CHAPTER 1

Introduction and Overview

Chapter Contents

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§ 1.01 Climate for the Savings Institutions Industry

Savings and loan associations and savings banks ("savings institutions" or "institutions") historically have occupied a unique position within the financial services marketplace. From the earliest days of their existence, their role was to provide a vehicle for family savings, which were invested primarily, if not entirely, in making residential mortgage loans in the same community. One thinks of the scene in the classic Frank Capra movie, "It's A Wonderful Life," set in the Great Depression, in which anxious depositors crowd around the manager of the local building and loan association, played by Jimmy Stewart, demanding their money back. "You're thinking of this place all wrong," he tells them. "The money's not here. Your money's in Joe's house—why, that's right next to yours. And in the Kennedy house, and Mrs. Macklin's house, and a hundred others. Why, you're lending them the money to build, and they're going to pay it back to you as best they can."

The industry has thus been part and parcel of the American dream of home ownership, and for that reason has historically been favored in both federal and state law. At the federal level, Regulation Q of the Federal Reserve, which regulated interest rates on deposit accounts, allowed savings institutions to pay one-quarter percent more—5.50% compared to the 5.250% ceiling for commercial bank savings deposits.[1] The purpose was to encourage deposits in savings institutions, which were the fuel for home building. For similar reasons, New York law at one time attempted to prohibit commercial banks from using the word "savings" in their advertising, in an effort to give the State's savings banks a leg up in the competition for savings deposits.[2]

The policy of setting maximum interest rates on savings deposits was a misguided attempt to cure the inherent mismatch between the assets held by savings associations—long-term mortgages with a fixed rate of return—and the liabilities used to fund them, namely short-term savings deposits. As long as higher rates were not available to consumers in the marketplace, it worked just fine. As interest rates rose in the late 1970's and early 1980's, in response to inflation and other economic pressures, the inherent weakness of this rate regulation was revealed. Exacerbating the problem was the development of alternative savings media, such as money market mutual funds, which for the first time made it possible for small savers to invest in U.S. Government bonds and other securities that provided substantially higher yields than the maximum 5.50% allowed on savings accounts. The predictable result was "disintermediation," i.e., the outflow of funds from thrift institutions and banks, and the onset of the

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[1] Regulation Q, 12 C.F.R § 217 (1980). Regulation Q was promulgated by the Federal Reserve in 1933, to implement new Section 19(i) of the Federal Reserve Act, 12 USC §371c, enacted by Congress in the belief that competition for deposits had caused banks to fail by paying excessive rates of interest. It gave the Federal Reserve the power to set maximum rates on time deposits, and prohibited the payment of interest on demand (checking) deposits. The ceilings on interest rate on savings and other time deposits were repealed by the Depository Institutions and Monetary Control Act of 1980, at a time when soaring interest rates generally were causing deposits to flow out of banks and thrifts, and were phased out over a period of six years. Regulation Q was finally repealed in its entirely by Section 627 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which authorized the payment of interest on checking accounts.

[2] See Franklin National Bank v. New York, 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed. 767 (1954).

thrift institution crisis of the 1980's, in which hundreds of thrifts failed, at massive cost to the Government.[3]

Eventually this led to punitive legislation in the Financial Industry Reform, Recovery and Enforcement Act of 1989 ("FIRREA") and the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), both of which are discussed herein. Initially, the immediate legislative and regulatory response was an attempt to stave off the crisis by dramatically expanding the investment powers of thrift institutions. As a result, emerging from the thrift industry crisis of the late 1980's, savings institutions possessed powers and operating flexibility to continue their historic role as providers of housing-related finance and to participate significantly in providing consumer-oriented financial products and services. Savings institutions historically have been viewed as vehicles with unique flexibility for geographic expansion; as acquisition candidates by firms within the financial services industry seeking access to the payments system or to diversify and gain access to additional powers and activities authorized under a federal thrift charter; and as promising acquisitions by companies and individuals not already in the financial services industry who see the potential for a new line of business to complement their existing operations.[4]

With the new regulatory regime under Dodd-Frank, however, it seems likely that the Federal Reserve, which now has jurisdiction over all acquisitions of thrifts (as well as banks) by a company, will increasingly apply the historic prohibition of mixing banking and "commerce" embodied in the Bank Holding Company Act of 1956 ("BHCA"), as amended.[5] Thus, to the extent that an investment in a thrift constitutes "control" under the BHCA, it is unlikely that nonfinancial companies will be able to make such acquisitions in the future.

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[3] For a lucid and well-written account of the thrift crisis, see generally, Lowy, *High Rollers: Inside the Savings and Loan Debacle* (Praeger 1991).

[4] See, e.g.: Kimelman, "More Insurers Are Expected to Buy Thrifts," Am. Banker (Dec. 10, 1996); Henderson, Williams and Weinstein, "Some Attributes of the Thrift Charter," paper presented to the Savings Institution Committee, Business Law Section, American Bar Association, April 10, 1992; Meehan and Yan, "S & Ls Are Hot Properties by Act of Congress," Bus. Week, p. 76 (Aug. 28, 1989); White, "Pension Funds Could Be the Rich Uncle Thrifts Need," Wall Street J., p. C2 (June 23, 1989); Weinstein, "Thrift Holding companies on the Rise," Am. Banker, p. 2 (Dec. 7, 1988); Bertlett, "Savings Banks Attract Aggressive Acquirors," N.Y. Times, p. D1 (Aug. 22, 1988); McTague, "Bill Would Lift Takeover Value of Thrift Firms," Am. Banker (July 28, 19888); Ellis, "12 Thrifts Named as Attractive Targets," Am. Banker (July 28, 1988); Ellis; "Thrifts Attract Diverse Array of Buyers," Am. Banker (May 27, 1988).

[5] 12 U.S.C. §§ 1841 *et seq.*

As the savings institution industry increasingly shifted from the mutual to the stock form of organization,[6] more acquisitions, mergers and corporate reorganizations, accomplished through a greater variety of transactions, also became possible. (This acquisition attention, in particular, has not always been welcomed by the institutions to which it is directed.)[7]

The growing ranks of savings institutions converting from mutual to stock form also are employing novel and increasingly complex types of conversion transactions, raising new issues for regulators.

