The bailout of the savings and loans: feet first into fascism

by Kathleen Klenetsky

The Financial Institutions Reform, Recovery, and Enforcement Act, or FIRREA, as the Bush administration's "rescue" legislation for the savings and loan institutions is known, poses a dangerous threat not only to the survival of U.S. thrift institutions, but to constitutional law as well. Currently under consideration by a House-Senate conference committee, which is expected to hammer out a final version for President Bush's signature by early August, FIRREA establishes a whole new range of banking offenses, with draconian penalties that include fines of $1 million per day and more for officials of the savings institutions.

These provisions of the legislation are obviously designed to frighten the remaining S&Ls into selling out to the big-money banks and other speculators, which are now hungrily circling the thrifts like vultures. But they have an additional purpose: to set legal precedents that can then be employed against other so-called "special interest groups" which represent an obstacle to the Bush administration's plans for a fascist reorganization of the U.S. economy.

This goes along with the warning of former Washington, D.C., U.S. Attorney Joseph DiGenova, interviewed on ABC News's "Nightline" on April 12, that the "criminals"—those who owned and operated the S&Ls—would be apprehended and convicted.

The legal witchhunt which President Bush and the Congress propose to wage against the S&Ls, is part of the same pattern of unconstitutional judicial assaults which have already been deployed against the defense industry through the Justice Department's "Operation Ill Wind"; against anti-abortion protestors, who have been convicted under the RICO statutes that were supposed to be used against organized crime kingpins; and against independent political movements, most notably, that of *EIR* founder Lyndon H. LaRouche, Jr.

While U.S. Attorney General Richard Thornburgh has been touring the country urging FIRREA's enactment on the grounds that it will give him an additional $50 million to prosecute S&L "fraud," the specifics of its enforcement provisions have been kept out of the public eye.

For this reason, we publish below excerpts of an analysis of FIRREA's enforcement measures presented to a recent conference of the U.S. League of Savings Institutions by John Villa, an attorney with the Washington firm of Williams and Connolly.

Villa warns that FIRREA's "far-reaching changes" will result in "uniformly more punitive sanctions, and at the same time allow unfettered discretion in their use." Although some details of the enforcement provisions may be altered in the House-Senate conference, there is no indication that they will be softened significantly.

New enforcement provisions

"FIRREA would expand the range of civil enforcement measures available under the Federal Deposit Insurance Act," Villa declared. "It also would extend the reach of certain existing enforcement measures to new (and in some instances less precisely defined) conduct. Finally, it would dramatically increase the civil and criminal penalties under the FDIA and the other federal banking statutes codified in Title 12 of the U.S. Code. The cumulative result of these far-reaching changes would be to make available to the federal banking regulators and law enforcement authorities uniformly more punitive sanctions, and at the same time allow unfettered discretion in their use. . . ."

Increased civil money penalties

"FIRREA will increase sharply the size of the civil money penalties that may be imposed on a financial institution and its insiders. In addition, both the procedure and standards for imposition of civil money penalties will be substantially revised. Under existing law, civil money penalties may generally be imposed only upon a finding by the appropriate regulatory agency that the institution or the insider has violated a cease and desist order, a temporary cease and desist order, or an order to comply with the reporting and record-keeping requirements of the Bank Secrecy Act. One of the most important changes in both the Senate and House versions of the Act is that the regulatory agencies will now be able to proceed *directly* to the assessment of civil money penalties for the violation" of laws, regulations, etc.

"Both versions also permit the assessment of civil money penalties for breach of such vague standards as 'any fiduciary duty' or any 'unsafe or unsound practice' which has resulted in loss to the institution or financial gain to the individual.

© 1989 EIR News Service Inc. All Rights Reserved. Reproduction in whole or in part without permission strictly prohibited.

The chief effect of this change is to take a two-step process, which gave individuals ample warning of the possibility that civil money penalties might be imposed, and compress it into a single step in which any violation could conceivably be the basis for civil money penalties.

"The maximum size of the civil money penalties has also been dramatically increased. Under existing law, the maximum civil penalty is generally $1,000 for each day during which such violation continues. Both Senate and House versions would permit a two-tiered penalty structure.

