

104<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. 394

To clarify the liability of banking and lending agencies, lenders, and fiduciaries, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 10 (legislative day, JANUARY 30), 1995

Mr. D'AMATO introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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## A BILL

To clarify the liability of banking and lending agencies, lenders, and fiduciaries, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Asset Conservation,  
5 Lender Liability, and Deposit Insurance Protection Act of  
6 1995”.

7 **SEC. 2. FEDERAL DEPOSIT INSURANCE ACT AMENDMENT.**

8 The Federal Deposit Insurance Act (12 U.S.C. 1811  
9 et seq.) is amended by adding at the end the following  
10 new section:

1 **“SEC. 45. FEDERAL BANKING AND LENDING AGENCY LI-**  
2 **ABILITY.**

3 “(a) GOVERNMENTAL ENTITIES.—

4 “(1) BANKING AND LENDING AGENCIES.—Ex-  
5 cept as provided in paragraph (3), a Federal bank-  
6 ing or lending agency shall not be liable under any  
7 law imposing strict liability for the release or threat-  
8 ened release of a hazardous substance at or from  
9 property (including a right or interest in property)  
10 acquired—

11 “(A) in connection with the exercise of re-  
12 ceivership or conservatorship authority, or the  
13 liquidation or winding up of the affairs of an  
14 insured depository institution, including a sub-  
15 sidiary of an insured depository institution;

16 “(B) in connection with the provision of a  
17 loan, a discount, an advance, a guarantee, in-  
18 surance, or other financial assistance; or

19 “(C) in connection with property received  
20 in a civil or criminal proceeding, or administra-  
21 tive enforcement action, whether by settlement  
22 or order.

23 “(2) APPLICATION OF STATE LAW.—Nothing in  
24 this section shall be construed as preempting, affect-  
25 ing, applying to, or modifying a State law, or a  
26 right, action, cause of action, or obligation under

1 State law, except that the liability of a Federal  
2 banking or lending agency under a State law shall  
3 not exceed the value of the interest of the agency in  
4 the asset giving rise to the liability. Nothing in this  
5 section shall prevent a Federal banking or lending  
6 agency from agreeing with a State to transfer prop-  
7 erty to the State in lieu of any liability that might  
8 otherwise be imposed under State law.

9 “(3) LIMITATION.—Notwithstanding paragraph  
10 (1), and subject to section 107(d) of the Comprehen-  
11 sive Environmental Response, Compensation, and  
12 Liability Act of 1980 and section 9003 of the Solid  
13 Waste Disposal Act, a Federal banking or lending  
14 agency that caused or contributed to the release of  
15 a hazardous substance may be liable for removal, re-  
16 medial, corrective, or other response action pertain-  
17 ing to that release.

18 “(4) SUBSEQUENT PURCHASER.—The immu-  
19 nity provided by paragraph (1) shall extend to the  
20 first subsequent purchaser of the property from a  
21 Federal banking or lending agency, unless the pur-  
22 chaser—

23 “(A) would otherwise be liable or poten-  
24 tially liable for all or part of the costs of the re-  
25 moval, remedial, corrective, or other response

1 action due to a prior relationship with the prop-  
2 erty;

3 “(B) is or was affiliated with or related to  
4 a party described in subparagraph (A);

5 “(C) fails to agree to take reasonable steps  
6 necessary to remedy the release or threatened  
7 release or to protect public health and safety in  
8 a manner consistent with the purposes of appli-  
9 cable environmental laws; or

10 “(D) causes or contributes to any addi-  
11 tional release or threatened release on the prop-  
12 erty.

13 “(5) FEDERAL OR STATE ACTION.—If a Fed-  
14 eral agency or State environmental agency is re-  
15 quired to take remedial or corrective action due to  
16 the failure of a subsequent purchaser to carry out,  
17 in good faith, the agreement described in paragraph  
18 (4)(C), the subsequent purchaser shall reimburse the  
19 Federal or State environmental agency for the costs  
20 of the remedial or corrective action. Any such reim-  
21 bursement shall not exceed the increase in the fair  
22 market value of the property attributable to the re-  
23 medial or corrective action.