The framework for regulation of the operations of savings institutions also evolved drastically in the late 1980's and early 1990's. In the wake of the savings and loan crisis of the later 1980's and the insolvency of the Federal Savings and Loan Insurance Corporation ("FSLIC"), major areas of savings institutions' operations were regulated with reference to standards previously developed for banks (capital standards, transactions-with-affiliates, restrictions, insider lending controls, loans-to-one-borrower limits) or pursuant to standards that are promulgated concurrently by all four of the federal depository

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[6] Statistics on mutual to stock conversions of federally chartered or FSLIC insured savings institutions showed a dramatic increase in conversion beginning in 1983. The numbers of completed conversions, with the total dollar amount of new capital raised in conversion stock offerings each year, are set out below:

1975 - one ($1.3 million)
1976 - fourteen ($50.9 million)
1977 - fourteen ($29.6 million)
1978 - five ($13.5 million)
1979 - fifteen ($114.4 million)
1980 - sixteen ($141.4 million)
1981 - thirty-seven ($126.6 million)
1982 - thirty-one ($123 million)
1983 - eighty-three ($2.74 billion)
1984 - ninety-six ($711.9 million)
1985 - seventy-eight ($1.38 billion)
1986 - eighty-six ($2.48 billion)
1987 - 130 ($2.0 billion)
1988 - ninety-eight ($767 million)
1989 - thirty-five ($351 million)
1990 - sixty-nine ($774 million)
1991 - sixty-nine ($950 million)
1992 - ninety-one ($1.09 billion)
1993 - _______ (_______)
1994 - sixty-five ($2.48 billion)
1995 - seventy-nine ($2.05 billion)

1995 - 1998, conversions accelerated, with 143 mutual to stock conversions, compared with 65 for the period 1987-93. However, most of these, 119, were of small thrifts (less than $500 million in total assets). Source: FDIC Banking Review. Vol. 11 No. 4 (1998).

[7] See "Survey of Hostile Takeover Activity in the Savings Institution Industry," Corporate and Securities Division (Nov. 1988).

institution regulatory agencies and apply uniformly to all types of insured depository institutions (Prompt Corrective Action rules, real estate lending standards). These standards now mix with older laws and regulations, which in various respects give thrifts a unique treatment compared to other federally insured financial institutions.

With the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[8] ("Dodd-Frank"), which abolished the Office of Thrift Supervision ("OTS"), the process of convergence of thrift regulation with that of banks has accelerated. Effective July 21, 2011 (the "transfer date"), the regulatory functions of the OTS were transferred to agencies—the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Federal Reserve Board ("FRB")—the historic mission of which has been to regulate commercial banks. At the same time, Dodd-Frank reduced or eliminated some of the historic advantages enjoyed by federal thrifts, in particular their greater ability to branch free of state restrictions as compared to commercial banks, and a greater degree of preemption of state consumer protection rules. At the state level as well, the advantages enjoyed under one charter or the other have gradually disappeared. For example, in New York the bank and thrift trade associations have merged, with the banks dropping their historic opposition to thrifts' being permitted to take public deposits. It may be anticipated that over time some thrifts will elect to convert to the commercial bank charter, as they find themselves increasingly regulated like commercial banks, to escape the strictures of the qualified thrift lender ("QTL") test.

In addition, in response to the horrific events of September 11, 2001, the USA PATRIOT Act[9] imposed new filing, reporting, recordkeeping and due diligence obligations on thrifts as well as banks, for the purpose of preventing, detecting, and prosecuting terrorism and international money laundering. While not directed at mergers, acquisitions, or conversions, the legislation is of significance to any entity contemplating such a transaction because of the obligations it imposes.

Within this framework, combining old and new components, many-faceted transactional activity in the thrift industry can be predicted to continue to increase, and to present new challenges of new types of transactions, and new types of acquirers.

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[8] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010); 12 U.S.C. § 5301 note.

[9] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001); 18 U.S.C. § 1 note. An Office of Thrift Supervision Staff Summary of the Act is reprinted as Appendix D.

§ 1.02 Evolution of the Savings Institution Industry

[1]—Beginnings of the Industry

Today's savings institutions bear little resemblance to the first building and loan association organized in the United States, which, in 1831, made its first loan to finance the home of the village lamplighter in Frankfort, (subsequently a part of Philadelphia) Pennsylvania.[1] This ancestor of the modern savings institutions was known as the Oxford Provident Building Association, and its purpose simply was to enable its owner/members, most of whom were workers in the textile business, to build or purchase homes. Not long before, the first mutual savings banks had been established; The Provident Institution for Savings in Boston and Philadelphia Savings Fund Society both began operations in 1816.[2]

The earliest building and loan associations operated on a "terminating plan," under which all the shares of the association were issued on the same date, were of the same value, and matured on the same date.[3] All owner/members joined at the same time, or, if someone joined at a later date, he paid back dues and interest sufficient to put him on the same footing as the other shareholders. When all the members who wished to do so had borrowed to finance their homes, the shares of the association matured, the members were paid the matured value of those shares, and the association was disbanded.[4]

This "terminating plan" style of organization presented operational difficulties and constraints on expansion that inhibited successful operations. In order to overcome these problems, a second type of plan

(Text continued on page 1-5)

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[1] Russell, *Savings and Loan Associations* 23 (1956).

[2] This discussion distinguishes building and loan associations from mutual savings banks. Mutual savings banks were established in the United States shortly before building and loan associations appeared and engaged in a broader range of activities than those conducted by building and loan associations. Mutual savings banks flourished in the Northeast region of the country. "In contrast with savings and loan associations, which [traditionally] have focused on residential financing, savings banks have invested in mortgages on all types of real estate as well as in government and high quality corporate bonds, plus 'blue chip' commons and preferred stocks." (Cohen and Freier, *The Federal Home Loan Bank System* 4 (1980).

[3] Bridewell, *The Federal Home Loan Bank Board and Its Agencies* 4 (1938).

[4] Bodfish, *History of Building and Loan in the United States* 32-74 (1931); Russell, *Savings and Loan Associations,* N.1 *supra,* at 23-25.

evolved, known as the "serial plan." Under this plan, the shares of the association were issued in series at stated intervals so that a new member would not have to pay back dues to the date of the organization of the association, but only to the date of the issuance of the series. Originally, new series of shares were issued annually, but this period was reduced to semi-annually, and quarterly in many cases. As a series matured, it was only necessary to pay off that series.[5] Under both the "terminating plan" and the "serial plan," a borrower was required to subscribe for shares in the association equivalent to the face amount of his loan, and then the shares were pledged to secure the loan.[6] However, under the serial plan, interest generally was charged on loans so that members had the choice of using their investment in the association to acquire a home or simply receiving interest on their savings (which was loaned to others).

