissenters’ rights as provided for in IC 28-1-7-21. Finally, the merger chapter has been amended to acknowledge that mergers are subject to approvals required under federal law. IC 28-1-7-4(a).

4. What changes have been made to the chapter governing the sale of assets by an Indiana financial institution (IC 28-1-8 et seq.)?

Like the chapter involving mergers, the chapter relating to the sale of substantially all of the assets of an Indiana financial institution (IC 28-1-8 *et seq.*) has been amended to clarify that if the assets sale involves a mutual savings bank or mutual savings association the term “shareholder” as used in IC 28-1-8 *et seq.* refers to a member of the mutual entity. Further, members of these mutual entities do not have dissenters’ rights as provided for in IC 28-1-8-5. Further, the asset sale chapter has been amended to acknowledge that assets sales are subject to approvals required under federal law. IC 28-1-8-3(b).

In addition, a new subsection (c) has been added to IC 28-1-8-3 to address potential conflicts of interest involving officers and directors “whose proposed disposition is approved by the department under IC 28-1-8-3(b) may not negotiate for or receive any economic benefit in connection with any sale of assets under IC 28-1-8, except for:

- (1) compensation and other benefits paid to the officer or director and to officers and directors of the purchasing institution in the ordinary course of business;
- (2) any economic benefit realized by all shareholders as a result of the disposition; or
- (3) any economic benefit received as part of a compensation or benefit plan existing at the time of the disposition and approved before the initiation of sale negotiations.”

IC 28-1-8-3(c).

5. In reviewing whether to approve a proposed purchase of substantially all of the assets under IC 28-1-8-6 what special consideration should the department give to the acquisition of deposits?

IC 28-1-8-6(c) has been amended to provide that if deposits are to be transferred as part of the proposed transaction, the department should consider whether the resulting institution will

maintain adequate federal deposit insurance or such other deposit insurance as approved by the director.

COMMUNITY BASED ECONOMIC DEVELOPMENTS:

6. What changes have been made to the provisions of allowing Indiana-chartered banks and trust companies and savings banks to invest in community based economic development projects?

Since numerous amendments have been made in recent years to the provisions relating to investments in community based economic development projects, the staff of the department felt it would be prudent to set out comprehensive provisions allowing Indiana-chartered financial institutions to invest in community based economic development projects. These expansive provisions allow Indiana-chartered institutions to select a variety of community based investments as long as they are consistent with safety and soundness.

To implement these expanded provisions, a new section IC 28-1-11-14 relating to banks and trust companies (and IC 28-6.1-7-11 relating to savings banks) was added. Definitions and limitations previously contained in multiple sections were amended and consolidated into a single, more easily understood section. In particular, the term "community based economic development" means "activities that seek to address economic causes of poverty within specific geographic areas, revitalizing the economic and social base of low income communities through activities that include:

- (1) affordable housing development;
 - (2) small business and micro-enterprise support;
 - (3) commercial, industrial, and retail revitalization, retention, and expansion;
 - (4) capacity development and technical assistance support for community development corporations;
 - (5) employment and training efforts;
 - (6) human resource development; and
 - (7) social service enterprises."
- IC 28-1-11-14(a) and IC 28-6.1-7-11(a).

Also, the term "community development corporation" means "a private, nonprofit corporation:

- (1) whose board of directors is comprised primarily of community representatives and business, civic, and community leaders; and
 - (2) whose principal purpose includes the provision of:
 - (A) housing;
 - (B) community based economic development projects; and
 - (C) social services;that primarily benefit low-income individuals and communities."
- IC 28-1-11-14(b) and IC 28-6.1-7-11(b).

7. What investments can a bank or trust company [or savings bank] make in community based economic developments?

IC 28-1-11-14(d) [or IC 28-6.1-7-11(b)] provides that “[s]ubject to the limitations of this section, other laws, and any regulation, rule, policy, or guidance adopted by the department concerning investments in community based economic development, any bank or trust company [or savings bank] may invest directly or indirectly in equity investments in a corporation, a limited partnership, a limited liability company, or another entity organized as:

- (1) a community development corporation;
- (2) an entity formed primarily to support community based economic development;
- (3) an entity qualifying for the new markets tax credits under 26 U.S.C. 45D; or
- (4) an entity approved by the director as being formed for a predominantly civic, community, or public purpose and that:
 - (A) primarily benefits low and moderate income individuals;
 - (B) primarily benefits low and moderate income areas;
 - (C) primarily benefits areas targeted for redevelopment by a government entity; or
 - (D) is a qualified investment under 12 CFR 25.23 for purposes of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 et seq.).”