"Under the House version, the lower tier . . . civil money penalty is a fine of up to $15,000 *per day*," and up to $25,000 per day in the Senate version. For more serious offenses, such as "any violation of any law, regulation, or any breach of a fiduciary duty or any unsafe or unsound practice, if performed with knowledge or reckless disregard of the fact that the Act may result in substantial loss to the institution or significant pecuniary gain to the person," the penalties are higher.

"*In the House version . . . the penalty can reach $1 million per day for individuals; for institutions, serious violations carry maximum daily fines of $1 million or 1% of the total assets of the institution. In the Senate version, the maximum is $1 million per day.*

"Both the lower- and upper-tier penalties are applicable to the financial institution, and to all 'institution-related parties' (Senate version) or 'persons participating in the conduct of the affairs of the financial institution' (House version).

"One significant change wrought by both the Senate and House versions of FIRREA is making the enforcement provisions (i.e., civil money penalties, removal, etc.) applicable to *all* financial institution insiders. . . . There is no doubt that the version of this provision that survives in the final legislation will expand the scope of the enforcement provisions beyond directors, officers, and employees, to reach significant shareholders, and independent contractors, such as accountants, appraisers, consultants and attorneys. . . ."

Informants and 'whistleblowers'

"The House version of FIRREA would provide incentives to informants or 'whistleblowers' to provide information to regulatory agencies or the Department of Justice regarding possible violations of federal laws or regulations relating to financial institutions. It would authorize federal banking agencies to pay rewards of up to $100,000 to persons who provide original information leading to the recovery of criminal fines, restitution of civil penalties, or to forfeitures. . . ."

The Right to Financial Privacy Act

Both Senate and House versions "make the Right to Financial Privacy Act (RFPA) inapplicable to (i) the examination by or disclosure to any supervisory agency of customer records in certain situations including receivership or conservatorship proceedings; (ii) the examination by or disclosure to the Federal Reserve System of customer records if they are obtained in connection with the Federal Reserve's authority to extend credit; and (iii) the examination by or disclosure to the Resolution Trust Company of customer records in the exercise of its conservatorship, receivership or liquidation functions."

Both versions include a "proposed amendment to the RFPA's grand jury exception which would preclude financial institutions from notifying their customers of the service of grand jury subpoenas for the customers' records if the crime under investigation is against any financial institution. The House goes even further. It provides that the prohibition against disclosure reaches crimes against supervisory agencies, *and* it further extends the prohibition to 'any target of a grand jury investigation.' In addition, the House version makes violation of this provision the basis for administrative enforcement penalties (including civil money penalties) under Section 8 of the FDIC.

"Furthermore, both the House and Senate versions of the bill add a new offense to Title 18. Under the Senate version of this 'notification' offense, it would be a crime, punishable by up to five years in prison and a fine, for a banker to notify a customer that his financial records are being sought by a grand jury for purposes of an investigation of a possible violation of various sections of 18 U.S.C."

Increased penalties

Both the House and Senate versions would "increase the penalties for the principal criminal statutes which affect federally insured institutions. . . . The Senate would increase the maximum term of imprisonment from two years or five years to *fifteen* years. The House would increase the terms to *twenty* years. The maximum criminal fine under the Senate bill would also be increased to $1 million or more."

Both bills would provide for a "parallel *civil* cause of action for each of the federal criminal banking statutes, which could be brought by the Attorney General in U.S. District Court. The government's burden of proof in such suits would be the civil standard of preponderance of evidence rather than the criminal standard of beyond a reasonable doubt. Under the Senate version, the maximum civil penalties would be the *greater* of $1 million for each day that the violations continues, or $5 million."

Banking offenses as RICO acts

"The Senate version of FIRREA would make *all* the federal banking criminal statutes predicate offenses for RICO, 18 U.S.C. 1961 *et seq*. This goes beyond what the administration's original bill sought. The House version does not make banking crimes into RICO predicates. If included in the final bill, this will have the unfortunate effect of vastly increasing the number of civil RICO actions against financial institutions and their officers and directors."