From the "serial plan," there evolved in the 1880's the "permanent plan." Its purpose was to eliminate the difficulty with the serial plan posed by the timing of serial investments, and it provided for shares that could be purchased at any time and that matured independently of other shares. In effect, each share was a series in itself.[7] A more sophisticated offshoot of the "permanent plan" was the "Dayton plan," under which members subscribed for shares upon which payments of dues could be made at any time and in any amount. The shares generally were withdrawable for the full amount of the dues paid in and dividends credited. This type of plan also provided for the issuance of paid up shares on which dividends were paid in cash after each periodic distribution of earnings.[8]

All of the foregoing types of associations were organized pursuant to a basic pattern whereby the association's borrowers also were its owner/members, and, as a result, the association's lending activities were locally oriented. In the late 1880's, however, so-called "national building and loan associations" made an appearance. These entities were organized in stock form under the general corporation laws of various states, and sought to do business and attract investors throughout the country, not confining their operation to any one community or

[5] Bodfish, *History of Building and Loan*, 85-92 (1931); Russell, *Savings and Loan Associations*, N.1 *supra*, at 25-27.

[6] Russell, *Savings and Loan Associations*, N.1 *supra*, at 26.

[7] Bodfish, *History of Building and Loan*, N.4 *supra*, at 93-99.

[8] *Id.* at 116-120.

locality. Their stock often was sold, on commission, by agents across the country.

In the depression of the mid-1890's, nearly all of these national building and loan associations failed, resulting in substantial losses to investors. Withdrawals prompted by depressed economic conditions and the depressed real estate market contributed to these failures, but were not their only cause. Patterns unfortunately now familiar to modern regulators also were responsible, including "outrageous expenses in some cases and the high risks taken to get high interest and premiums and the fact that loans were made over wide areas where it was impractical, economically, to service such loans, foreclose where necessary, and maintain, repair and sell the security to advantage."[9] By the turn of the century, nationally oriented building and loan associations had disappeared, leaving a blemish on the name of the savings and loan business, and savings institutions refocused their business on first (and in some cases, second) mortgage lending on local homes.

[2]—Contemporary Savings Institutions

Modern savings institutions, while perhaps not entirely warranting the label of a "lean, mean financial machine" that was bestowed by one federal official,[10] do possess attractive powers to engage in a wide range of financial services activities in addition to operations that are closely allied with their housing finance function. However, the transition from quiescent home mortgage lenders to contemporary financial services firms specializing in housing finance came with remarkable speed—and some adverse consequences.

In the early 1980's, savings institutions, with generally limited asset powers and low interest, fixed rate, long-term mortgage income, were jolted by the effects of interest rate de-control undertaken by the Federal Reserve Board, and the savings institution industry was brought to the precipice of financial ruin. Both state legislatures and the Congress saw the need to enhance the operating flexibility of savings institutions so that they would have sufficient non-mortgage related supplemental sources of income to keep pace with market-driven interest rates and to

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[9] Bodfish, *History of Building and Loan* at 100-115 (1931); Russell, *Savings and Loan Associations* 28 (1956).

[10] Remarks by Thomas P. Vartanian, General Counsel, FHLBB, at the Law and Business, Inc. seminar on "Banking Expansion in the '80's," December 9, 1982.

survive. In the federal arena, the Garn-St Germain Depository Institutions Act of 1982 ("Garn-St Germain Act") granted federal savings institutions expanded lending and investment authorities "to provide [federal institutions] for [the] flexibility necessary to maintain their role of providing credit for housing."[11]

First, to bolster the ability of federal institutions to offer services competitive with banks and other depository institutions, the Garn-St Germain Act permitted federal institutions to offer demand deposit accounts (including overdraft privileges),[12] to make commercial loans,[13] and to engage in certain leasing operations.[14] The powers of federal institutions in the areas of real estate lending,[15] investment in government securities,[16] educational lending,[17] and consumer lending,[18] also were significantly expanded.

Second, to enable savings institutions to challenge other financial industry firms, federal institutions (and other federally-regulated depository institutions) were authorized to offer a new "money market deposit account," not subject to an interest rate ceiling. The Garn-St Germain Act directed that this type of account be structured to be "directly equivalent to and competitive with" money market mutual funds.[19]

With their restructured powers, federally chartered savings institutions were described as a "banker's fantasy" in one commentary.[20] Meanwhile, in the various states, legislation was enacted that sometimes went even beyond the scope of the new powers authorized for federal institutions.[21] All these new authorities proved to be a mixed blessing, however. While expanded powers were tools with which savings institutions could compete in the contemporary financial services marketplace, they also provided the means by which institutions could engage in new and riskier activities which many institutions were ill-equipped to conduct, and proved to be a lure that attracted some

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[11] Pub. L. No. 97-320, 96 Stat. 1404 (Oct. 15, 1982); 42 U.S.C. § 226 note. See, e.g., Vartanian and MacFarlane, "FHLBB Helps Bring About Major Changes in Thrifts," Legal Times, at 16 (Nov. 1, 1982) (in which the Garn-St Germain Act was described as "[s]imply stated, ... the most comprehensive piece of substantive banking law to be enacted for 50 years.").

[12] See 12 U.S.C. §§ 1464(b)(1)(A), 1832(a)(2).

[13] See 12 U.S.C. § 1464(c)(1)(R).

[14] See 12 U.S.C. § 1464(c)(2)(A).

[15] See 12 U.S.C. § 1464(c)(1)(B).

[16] See 12 U.S.C. § 1464(c)(1)(H).

[17] See 12 U.S.C. § 1464(c)(3)(A).

[18] See 12 U.S.C. § 1464(c)(2)(B).

[19] Section 327 of the Garn-St Germain Act, codified at 12 U.S.C. § 3503(c).

[20] Vartanian and Hawke, Jr., "It Sounds Like a Banker's Fantasy, but It Isn't," American Banker at 4 (April 23, 1983).