24 “(b) LIEN EXEMPTION.—Notwithstanding any other  
25 provision of law, any property held by a subsequent pur-

1 chaser referred to in subsection (a)(4) or held by a Federal  
2 banking or lending agency shall not be subject to a lien  
3 for costs or damages associated with the release or threat-  
4 ened release of a hazardous substance existing at the time  
5 of the transfer.

6 “(c) EXEMPTION FROM COVENANTS TO REMEDI-  
7 ATE.—A Federal banking or lending agency shall be ex-  
8 empt from any law requiring the agency to grant a cov-  
9 enant warranting that a removal, remedial, corrective, or  
10 other response action has been, or will in the future be,  
11 taken with respect to property acquired in the manner re-  
12 ferred to in subsection (a)(1).

13 “(d) DEFINITIONS.—As used in this section:

14 “(1) FEDERAL BANKING OR LENDING AGEN-  
15 CY.—The term ‘Federal banking or lending agency’  
16 means the Corporation, the Resolution Trust Cor-  
17 poration, the Board of Governors of the Federal Re-  
18 serve System, the Comptroller of the Currency, the  
19 Office of Thrift Supervision, a Federal Reserve  
20 Bank, a Federal Home Loan Bank, the Department  
21 of Housing and Urban Development, the National  
22 Credit Union Administration Board, the Farm Cred-  
23 it Administration, the Farm Credit System Insur-  
24 ance Corporation, the Farm Credit System Assist-  
25 ance Board, the Farmers Home Administration, the

1 Rural Electrification Administration, the Small  
2 Business Administration, and any other Federal  
3 agency acting in a similar capacity, in any of their  
4 capacities, and their agents or appointees.

5 “(2) HAZARDOUS SUBSTANCE.—The term ‘haz-  
6 arduous substance’ means—

7 “(A) any substance defined in section  
8 101(14) of the Comprehensive Environmental  
9 Response, Compensation, and Liability Act of  
10 1980; and

11 “(B) petroleum.

12 “(3) RELEASE.—The term ‘release’ has the  
13 same meaning as in—

14 “(A) section 101(22) of the Comprehensive  
15 Environmental Response, Compensation, and  
16 Liability Act of 1980, including the use, stor-  
17 age, disposal, treatment, generation, or trans-  
18 portation of a hazardous substance; and

19 “(B) section 9002(5) of the Solid Waste  
20 Disposal Act.

21 “(e) SAVINGS CLAUSE.—Nothing in this section  
22 shall—

23 “(1) affect the rights or immunities or other de-  
24 fenses that are available under this Act, the Com-  
25 prehensive Environmental Response, Compensation,

1 and Liability Act of 1980, subtitle I of the Solid  
 2 Waste Disposal Act, or other applicable law to any  
 3 party;

4 “(2) create any liability for any party; or

5 “(3) create a private right of action against an  
 6 insured depository institution or lender, a Federal  
 7 banking or lending agency, or any other party.”.

8 **SEC. 3. CERCLA AMENDMENTS.**

9 (a) LENDER AND FIDUCIARY LIABILITY LIMITA-  
 10 TIONS.—Title I of the Comprehensive Environmental Re-  
 11 sponse, Compensation, and Liability Act of 1980 (42  
 12 U.S.C. 9601 et seq.) is amended by adding at the end  
 13 the following:

14 **“SEC. 127. INSURED DEPOSITORY INSTITUTION AND OTHER**  
 15 **LENDER LIABILITY.**

16 “(a) LIABILITY LIMITATIONS.—The liability of an in-  
 17 sured depository institution or other lender that is liable  
 18 under any other provision of this Act or subtitle I of the  
 19 Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) for  
 20 the release or threatened release of a hazardous substance  
 21 at, from, or in connection with property—

22 “(1) acquired through foreclosure;

23 “(2) subject to a security interest held by the  
 24 institution or lender;

1           “(3) held by a lessor pursuant to the terms of  
2           an extension of credit; or

3           “(4) subject to financial control or financial  
4           oversight pursuant to the terms of an extension of  
5           credit;

6 shall be limited to the actual benefit conferred on the insti-  
7 tution or lender by a removal, remedial, corrective, or  
8 other response action undertaken by another party.