8. What are the limitations have been established relating to how much an institution may invest in community based economic developments?

The aggregate of all equity investments by a bank or trust company under IC 28-1-11-14(e) [or a savings bank under IC 28-6.1-7-11(e)] may not exceed:

- (1) five percent (5%) of the capital and surplus of the bank or trust company [or a savings bank] without the prior written approval of the director; and
- (2) fifteen percent (15%) of the capital and surplus of the bank or trust company [or savings bank] under any circumstances.

IC 28-1-11-14(e) [IC 28-6.1-7-11(e)].

IC 28-1-11-14(f) [or IC 28-6.1-7-11(f)] provides that “[i]n determining whether to permit the aggregate of all equity investments to exceed five percent (5%) of the capital and surplus, the director shall consider whether:

- (1) the aggregate of all equity investments under subsection (d) will pose a significant risk to the affected deposit insurance fund; and
- (2) the bank or trust company [or savings bank] is adequately capitalized.”

IC 28-1-11-14(f) [IC 28-6.1-7-11(f)].

IC 28-1-11-14(g) [or IC 28-6.1-7-11(g)] provides that “[a] bank or trust company [or savings bank] shall not make any investment in a project if the investment would expose the bank or trust company to unlimited liability.”

It should be noted that the previous 2% limitation on investments in any one project has been eliminated.

LENDING LIMITS FOR BANKS, SAVINGS BANKS AND CREDIT UNIONS:

9. What changes have been made to the lending limits for Indiana-chartered banks, savings banks, credit unions and savings associations?

As mandated by Dodd-Frank, IC 28-1-13-1.5 (banks), IC 28-6.1-9-5 (savings banks), IC 28-7-1-39 (credit unions) and IC 28-15-6-1 (savings associations) have been amended to add provisions stating that total loans and extensions of credit by a bank, savings bank, credit union or savings association, respectively, must include any credit exposure to a person from a derivative transaction (as defined in 12 U.S.C. 84(b)(3)) between the bank, savings bank, credit union and savings association and the person.

BOLI FOR BANKS, SAVINGS BANKS, CREDIT UNIONS AND SAVINGS ASSOCIATIONS:

10. What legislative changes have occurred relating to Business Owned Life Insurance (“BOLI”)?

IC 28-7-1-9 relating to the powers of a state-chartered credit union has been amended to add subsection (c) which adds that “[s]ubject to any limitations or restrictions that the department or a federal regulator may impose by regulation, rule, policy, or guidance, a credit union to purchase and hold life insurance as follows:

- (1) Life insurance purchased or held in connection with employee compensation or benefit plans approved by the credit union's board of directors.
- (2) Life insurance purchased or held to recover the cost of providing preretirement or postretirement employee benefits approved by the credit union's board of directors.
- (3) Life insurance on the lives of borrowers.
- (4) Life insurance held as security for a loan.
- (5) Life insurance that a federal credit union may purchase or hold under 12 CFR 701.19(c).”

IC 28-7-1-9(c).

These provisions mirror business owned life insurance provisions applicable to banks in IC 28-1-5-2(c), savings banks in IC 28-6.1-6-14(f) and savings associations in 28-15-2-1(b).

11. What is the “Interagency Statement on the Purchase and Risk Management of Life Insurance” (“BOLI Statement”) and how does it apply to Indiana-chartered financial institutions?

In 2004, the federal banking agencies (Office of the Comptroller of the Currency (“OCC”), Federal Deposit Insurance Corporation (“FDIC”), Board of Governors of the Federal Reserve (“Federal Reserve”) and the Office of Thrift Supervision (“OTS”) but not the National Credit Union Administration (“NCUA”)¹) adopted the BOLI Statement, which is a thorough and comprehensive statement on ownership of life insurance by financial institutions to defray the costs of employee

¹ While NCUA has not specifically adopted the BOLI Statement, it has adopted a series of legal opinions issued by the NCUA General Counsel's office on this topic which can be found at: <http://www.ncua.gov/Legal/Regs/Pages/OL2012.aspx>.

benefits with an emphasis on risk management. The following is a link to an Executive Summary as well as the complete statement: <http://www.fdic.gov/news/news/financial/2004/fil12704.html>.