[21] See discussion in S. Rep. No. 97-536, 97th Cong. 2d Sess. at 14-17 (1982).

unqualified and unscrupulous operators to the industry. These factors, coupled with crippling economic recessions in certain regions of the country, lead to an unpredecented financial crisis in the thrift industry, which ultimately provoked the Congress to enact legislation in 1989, that comprehensively restructured the federal regulatory and insurance oversight of savings institutions.[22]

The financial crisis of 2008 presaged the next round of significant regulatory changes for the industry. In part reflecting Congress' dissatisfaction with its performance, and in particular its inability to anticipate the massive losses at insurance giant AIG (which was under its jurisdiction as a savings and loan holding company), The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[23] ("Dodd-Frank") abolished the Office of Thrift Supervision ("OTS"). The OTS had replaced the Federal Home Loan Bank Board ("FHLBB") as the chartering authority for federal savings and loan associations and federal savings banks and the principal federal supervisory authority for thrift institutions and their holding companies.

Effective July 21, 2011, the first anniversary of Dodd-Frank, the functions of the OTS were transferred to the Office of the Comptroller of the Currency ("OCC"), which charters and oversees national banks with respect to federal thrifts; the Federal Deposit Insurance Corporation ("FDIC"), with respect to other FDIC-insured savings institutions; and the Board of Governors of the Federal Reserve System ("FRB"), which has "umbrella" supervisory authority over all bank holding companies, with respect to savings institution holding companies. All of these agencies are considered more robust regulators of the institutions under their jurisdiction, and their historic experience in supervising commercial banking institutions—which are larger and more complex than savings institutions—is sure to inform their approach to the latter over time. While rule-making under Dodd-Frank remains incomplete at this writing, the OCC in particular has made substantial progress in rescinding redundant or outmoded regulations and integrating the OTS regulations applicable to federal thrift institutions with its own regulations for national banks.[24] Future revisions to this book will continue to reflect significant regulatory changes as the new regulators flesh out their approach.

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[22] See § 1.03[4] *infra*.

[23] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010); 12 U.S.C. § 5301 note.

[24] See OCC Bulletin 2011-47, Dec. 8, 2011 available at http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-47.html (last visited Dec. 6, 2012).

§ 1.03 The Federal Regulatory Framework for Savings Institutions

The growth of building and loan associations during the late 1800's and the rise and fall of the "national associations" at the close of the century increased public awareness of the importance of building and loan associations, the hardships that could result from abuses in their operations, and the need for some form of supervision of their activities. Early supervision passed through several stages: (1) reports to state officials; (2) permissive examination by state officials, sometimes upon the request of the shareholders of the association or as determined by the cognizant supervisory authorities; and finally, (3) compulsory periodic examination by state officials.[1] Only with the Depression of the 1930's did the federal government become involved in regulation of savings institutions. When the federal government intervened, however, its entry into the field was rapid and pervasive.

While the regulation of savings institutions from the outset was kept separate from that of banks, the overall structure of thrift institution regulation mimicked the bank regulatory structure. With the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[1.1] the remaining thrift regulator, the OTS, was abolished, and its functions taken over by the bank regulators. Going forward, it may be expected that the regulation of savings institutions will be essentially the same as that of banks.

[1]—Federal Home Loan Bank Act of 1932

With the onset of the Depression in 1929-1930, savings institutions found themselves burdened with loans that borrowers lacked the funds to repay, secured with property that had declined in value so far that only a part of the mortgage loan could be recovered through foreclosure. Savings account withdrawals also were heavy, exacerbating the pressure on institutions when their loan income declined.

For many homeowners, the only hope lay in restructuring their mortgages to extend over a longer period of time, with provision for smaller payments over a new, extended term. However, savings institutions generally were short of funds, and were disinclined to extend mortgages to those who had failed to keep up their original payments. Moreover, lacking a central credit facility comparable to the Federal Reserve System (established in 1913) or the Federal Land Bank System (established in 1916), savings institutions were unable effective-

[1] Bodfish, *History of Building and Loan in the United States* 121-132 (1931); Bridewell, *The Federal Home Loan Bank Board and Its Agencies* 6 (1938).

[1.1] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010); 12 U.S.C. § 5301 note.

ly to use their mortgage holdings as a basis for credit which might have provided the funds with which they could better have responded to the financial crisis.

The Federal Home Loan Bank Act ("Bank Act"), the first major federal legislation in the savings institution area, tried to remedy this problem by creating a new system of funding facilities for mortgage lenders.[2] The Bank Act called for the establishment of up to twelve Federal Home Loan Banks ("Banks") to be located throughout the country, which were given "one basic function—to loan money to savings and loan associations and to certain other mortgage lenders."[3] The Banks initially were funded by the sale of their stock to the United States Treasury and to savings institutions and other home lenders. The Bank Act also created the Federal Home Loan Bank Board ("FHLBB") to oversee the Banks and to raise money for the Banks by selling bonds. At the outset of the FHLBB's existence, these activities were the FHLBB's only functions.

Under the Bank Act, any savings and loan association, savings bank or insurance company could become a member of one of the Federal Home Loan Banks if the FHLBB determined that the institution met the requisite membership criteria—which included, of course, that the institution make home mortgage loans. Bank members then were able, subject to the approval of the FHLBB, to borrow from the Bank of which they were a member.

In more recent times, the Federal Home Loan Banks continued to function as credit-providers to savings institutions, but also assumed an important role in supervision and examination of the savings institutions located in their respective Bank districts.[4] Prior to passage of

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[2] 12 U.S.C. §§ 1421 *et seq*. According to President Herbert Hoover, the purposes of the Bank Act were:

> "(1) for the present emergency purpose of relieving the financial strains upon sound building and loan associations, savings banks, deposit banks, and farm loan banks that have been giving credit through the medium of small mortgage loans upon urban and farm properties used for homes, thereby to relieve pressures upon home and farm owners; (2) to put the various types of institutions loaning on mortgages in a position to assist in the revival of home construction in many parts of the country and with its resultant increase in employment; (3) to safeguard against the repetition of such experiences in the future; (4) for the long-view purpose of strengthening such institutions in the promotion of home ownership particularly through the financial strength thus made available to building and loan associations."

[3] Marvell, *The Federal Home Loan Bank Board* 20 (1969).

[4] The Banks serve geographic areas of the country (the Banks currently are located in Boston, New York, Pittsburgh, Atlanta, Cincinnati, Indianapolis, Chicago, Dallas, Des Moines, Topeka, San Francisco, and Seattle). While they operate within the framework established by the Bank Act and the FHLBB pursuant to its authority thereunder, the Banks are wholly owned by their member institutions.

the Financial Institutions Reform, Recovery and Enforcement Act of 1989[4.1] ("FIRREA"), each district Bank had two main functions: banking and regulatory. The banking function operates much like a commercial bank, with the members as customers. The Bank provides services to its members, including check processing, safekeeping, payment of interest on deposits, negotiable order of withdrawal ("NOW") account processing, and various types of credit programs.