9           “(b) ACTUAL BENEFIT.—For purposes of this sec-  
10 tion, the actual benefit conferred on an institution or lend-  
11 er by a removal, remedial, corrective, or other response  
12 action shall be equal to the net gain, if any, realized by  
13 the institution or lender due to the action. For purposes  
14 of this subsection, the net gain shall not exceed the  
15 amount realized by the institution or lender on the sale  
16 of property less acquisition, holding, and disposition costs.

17           “(c) EXCLUSION.—Notwithstanding subsection (a),  
18 but subject to section 107(d) and section 9003 of the Solid  
19 Waste Disposal Act (42 U.S.C. 6991b), a depository insti-  
20 tution or lender that caused or contributed to the release  
21 of a hazardous substance may be liable for removal, reme-  
22 dial, corrective, or other response action pertaining to that  
23 release.

24           “(d) ENVIRONMENTAL ASSESSMENTS.—

1           “(1) DEPOSITORY INSTITUTIONS.—The Admin-  
2           istrator, after consultation with the Federal Deposit  
3           Insurance Corporation, shall issue and publish  
4           guidelines for insured depository institutions and  
5           other lenders to develop and carry out adequate pro-  
6           cedures to evaluate actual and potential environ-  
7           mental risks that may arise from or at property  
8           prior to making an extension of credit secured by  
9           the property. The requirements may provide for ex-  
10          clusions or different types of environmental assess-  
11          ments as may be appropriate under the cir-  
12          cumstances to account for the levels of risk that may  
13          be posed by different classes of collateral. Each Fed-  
14          eral agency having the authority under Federal law  
15          to make an examination of an insured depository in-  
16          stitution shall take compliance with the guidelines  
17          into account in performing the examinations.

18           “(2) FINAL GUIDELINES.—Final guidelines re-  
19          quired to be issued pursuant to paragraph (1) shall  
20          be issued not later than 180 days after the date of  
21          enactment of this section.

22          “(e) DEFINITIONS.—As used in this section:

23           “(1) APPROPRIATE FEDERAL BANKING AGEN-  
24          CY.—The term ‘appropriate Federal banking agen-  
25          cy’—

1           “(A) has the same meaning as in section  
2           3 of the Federal Deposit Insurance Act (12  
3           U.S.C. 1813); and

4           “(B) includes the National Credit Union  
5           Administration Board.

6           “(2) EXTENSION OF CREDIT.—The term ‘exten-  
7           sion of credit’ includes a lease finance transaction—

8           “(A) in which the lessor does not initially  
9           select the leased property and does not during  
10          the lease term control the daily operations or  
11          maintenance of the property; or

12          “(B) that conforms with regulations issued  
13          by the appropriate Federal banking agency or  
14          the appropriate State banking regulatory agen-  
15          cy.

16          “(3) HAZARDOUS SUBSTANCE.—The term ‘haz-  
17          ardous substance’ has the same meaning as in sec-  
18          tion 45(d)(2) of the Federal Deposit Insurance Act.

19          “(4) INSURED DEPOSITORY INSTITUTION.—The  
20          term ‘insured depository institution’ has the same  
21          meaning as in section 3(c) of the Federal Deposit  
22          Insurance Act (12 U.S.C. 1813(c)), and shall also  
23          include—

1           “(A) an insured credit union, as defined in  
2 section 101 of the Federal Credit Union Act  
3 (12 U.S.C. 1752);

4           “(B) a bank or association chartered under  
5 the Farm Credit Act of 1971 (12 U.S.C. 2001  
6 et seq.); and

7           “(C) a leasing or trust company that is an  
8 affiliate of an insured depository institution (as  
9 the term is defined in this paragraph).