While most state-chartered institutions have been subject to the BOLI Statement since its adoption by their principal federal banking regulator in 2004 or 2005, the DFI Members felt that the amendment to the Credit Union Act (IC 28-7-1-9(c)) authorizing credit unions to acquire BOLI was an opportune time to alert all state-chartered financial institutions of the importance of complying with the BOLI Statement. In particular, the DFI Members felt it was crucial to clarify the applicability of the BOLI Statement to state-chartered credit unions. Consequently, at their meeting on June 14, 2012, the Members, in accordance with IC 28-11-1-13, adopted the following resolution:

Indiana-chartered financial institutions, including banks, credit unions, corporate fiduciaries, industrial loan and investment companies, savings banks and savings associations, considering the purchase, ownership or acquisition of a beneficial interest in life insurance products shall follow the guidance set out in the "Interagency Statement on the Purchase and Risk Management of Life Insurance" issued by the federal banking regulators as amended and supplemented from time to time) and general safety and soundness considerations.

According to the FDIC, when the BOLI Statement was issued eight years ago more than 40 percent of U.S. commercial and savings banks used bank-owned life insurance to recover employee benefit costs. As the BOLI Statement reaffirms, this is a complex issue requiring careful due diligence and continuing vigilance by an institution's management and board of directors.

APPRAISALS FOR REAL ESTATE LOANS BY CREDIT UNIONS:

12. What changes have been adopted relating to the appraisal requirements for real estate loans made by credit unions?

IC 28-7-1-17(b)(3) has been amended to clarify that all real estate mortgage loans must be documented by a written appraisal; however, if the amount of the loan is at least \$250,000 the written appraisal must be performed by a state licensed or certified appraiser designated by the board of directors.

LIMITED LIABILITY COMPANIES

13. What types of financial institutions can be organized as a limited liability company?

IC 28-11-5-10 has been amended to clarify that the provisions relating to organizing as a limited liability company apply to the following financial institutions:

- (1) A bank.
- (2) A savings association.
- (3) A credit union.
- (4) A savings bank.
- (5) A trust company.
- (6) A corporate fiduciary.

FOREIGN FIDUCIARIES

14. Can a trust company organized in another state with only minimal capital open an office to do business in Indiana?

No. IC 28-14-3-22 has been amended to add subsection (b) which clarifies that “[a] corporate fiduciary, trust company, or bank that is organized and doing business under the laws of any state, territory, or district other than Indiana, including a national bank or national trust company that is primarily domiciled in any other state, has the same rights, privileges, and restrictions, including capital requirements, as an Indiana bank, an Indiana corporate fiduciary, or an Indiana trust company of like character or charter, and to the same extent as if the corporate fiduciary, trust company, or bank organized and doing business under the laws of any state, territory, or district other than Indiana had been organized under this article, to transact the business for which a certificate of admission is issued.”

An out of state trust company would be required to increase its capitalization to the level which would be required of a corporate fiduciary organized under Indiana law.

ABOLISHMENT OF OFFICE OF THRIFT SUPERVISION

15. What changes in Indiana financial institution laws were necessitated from the abolishment of the Office of Thrift Supervision (“OTS”)?

Pursuant to Section 312 of Dodd-Frank regulatory jurisdiction over thrifts and their holding companies and their non-depository institution subsidiaries was transferred from the OTS to other applicable federal regulators. Specifically, OTS supervisory functions relating to federal thrifts and all OTS rulemaking authority for federal and state-chartered thrifts were transferred to the OCC. OTS supervisory functions with regard to state-chartered thrifts were transferred to the FDIC and OTS supervisory and rulemaking functions relating to savings and loan holding companies and their non-depository institution subsidiaries were transferred to the Federal Reserve. The OTS ceased to exist on October 19, 2011.

Consequently, the numerous references to the OTS throughout the Financial Institutions Act (IC 28 *et seq.*) have been eliminated in favor of the term “primary federal regulator” which means the OCC in the case of federal thrifts, the FDIC relating to state-chartered thrifts and the Federal Reserve in the case of savings and loan holding companies and their non-depository institution subsidiaries.