The regulatory function performed by each district Bank had been delegated to the Banks from the FHLBB. In this role, the Banks assisted the FHLBB in administering and enforcing applicable laws and regulations. Certain personnel employed by the banks were designated as Supervisory Agents ("SAs") of the FHLBB, and the President of each Bank customarily wore two hats—acting as both Bank President and as the FHLBB's Principal Supervisory Agent ("PSA") for that district.[5] In this capacity, the district Banks acted as overseers of institutions' safety and soundness, monitoring their member institutions and recommending corrective action when necessary. In this oversight role, the Banks employed regular on-site examinations as well as monthly and quarterly reports. In addition, personnel of the district Banks reviewed various types of applications, including applications involving acquisitions, mergers and reorganizations pursuant to the delegated authority from the FHLBB. Depending upon the type of application and specifics of the transaction, to which it pertained, the PSA also may have had delegated authority from the FHLBB to approve or deny the application.

The organizational structure of each district Bank's regulatory function was different. Often there was a general division between field and supervisory functions. The field staff consisted of examiners who reviewed loan transactions, appraisals and the books and records of the Bank's member institutions. The supervisory staff performed ongoing financial monitoring, verified regulatory compliance, and reviewed applications. Some Banks further divided this latter function to separate out an applications group.[6]

As discussed in more detail below,[7] the FIRREA fundamentally changed the functions of the district Banks, eliminating their regulatory role and requiring them to play several specific new functions in providing low cost funding for housing finance.

[4.1] Pub. L. No. 101-73, 103 Stat. 498 (Aug. 9, 1989); 12 U.S.C. § 1811 note.

[5] See 12 U.S.C. § 1437(a). See also: 12 C.F.R. §§ 501.10, 501.11.

[6] For a detailed discussion of the pre-FIRREA organization and operations of the Federal Home and Loan Bank system, see Adams and Peck, "The Federal Home Loan Banks and the Home Finance System," 43 Bus. Law. 833 (May 1988).

[7] See § 1.03[4] *infra*.

[2]—Home Owners' Loan Act of 1933

While it had been hoped that savings institutions and others borrowing from the Federal Home Loan Banks would use the borrowed funds to refinance existing mortgages and thereby assist homeowners, there was no assurance that funds borrowed from a Bank would be put to this use, and in many cases they are not. "The statute was used almost exclusively for the benefit of the mortgage lending institutions and offered little help to the home owners."[8]

With the economic situation continuing to look dire, Congress increased the federal involvement in the savings institution industry further with passage of the Home Owners' Loan Act[8.1] ("HOLA")—a statute designed to accomplish for home owners what it had been hoped that savings institutions would do with the tools granted them under the Bank Act.[9] As one commentator described:

> Foreclosures were proceeding at an average rate of one thousand a day in the country. Mortgages already had acquired several billion dollars of foreclosed real estate and were threatened either with insolvency or with inability to perform their normal functions. The market price of homes had declined about 40% and there was no effective market even at this discount. The Federal Home Loan Bank System had rendered no substantial assistance and it was clear that, as organized, it would be unable to solve the problem of home mortgage institutions or of individual home owners.[10]

The primary purpose of the HOLA was the creation of a temporary agency, the Home Owners' Loan Corporation ("HOLC"), to help distressed home owners. Created as a part of the FHLBB, the mission of the HOLC was to purchase delinquent mortgage from banks, savings institutions, and other mortgages lenders and to refinance these mortgages over longer terms and at lower interest rates.[11] The HOLC—

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[8] Marvell, *The Federal Home Loan Bank Board*, N. 3 *supra*, at 22.

[8.1] Pub. L. No. 101-73, 48 Stat. 128 (June 13, 1933); 12 U.S.C. § 1461.

[9] 12 U.S.C. §§ 1464 *et seq.*

[10] Russell, *Savings and Loan Associations*, 54 (1956).

[11] Cohen and Freier, *The Federal Home Loan Bank System* 8 (1980).

> "According to the program organized by the [HOLC], lenders exchanged delinquent mortgages for bonds of the [HOLC]. The mortgage loans were then refinanced by the [HOLC] on more liberal terms. In this way, the borrowers' obligations were held directly by the federal government. Under this process, savings and loan associations transferred 13 percent of their total mortgage loan portfolio to the [HOLC]. The $770 million in [HOLC] bonds that the institutions received in exchange for their mortgage loans alleviated their financial difficulties.

once a huge, nationwide agency—performed its role with success and was liquidated in 1951.

Another feature of the HOLA, of secondary importance at the time of its passage, was provision for the creation of a new type of savings institution to be chartered and regulated by the FHLBB. A number of factors were responsible for this aspect of the HOLA. Apparently, it was thought that federal institutions would be a vehicle to establish savings institutions in areas of the country where there were no home financing lenders.[12] (In fact, in the FHLBB's early days it actively promoted the formation of new federal institutions, with FHLBB employees going from town to town trying to persuade local businessmen to establish new federal institutions.)[13] It also was hoped that the prestige of the federal government would instill confidence in savers and discourage deposit "runs," and that the FHLBB would establish rules and regulations that would set an example for uniform and sound savings institution regulation.[14]

This federal chartering feature of the HOLA has had an enormous and continuing impact on the structure of the savings institution industry. Today, more than half of the nation's savings institutions were federally chartered. In addition, an extensive scheme of regulations promulgated by the FHLBB, (and adopted by the Office of Thrift Supervision, its successor), governs the operations of federally chartered institutions, in the words of one court, from their "cradle to [their] corporate grave."[15]

[3]—National Housing Act of 1934

The National Housing Act[15.1] ("NHA") represented the third major federal initiative in three years to aid housing finance.[16] Passed by the

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"Over the three years of its lending life, from June 1933 to June 1936, the[HOLC] refinanced $2.75 billion worth of home mortgages. Ultimately, it processed over 1.8 million loans amounting to $6.2 billion."