10       “(5) LENDER.—The term ‘lender’ means—

11           “(A) a person (other than an insured de-  
12 pository institution) that—

13               “(i) makes a bona fide extension of  
14 credit to or takes a security interest from  
15 a nonaffiliated party; and

16               “(ii) substantially and materially com-  
17 plies with the environmental assessment  
18 requirements imposed under subsection  
19 (d), after final guidelines under the sub-  
20 section have been issued;

21 and includes a successor or assignee of any  
22 such person;

23           “(B) the Federal National Mortgage Asso-  
24 ciation, the Federal Home Loan Mortgage Cor-  
25 poration, the Federal Agricultural Mortgage

1 Corporation, or other entity that in a bona fide  
2 manner is engaged in the business of buying or  
3 selling loans or interests in loans, if the Asso-  
4 ciation, Corporation, or entity requires institu-  
5 tions from which it purchases loans (or other  
6 obligations) to comply substantially and materi-  
7 ally with the requirements of subsection (d),  
8 after final guidelines under that subsection have  
9 been issued;

10 “(C) a person engaged in the business of  
11 insuring or guaranteeing against a default in  
12 the repayment of an extension of credit, or act-  
13 ing as a surety with respect to an extension of  
14 credit, to nonaffiliated parties; and

15 “(D) a person regularly engaged in the  
16 business of providing title insurance who ac-  
17 quires the property as a result of assignment or  
18 conveyance in the course of underwriting claims  
19 and claims settlement.

20 “(6) PROPERTY ACQUIRED THROUGH FORE-  
21 CLOSURE.—

22 “(A) IN GENERAL.—The term ‘property  
23 acquired through foreclosure’ means property  
24 acquired, or the act of acquiring property, from

1 a nonaffiliated party by an insured depository  
2 institution or other lender—

3 “(i) through purchase at sales under  
4 judgment or decree, power of sales,  
5 nonjudicial foreclosure sales, or from a  
6 trustee, deed in lieu of foreclosure, or simi-  
7 lar conveyance, or through repossession, if  
8 the property was security for an extension  
9 of credit previously contracted;

10 “(ii) through conveyance pursuant to  
11 an extension of credit previously con-  
12 tracted, including the termination of a  
13 lease agreement; or

14 “(iii) through any other formal or in-  
15 formal manner by which the insured depos-  
16 itory institution or other lender tempo-  
17 rarily acquires, for subsequent disposition,  
18 possession of collateral in order to protect  
19 the interest of the institution or lender.

20 “(B) EXCLUSION.—Property is not ac-  
21 quired through foreclosure if the insured depos-  
22 itory institution or lender does not seek to sell  
23 or otherwise divest the property at the earliest  
24 practical, commercially reasonable time, on  
25 commercially reasonable terms, taking into ac-

1 count market conditions and legal and regu-  
2 latory requirements.

3 “(7) RELEASE.—The term ‘release’ has the  
4 same meaning as in section 45(d)(3) of the Federal  
5 Deposit Insurance Act.

6 “(8) SECURITY INTEREST.—The term ‘security  
7 interest’ includes rights under a mortgage, deed of  
8 trust, assignment, judgment lien, pledge, security  
9 agreement, factoring agreement, lease, or any other  
10 right accruing to a person to secure the repayment  
11 of money, the performance of a duty, or some other  
12 obligation.

13 “(f) SAVINGS CLAUSE.—Nothing in this section  
14 shall—

15 “(1) affect the rights or immunities or other de-  
16 fenses that are available under this Act, subtitle I of  
17 the Solid Waste Disposal Act (42 U.S.C. 6991 et  
18 seq.), or other applicable law to a party subject to  
19 this section;

20 “(2) create any liability for a party; or

21 “(3) create a private right of action against an  
22 insured depository institution or lender, a Federal  
23 agency that regulates an insured depository institu-  
24 tion or other lender, or any other party.

1 **“SEC. 128. LIABILITY OF FIDUCIARIES.**

2       “(a) IN GENERAL.—The liability of a fiduciary that  
3 is liable under any other provision of this Act or subtitle  
4 I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.)  
5 for the release or threatened release of a hazardous sub-  
6 stance at, from, or in connection with property held in a  
7 fiduciary capacity, may not exceed the assets held in the  
8 fiduciary capacity that are available to indemnify the fidu-  
9 ciary.

10       “(b) EXCLUSION.—Subsection (a) does not apply to  
11 the extent that a person is liable under this Act independ-  
12 ently of the person’s ownership or actions taken in a fidu-  
13 ciary capacity.

14       “(c) LIMITATION.—Notwithstanding subsections (a)  
15 and (d), a fiduciary whose failure to exercise due care  
16 caused or contributed to the release of a hazardous sub-  
17 stance may have liability in its personal capacity for a re-  
18 sponse or corrective action pertaining to the release.

19       “(d) SAFE HARBOR.—A fiduciary shall not be liable  
20 in its personal capacity under this Act for—

21               “(1) undertaking or directing another person to  
22 undertake a response action under section 107(d)(1)  
23 or under the direction of an on-scene coordinator;

24               “(2) undertaking or directing another to under-  
25 take a corrective action under section 9003(h) of the  
26 Solid Waste Disposal Act (42 U.S.C. 6991b(h));

1           “(3) undertaking or directing another to under-  
2           take any other lawful means of addressing hazard-  
3           ous substances in connection with the property;

4           “(4) terminating the fiduciary relationship;

5           “(5) including in the terms of the fiduciary  
6           agreement a covenant, warranty, or other term or  
7           condition that relates to compliance with an environ-  
8           mental law, or monitoring or enforcing the term;

9           “(6) monitoring or undertaking 1 or more in-  
10          spections of the property;

11          “(7) providing financial or other advice or coun-  
12          seling to other parties to the fiduciary relationship,  
13          including the settler or beneficiary;

14          “(8) restructuring, renegotiating, or otherwise  
15          altering the terms and conditions of the fiduciary re-  
16          lationship; or

17          “(9) declining to take any of the actions re-  
18          ferred to in paragraphs (3) through (8).

19          “(e) DEFINITIONS.—As used in this section:

20                 “(1) FIDUCIARY.—The term ‘fiduciary’—

21                         “(A) means a person acting for the benefit  
22                         of another party as a bona fide—

23                                 “(i) trustee;

24                                 “(ii) executor;

25                                 “(iii) administrator;

1 “(iv) custodian;

2 “(v) guardian of estates or guardian  
3 ad litem;

4 “(vi) receiver;

5 “(vii) conservator;

6 “(viii) committee of estates of lunatics  
7 or other disabled persons;

8 “(ix) personal representative; or

9 “(x) representative in any other ca-  
10 pacity that the Administrator, pursuant to  
11 public notice, determines to be similar to  
12 the persons listed in clauses (i) through  
13 (ix); and

14 “(B) does not include any person who is  
15 acting as a fiduciary with respect to a trust or  
16 other fiduciary estate that—

17 “(i) was not created as part of, or to  
18 facilitate, 1 or more estate plans or pursu-  
19 ant to the incapacity of a natural person;  
20 and

21 “(ii) was organized for the primary  
22 purpose of, or is engaged in, actively carry-  
23 ing on a trade or business for profit.

24 “(2) FIDUCIARY CAPACITY.—The term ‘fidu-  
25 ciary capacity’ means the capacity of a person in

1 holding title to the property, or otherwise having  
2 control of or an interest in the property, pursuant  
3 to the exercise of the responsibilities of the person  
4 as a fiduciary.

5 “(3) FEDERAL BANKING OR LENDING AGEN-  
6 CY.—The term ‘Federal banking or lending agency’  
7 has the same meaning as in section 45(d)(1) of the  
8 Federal Deposit Insurance Act.

9 “(4) HAZARDOUS SUBSTANCE.—The term ‘haz-  
10 arduous substance’ has the same meaning as in sec-  
11 tion 45(d)(2) of the Federal Deposit Insurance Act.

12 “(5) RELEASE.—The term ‘release’ has the  
13 same meaning as in section 45(d)(3) of the Federal  
14 Deposit Insurance Act.

15 “(f) SAVINGS CLAUSE.—Nothing in this section shall  
16 affect the rights or immunities or other defenses that are  
17 available under this Act, subtitle I of the Solid Waste Dis-  
18 posal Act (42 U.S.C. 6991 et seq.), or other law that is  
19 applicable to a person subject to this section. Nothing in  
20 this section creates any liability for a party or a private  
21 right of action against a fiduciary or any other party.

22 “(g) INAPPLICABILITY TO FEDERAL BANKING AND  
23 LENDING AGENCIES.—Nothing in this section applies to  
24 a Federal banking or lending agency.