[12] Marvell, *The Federal Home Loan Bank Board* 26-27 (1969). The expectation that federal institutions would fill gaps where home financing services were not otherwise available, rather than compete with existing savings institutions is reflected in the standards set by the Hola for chartering of new federal savings institutions by the FHLBB. "No charter shall be granted...unless in the judgment of the [FHLBB] a necessity exists for such an institution in the community to be served . . . *nor unless* the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions." 12 U.S.C. § 1464(e).

[13] Marvell, *The Federal Home Loan Bank Board* 27 (1969).

[14] Marvell, *The Federal Home Loan Bank Board* 26 (1969).

[15] Fidelity Federal Savings and Loan Ass'n v. del la Cuesta 458 U.S. 141, 145, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1983) quoting California v. Coast Federal Savings and Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951). See Chapter 17 *infra*.

[15.1] Pub. L. No. 84-345, 48 Stat. 847 (June 28, 1934); 12 U.S.C. § 1701.

[16] 12 U.S.C. §§ 1724 *et seq*.

Congress only a year after the HOLA, one purpose of the legislation was to provide federal home mortgage insurance. Administration of this new program was not vested with the FHLBB, but with a new agency, the Federal Housing Agency. This choice was attributed by one writer to a concern with how the new program would fare if administered by the FHLBB, which was perceived as too closely allied with the savings institution industry.[17] The industry, in turn, was opposed to aspects of the new program that made mortgage insurance available where the lender was an entity other than a savings institution, such as a bank or insurance company.

However, in addition to the mortgage insurance program, the legislation's most lasting mark was the creation of the Federal Savings and Loan Insurance Corporation ("FSLIC"). The FSLIC's purpose was to insure the accounts of federal institutions and those state chartered institutions that met standards for federal insurance coverage. The concept of the FSLIC was copied from the banking field and modelled upon the Federal Deposit Insurance Corporation ("FDIC") which had been created just a year earlier. However, the FSLIC was not kept as a separate and independent agency as was the FDIC. Instead, it was placed under, and effectively made a part of, the FHLBB. In practice, the FHLBB was the operating head of the FSLIC with the members of the FHLBB acting also as the board of trustees of the FSLIC.[18] The FSLIC received its original funding of $100 million from the HOLC, and additional funds were provided since that time through deposit insurance premiums paid by institutions. In addition, as part of the Competitive Equality Banking Act of 1987[18.1] ("CEBA"), Congress authorized the creation of the FSLIC Financing Corporation, which was designated to raise additional funds for the FSLIC through a complex financing mechanism that involved the sale of up to $10.8 billion in bonds, the proceeds of which are transferred to the FSLIC.[19]

Very soon after passage of this funding authority, however, it became clear that the amount authorized was far short of what would be needed to resolve the number and magnitude of savings institution failures confronting the FHLBB and the FSLIC. Shortly after taking office, President George H. W. Bush responded by proposing reforms and restructuring of the savings institution regulatory system and a massive recapitalization to enable the regulators to resolve the current and projected numbers of failed thrifts.

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[17] Marvell, *The Federal Home Loan Bank Board* 27-28 (1969).

[18] 12 U.S.C. § 1725(a). Operationally, the FSLIC was simply one of the major offices of the FHLBB, and staff of the FSLIC interacted with the FHLBB in the same capacity as staff of other FHLBB offices.

[18.1] Pub. L. No. 100-86, 101 Stat. 552 (Aug. 10, 1987); 12 U.S.C. § 226 note.

[19] 12 U.S.C. § 1441.

[4]—Financial Institutions Reform, Recovery and Enforcement Act of 1989

The magnitude and diversity of change in the savings institution federal regulatory framework brought about by the FIRREA is difficult to overstate.[20] Structurally, the law parceled out the former responsibilities of the Federal Home Loan Bank Board to other agencies, some of which were newly established, and created new funding mechanisms to finance assisted acquisitions and liquidations of insolvent thrifts. Substantively, FIRREA provided tough new enforcement powers for all the federal banking regulatory agencies, and dictated a number of specific new regulatory standards, requirements and limitations for savings institutions, notably in the areas of increased capital requirements and permissible activities of state-chartered thrifts.[21]

In making these changes, FIRREA radically overhauled the statutes governing thrift institutions. The National Housing Act sections applicable to savings institutions and savings and loan holding companies were repealed, and those provisions that Congress determined to keep were moved into the HOLA. The HOLA thus expanded from a law governing solely federally chartered savings institutions to become the statute which comprehensively governs both federal- and state-chartered thrifts, as well as savings institution holding companies. In addition, many new provisions were added to the HOLA. The Federal Deposit Insurance Act[22] ("FDIA") also was made applicable to savings institutions by including coverage of savings institutions in provisions already applicable to banks, and by creating new features uniquely applicable to thrifts.

Federal regulation of savings institutions post-FIRREA became more complex and diverse than ever before. The regulatory role previously performed by the FHLBB (in its own right and as the operating head of the FSLIC) with respect to federal-and state-chartered institutions and savings and loan holding companies shifted to a new agency, the Office of Thrift Supervision ("OTS"), an autonomous

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[20] See, e.g.: Garsson, "President's Pen Ends Era of Deregulation for Thrift Industry," Am. Banker, 1A (Aug. 10, 1989); Hershey, "Bush Signs Savings Legislation: Remaking of Industry Starts Fast," N.Y. Times, (Aug. 10, 1989); Hill and Thomas, "Big Thrift Rescue Bill Is Likely to Realign the Financial System," Wall St. J., p. A2 (Aug. 7, 1989).

[21] See, e.g., Castle v. United States, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (even if legislature's enactment of FIRREA breached supervisory merger contract between government and thrifts, there was no Fifth Amendment taking, since contract did not create reasonable expectation that government would cease regulating thrift industry or any particular association).

[22] Pub. L. No. 81-797, 64 Stat. 873 (Sept. 21, 1950); 12 U.S.C. § 1811 note.

bureau of the Department of the Treasury, subject to the general oversight of the Department.[22.1] The FHLBB was abolished, and the OTS was headed by a single executive, the Director of the Office of Thrift Supervision.

The FSLIC also was abolished and the insurance role it performed reshaped, with the insurance oversight responsibility for savings institutions shifted to the Federal Deposit Insurance Corporation ("FDIC"), which administers the Deposit Insurance Fund ("DIF").[22.2] In conjunction with this change, the size of the FDIC board of directors was expanded to accommodate the Director of OTS as well as an additional presidential appointee. The FDIC also was granted additional powers under the FDIA to oversee or limit certain activities of savings institutions which present risks to the deposit insurance fund.

The role of the FHLBB as overseer of the Federal Home Loan Bank System and the Federal Home Loan Banks also was shifted to another regulator, the newly created Federal Housing Finance Board, operating under the aegis of the Department of Housing and Urban Development. In conjunction with this realignment, the combination of credit and supervisory functions performed by the Banks was dismantled, with the personnel of the Banks performing supervisory and regulatory functions becoming Regional Office personnel of the OTS.

A new temporary agency, the Resolution Trust Corporation ("RTC") also was created to play a role comparable to that previously undertaken by the FSLIC in arranging for acquisitions and liquidations of insolvent institutions. In addition, another new agency, the Resolution Funding Corporation, was created as a vehicle to raise the

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[22.1] The Secretary of the Treasury cannot intervene in any matter or proceeding before the OTS unless otherwise specifically provided by law. See: 12 U.S.C. § 1462a; Home Federal Savings Bank v. Office of Thrift Supervision, 648 F. Supp.2d 911, 913 (E.D. Mich. 2009).

[22.2] The Deposit Insurance Fund ("DIF") resulted from the merger of two insurance funds, the Bank Insurance Fund ("BIF") and the Savings Association Insurance Fund ("SAIF"), pursuant to the Federal Deposit Insurance Reform Act of 2005, Pub. L. No. 109-171, 120 Stat. 9 (Feb. 8, 2001); 12 U.S.C. § 1811 note. The merger of the BIF and SAIF had been resisted by the commercial banking industry, primarily because the BIF, funded by the commercial banks, was in substantially stronger condition than the SAIF and the banks were concerned that the merger would dilute coverage for their depositors. The merger was effectuated on March 31, 2006. The OTS subsequently amended its regulations to reflect this merger, deleting references to the SAIF and the BIF and substituting references to the DIF when applicable. 71 Fed. Reg. 19,810 (April 18, 2006). The insurance funds merger necessitated the repeal of 12 U.S.C. § 1815(d)(2) and (3) and the elimination of regulations dealing with fund conversions and entrance and exit fees that were previously required when an institution converted from one fund to the other. The revised regulations also eliminated references to Oakar transactions, since deposit insurance fund conversions are obsolete following the merger. See the discussion accompanying the amendments to FDIC regulations at 71 Fed. Reg. 20,524 (April 21, 2006).

billions of dollars needed to resolve presently insolvent thrifts and projected thrift failures.

The FIRREA made the OTS the primary federal regulator of both federal and state savings institutions and their holding companies. Thus, from the enactment of FIRREA in 1989 through the abolition of the OTS by the Dodd-Frank Act in 2010, the supervision of savings institution operations and oversight of thrift mergers, acquisitions and conversions was the responsibility of the OTS, administering the amended HOLA. As successor in the regulatory shoes of the FHLBB and the FSLIC, the OTS continued many regulations and policies previously applied by the FHLBB in these areas. On some matters, however, the powers granted by FIRREA to the FDIC to curtail certain types of activities by savings institutions, and generally to intervene when an institution is engaged in practices that constitute a risk to the DIF,[23] will be very relevant in determining if a transaction is permissible and how it will be regulated. With the abolition of the OTS under Dodd-Frank, going forward the approach of the OCC, FDIC and FRB as the successor regulators no doubt will lead to significant changes. In the interim, however, the OTS regulations remain in full force and effect unless and until repealed or replaced. The following discussions therefore continue to refer, as appropriate, to the OTS practices and procedures.

Prior to the enactment of FIRREA, the FSLIC had provided certain economic incentives to encourage private investors to purchase struggling thrifts.[24] In particular, the FSLIC allowed a partial forbearance from regulatory capital requirements, permitting purchasers to treat the shortfall between assets and liabilities as a fictional asset called "supervisory goodwill." FIRREA phased out the inclusion of

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[23] The OTS may deny an application to acquire a savings association if the transaction would increase the insurance risk of the SAIF (now the DIF). See, e.g., OTS, Director's Order No. 2004-47, Oct. 15, 2004. In this instance, the OTS denied the application because the target association was a troubled institution that had experienced declining profitability and recent significant net losses, and the acquirors had not demonstrated that they could resolve its operational problems.

[24] For example, FSLIC offered tax incentives to outside investors to induce them to acquire failing thrifts and restore them to financial viability. The tax deduction for covered asset losses was retroactively eliminated by the so-called "Guarini legislation" (Section 13224 of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 485 (1993)). In Temple-Inland, Inc. v. United States, 59 Fed. Cl. 550 (2004), the Court of Federal Claims held that the government, by enacting this legislation, had breached the implied covenant of good faith and fair dealing in its agreement with institutions that acquired failing thrifts. The court observed that "if the government had wished to retain the broad authority to retroactively reduce or eliminate the bargained-for fruits of the agreement in a select, targeted manner, it was defendant's responsibility to spell out such power in the express terms of the agreement." *Id.*, 59 Fed. Cl. at 562.

supervisory goodwill in the calculation of regulatory capital and imposed on thrifts additional capital requirements. As a result of the new capital standards, many thrifts immediately fell out of capital compliance, making them subject to immediate seizure.[25] Eventually, the Supreme Court held that the government had breached its contracts with several financial institutions by enacting FIRREA.[26]

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[25] See discussion in Admiral Financial Corp. v. United States, 329 F.3d 1372, 1373-1375 (Fed. Cir. 2003).

[26] United States v. Winstar Corp., 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). The issue of whether the government actually entered into contracts with particular thrifts continues to be litigated in the lower courts. A contract between the government and a savings institution does not have to be express but may be implied in fact. AG Route Seven Partnership v. United States, 57 Fed. Cl. 521, 536-537 (Fed. Cl. 2003). A party to these transactions may, by its conduct, be deemed to have accepted a counter offer. First Commerce Corp. v. United States, 60 Fed. Cl. 570, 581 (Fed. Cl. 2004). However, the government's representative must have actual authority to bind the government in contract. Home Federal Bank of Tennessee v. United States, 62 Fed. Cl. 54, 61-63 (Fed. Cl. 2004) (regional regulatory personnel lacked authority to bind FHLBB to promises regarding supervisory goodwill).