1       “(h) NO EFFECT ON CERTAIN PERSONS.—Nothing  
2 in this section affects the liability, if any, of a person  
3 who—

4               “(1)(A) acts in a capacity other than a fidu-  
5 ciary capacity; and

6               “(B) directly or indirectly benefits from a trust  
7 or fiduciary relationship; or

8               “(2) who—

9                       “(A) is a beneficiary and a fiduciary with  
10 respect to the same fiduciary estate; and

11                      “(B) as a fiduciary, receives benefits that  
12 exceed customary or reasonable compensation,  
13 and incidental benefits, permitted under other  
14 applicable law.

15       “(i) REGULATIONS.—The Administrator, after con-  
16 sultation with the Federal Deposit Insurance Corporation,  
17 may promulgate regulations to carry out this section.”.

18       (b) DEFINITION OF OWNER OR OPERATOR.—Section  
19 101(20) of the Comprehensive Environmental Response,  
20 Compensation, and Liability Act of 1980 (42 U.S.C.  
21 9601(20)) is amended—

22               (1) in subparagraph (A)—

23                       (A) in clause (iii) of the first sentence, by  
24 inserting “the United States or” after “aban-  
25 donment, or similar means to”; and

1 (B) by striking the second sentence;

2 (2) in subparagraph (D)—

3 (A) in the first sentence, by inserting “the  
4 United States or” after “does not include”; and

5 (B) in the second sentence—

6 (i) by inserting “any department,  
7 agency, or instrumentality of the United  
8 States or” after “shall not apply to”; and

9 (ii) by striking “, and such a” and in-  
10 sserting “, and the department, agency, or  
11 instrumentality of the United States or”;  
12 and

13 (3) by adding at the end the following:

14 “(E) EXCLUSION OF UNITED STATES, CON-  
15 SERVATOR, OR RECEIVER.—The term ‘owner or  
16 operator’ shall not include the United States or  
17 any department, agency, or instrumentality of  
18 the United States, or a conservator or receiver  
19 appointed by a department, agency, or instru-  
20 mentality of the United States, if the United  
21 States or the conservator or receiver meets both  
22 of the following conditions:

23 “(i) AUTHORITY.—The United States,  
24 conservator, or receiver acquired ownership

1 or control of a vessel or facility (or any  
2 right or interest in a vessel or facility)—

3 “(I) in connection with the exer-  
4 cise of receivership or conservatorship  
5 authority or the liquidation or winding  
6 up of the affairs of an entity subject  
7 to a receivership or conservatorship,  
8 including a subsidiary of the entity;

9 “(II) in connection with the exer-  
10 cise of any seizure or forfeiture au-  
11 thority; or

12 “(III) pursuant to a law specify-  
13 ing the property to be acquired.

14 “(ii) NONPARTICIPATION IN MANAGE-  
15 MENT.—The United States, conservator, or  
16 receiver does not participate in the man-  
17 agement of the vessel or facility operations  
18 that result in a release or threat of release  
19 of hazardous substances and complies with  
20 such other requirements as the Adminis-  
21 trator, after consultation with the Federal  
22 Deposit Insurance Corporation, may estab-  
23 lish by regulation.

24 “(F) EXCLUSION OF PERSONS NOT PAR-  
25 TICIPANTS IN MANAGEMENT.—

1           “(i) INDICIA OF OWNERSHIP TO PRO-  
2           TECT SECURITY INTEREST.—The term  
3           ‘owner or operator’ does not include a per-  
4           son who, without participating in the man-  
5           agement of a vessel or facility, holds indi-  
6           cia of ownership primarily to protect the  
7           security interest of the person in the vessel  
8           or facility.

9           “(ii) NONPARTICIPATION IN MANAGE-  
10          MENT PRIOR TO FORECLOSURE.—The term  
11          ‘owner or operator’ does not include a per-  
12          son who did not participate in management  
13          of a vessel or facility prior to foreclosure,  
14          even if the person forecloses on the vessel  
15          or facility, sells, re-leases (in the case of a  
16          lease finance transaction), or liquidates the  
17          vessel or facility, maintains business activi-  
18          ties, winds up operations, undertakes a re-  
19          sponse action under section 107(d)(1) or  
20          under the direction of an on-scene coordi-  
21          nator, or undertakes a corrective action  
22          under section 9003 of the Solid Waste Dis-  
23          posal Act (42 U.S.C. 6991b), with respect  
24          to the vessel or facility, or takes other  
25          measures to preserve, protect, or prepare

1 the vessel or facility prior to sale or dis-  
2 position, if the person seeks to sell, re-lease  
3 (in the case of a lease finance transaction),  
4 or otherwise divest the vessel or facility at  
5 the earliest practical, commercially reason-  
6 able time, on commercially reasonable  
7 terms, taking into account market condi-  
8 tions and legal and regulatory require-  
9 ments.

10 “(G) PARTICIPATION IN MANAGEMENT.—

11 For purposes of subparagraph (F)—

12 “(i) the term ‘participate in manage-  
13 ment’ means actually participating in the  
14 management or operational affairs of a  
15 vessel or facility, and does not include  
16 merely having the capacity to influence, or  
17 the unexercised right to control, vessel or  
18 facility operations;

19 “(ii) a person shall be considered to  
20 participate in management while the bor-  
21 rower is still in possession of the vessel or  
22 facility encumbered by the security interest  
23 only if the person—

24 “(I) exercises decisionmaking  
25 control over the environmental compli-

1           ance of a borrower, such that the per-  
2           son has undertaken responsibility for  
3           the hazardous substance handling or  
4           disposal practices of the borrower; or  
5           “(II) exercises control at a level  
6           comparable to that of a manager of  
7           the enterprise of the borrower, such  
8           that the person has assumed or mani-  
9           fested responsibility for the overall  
10          management of the enterprise encom-  
11          passing day-to-day decisionmaking  
12          with respect to environmental compli-  
13          ance, or with respect to substantially  
14          all of the operational aspects (as dis-  
15          tinguished from financial or adminis-  
16          trative aspects) of the enterprise,  
17          other than environmental compliance;  
18          “(iii) the term ‘participate in manage-  
19          ment’ does not include conducting an act  
20          or failing to act prior to the time that a se-  
21          curity interest is created in a vessel or fa-  
22          cility; and  
23          “(iv) the term ‘participate in manage-  
24          ment’ does not include—

1           “(I) holding such a security in-  
2           terest or abandoning or releasing such  
3           a security interest;

4           “(II) including in the terms of an  
5           extension of credit, or in a contract or  
6           security agreement relating to the ex-  
7           tension, a covenant, warranty, or  
8           other term or condition that relates to  
9           environmental compliance;

10          “(III) monitoring or enforcing  
11          the terms and conditions of the exten-  
12          sion of credit or security interest;

13          “(IV) monitoring or undertaking  
14          1 or more inspections of the vessel or  
15          facility;

16          “(V) requiring or conducting re-  
17          sponse action or other lawful means of  
18          addressing the release or threatened  
19          release of a hazardous substance in  
20          connection with the vessel or facility  
21          prior to, during, or on the expiration  
22          of the term of the extension of credit;

23          “(VI) providing financial or other  
24          advice or counseling in an effort to  
25          mitigate, prevent, or cure default or

1           diminution in the value of the vessel  
2           or facility;

3                   “(VII) restructuring, re-  
4                   negotiating, or otherwise agreeing to  
5                   alter the terms and conditions of the  
6                   extension of credit or security interest,  
7                   exercising forbearance; or

8                   “(VIII) exercising other remedies  
9                   that may be available under applicable  
10                  law for the breach of a term or condi-  
11                  tion of the extension of credit or secu-  
12                  rity agreement;

13           if the actions do not rise to the level of  
14           participating in management, as defined in  
15           clauses (i) and (ii).

16                   “(H) OTHER TERMS.—As used in subpara-  
17                  graphs (E) through (G), and this subpara-  
18                  graph:

19                           “(i) EXTENSION OF CREDIT.—The  
20                           term ‘extension of credit’ includes a lease  
21                           finance transaction—

22                                   “(I) in which the lessor does not  
23                                   initially select the leased vessel or fa-  
24                                   cility and does not during the lease  
25                                   term control the daily operations or

1 maintenance of the vessel or facility;  
2 or

3 “(II) that conforms with regula-  
4 tions issued by the appropriate Fed-  
5 eral banking agency or the appro-  
6 priate State bank supervisor (as those  
7 terms are defined in section 3 of the  
8 Federal Deposit Insurance Act (12  
9 U.S.C. 1813)) or with regulations is-  
10 sued by the National Credit Union  
11 Administration Board, as appropriate.

12 “(ii) FINANCIAL OR ADMINISTRATIVE  
13 ASPECT.—The term ‘financial or adminis-  
14 trative aspect’ includes a function such as  
15 a function of a credit manager, accounts  
16 payable officer, accounts receivable officer,  
17 personnel manager, comptroller, or chief fi-  
18 nancial officer, or a similar function.

19 “(iii) FORECLOSURE; FORECLOSE.—  
20 The terms ‘foreclosure’ and ‘foreclose’  
21 mean, respectively, acquiring, and to ac-  
22 quire, a vessel or facility through—

23 “(I) purchase at sale under a  
24 judgment or decree, a power of sale, a  
25 nonjudicial foreclosure sale, or from a

1 trustee, deed in lieu of foreclosure, or  
2 similar conveyance, or through repos-  
3 session, if the vessel or facility was se-  
4 curity for an extension of credit pre-  
5 viously contracted;

6 “(II) conveyance pursuant to an  
7 extension of credit previously con-  
8 tracted, including the termination of a  
9 lease agreement; or

10 “(III) any other formal or infor-  
11 mal manner by which the person ac-  
12 quires, for subsequent disposition,  
13 possession of collateral in order to  
14 protect the security interest of the  
15 person.

16 “(iv) HAZARDOUS SUBSTANCE.—The  
17 term ‘hazardous substance’ has the same  
18 meaning as in section 45(d)(2) of the Fed-  
19 eral Deposit Insurance Act.

20 “(v) OPERATIONAL ASPECT.—The  
21 term ‘operational aspect’ includes a func-  
22 tion such as a function of a facility or  
23 plant manager, operations manager, chief  
24 operating officer, or chief executive officer.

1           “(vi) RELEASE.—The term ‘release’  
2           has the same meaning as in section  
3           45(d)(3) of the Federal Deposit Insurance  
4           Act.

5           “(vii) SECURITY INTEREST.—The  
6           term ‘security interest’ includes a right  
7           under a mortgage, deed of trust, assign-  
8           ment, judgment lien, pledge, security  
9           agreement, factoring agreement, or lease,  
10          or any other right accruing to a person to  
11          secure the repayment of money, the per-  
12          formance of a duty, or some other obliga-  
13          tion.

14          “(viii) VESSEL OR FACILITY.—The  
15          term ‘vessel or facility’ includes an under-  
16          ground storage tank as defined in section  
17          9001(1) of the Solid Waste Disposal Act  
18          (42 U.S.C. 6991(1)).”.

19 **SEC. 4. SOLID WASTE DISPOSAL ACT AMENDMENTS.**

20          (a) DEFINITION OF OWNER AND OPERATOR.—Sec-  
21          tion 9001 of the Solid Waste Disposal Act (42 U.S.C.  
22          6991) is amended by adding at the end the following:

23                 “(9) OWNER AND OPERATOR.—The terms  
24                 ‘owner’ and ‘operator’ do not include any person ex-  
25                 cluded from the definition of an ‘owner or operator’

1 under subparagraphs (E) through (H) of section  
 2 101(20) of the Comprehensive Environmental Re-  
 3 sponse, Compensation, and Liability Act of 1980 (42  
 4 U.S.C. 9601(20)).”.

5 (b) LENDER AND FIDUCIARY LIABILITY.—Subtitle I  
 6 of the Act (42 U.S.C. 6991 et seq.) is amended by adding  
 7 at the end the following:

8 **“SEC. 9011. LENDER AND FIDUCIARY LIABILITY.**

9 “This subtitle shall be subject to the limitations on  
 10 liability in sections 127 and 128 of the Comprehensive En-  
 11 vironmental Response, Compensation, and Liability Act of  
 12 1980.”.

13 **SEC. 5. EFFECTIVE DATE.**

14 The amendments made by this Act shall be applicable  
 15 with respect to any claim that has not been finally adju-  
 16 dicated as of the date of enactment of this Act.

○

S 394 IS—2

S 394 IS—3