The Federal Circuit has pointed out that a government agency's performance of its regulatory or sovereign functions does not create contractual obligations; something more is necessary. 1st Home Liquidating Trust v. United States, 581 F.3d 1350, 1356-1357 (Fed. Cir. 2009) (FHLBB's mere approval of proposed accounting method and investors' belief that agency had promised favorable treatment of supervisory goodwill did not establish existence of contract); D & N Bank v. United States, 331 F.3d 1374, 1378-1379 (Fed. Cir. 2003) (agency's mere approval of merger application did not amount to intent to enter into contract). That "something more" has been defined as a manifest assent by the government to the same bargain proposed by the offer. See, e.g.: Holland v. United States, 621 F.3d 1366, 1375 (Fed. Cir. 2010) (FHLBB's resolutions and forbearance letters created contractual obligations to provide favorable accounting treatment); LaVan v. United States, 382 F.3d 1340, 1347 (Fed. Cir. 2004) (evidence showed that treatment of goodwill was "at the epicenter of the conversion process"; purchasers agreed to infuse capital into institution based on express understanding that they could amortize resulting goodwill over thirty-five years); First Annapolis Bancorp, Inc. v. United States, 75 Fed. Cl. 263, 273-274 (Fed. Cl. 2007) (letter from FHLBB recognized that thrift would be permitted to use relaxed capital benchmarks for first five years after conversion to stock savings bank). Contractual commitments can be memorialized in standardized FHLBB agency documents. Fifth Third Bank of Western Ohio v. United States, 402 F.3d 1221, 1234 (Fed. Cir. 2005). Furthermore, a formal, written agreement is not necessary if there is other evidence of the government's intent to enter into a contract. First Federal Lincoln Bank v. United States, 518 F.3d 1308, 1320 (Fed. Cir. 2008) (however, evidence in this case did not indicate that parties intended merger to be governed by same terms as previous merger). However, the government's mere regulatory proclamations approving a merger are insufficient to create contractual obligations. Anderson v. United States, 344 F.3d 1343, 1356-1357 (Fed. Cir. 2003). *Accord:* Suess v. United States, 535 F.3d 1348, 1362 (Fed. Cir. 2008) (government's mere approval in merger documents of purchase accounting and amortization of goodwill did not constitute agreement permitting institution to continue using those accounting methods); Mola Development Corp. v. United States, 516 F.3d 1370, 1379 (Fed. Cir. 2008) (labeling merger as "supervisory" did not show government's intent to enter into contract; nor could parties' negotiation over "supervisory" desig-

In 1995, the special role of the RTC expired and responsibility for resolution of failing savings institutions shifted to the FDIC. The basic statutory framework for savings institution resolutions was unchanged, however, and continues, with the FDIC implementing it.

As discussed below,[27] Dodd-Frank once again brought about major changes in the savings institution federal regulatory framework. Most

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nation be construed as negotiation over treatment of goodwill); Franklin Federal Savings Bank v. United States, 431 F.3d 1360, 1365 (Fed. Cir. 2005) (government's mere issuance of approval and forbearance letters did not create contract). See also, PALFED, Inc. v. United States, 61 Fed. Cl. 467, 477 (Fed. Cl. 2004) (government's general encouragement of supervisory mergers did not establish "something more").

In another case, the Federal Circuit found that a holding company expressly assumed the risk of the regulatory changes brought about by FIRREA pursuant to a contractual clause setting forth the parties' understanding "that subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquirors' obligation under this Agreement." Admiral Financial Corp. v. United States, 378 F.3d 1336, 1343 (Fed. Cir. 2004). *Cf.*, Hometown Financial, Inc. v. United States, 409 F.3d 1360, 1368 (Fed. Cir. 2005) (agreement specifically excepted savings bank from assumption of risk for period of five years).

The courts also continue to consider issues of standing in these cases, particularly privity requirements and third-party beneficiary status. See, e.g.: Anderson v. United States, 344 F.3d 1343, 1351-1352 (Fed. Cir. 2003) (beneficiaries of trust were not in privity with government with respect to documents signed by trustee; nor were they third-party beneficiaries of alleged contract); Federal Deposit Insurance Corporation v. United States, 342 F.3d 1313, 1319-1320 (Fed. Cir. 2003) (shareholders of failed thrift lacked standing to sue government for breach of alleged contract to which they were not parties; nor were they third-party beneficiaries entitled to enforce contract); Bailey v. United States, 341 F.3d 1342, 1346 (Fed. Cir. 2003) (shareholder who was not party to assistance agreements lacked standing); Perpetual Financial Corp. v. United States, 61 Fed. Cl. 126, 139-140 (Fed. Cl. 2004) (holding company that was sole shareholder of insolvent thrift lacked standing, because its regulatory capital maintenance agreement with FSLIC was effective only as long as it controlled thrift and it had lost control of the thrift when the OTS appointed a receiver); AG Route Seven Partnership v. United States, 57 Fed. Cl. 521, 534 (2003) (shareholders do not have standing to bring derivative claim while FDIC, as receiver, is acting as thrift's legal representative). But see:

Federal Circuit: Home Savings of America, FSB V. United States, 399 F.3d 1341, 1349 (Fed. Cir. 2005) (since holding company was party to larger transactions in which obligations arose, it was in privity of contract with government and had standing); LaVan v. United States, 382 F.3d 1340, 1349 (Fed. Cir. 2004) (individual purchasers who negotiated with government and subsequently became shareholders in new institution had standing).

Federal Claims Court: First Annapolis Bancorp, Inc. v. United States, 75 Fed. Cl. 263, 273-274 (Fed. Cl. 2007) (holding company had standing—it was actual acquiror of thrift and was essential participant in transaction as a contracting party, since it was obligated to ensure thrift's compliance with capital requirements and to infuse additional capital as needed); American Capital Corp. v. United States, 60 Fed. Cl. 294, 296 (Fed. Cl. 2004) (shareholder with direct, personal interest in cause of action may bring suit even if corporation's rights are also implicated).

[27] See § 1.03[8] *infra*. See also, Dodd-Frank Act § 367 (amendments to FIRREA).

significantly, it abolished the OTS, which many in Congress viewed as an ineffective regulator, and transferred its functions to the OCC, the Federal Reserve Board, the FDIC, and the newly created Consumer Financial Protection Bureau ("CFPB").

[5]—Economic Growth and Regulatory Paperwork Reduction Act of 1996

The thrift industry staged a comeback with the passage of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA").[28] In addition to providing a funding mechanism to bring the thrift industry's Savings Association Insurance Fund reserve to a fully funded level, the EGRPRA amended various lending restrictions that are contained in the HOLA, liberalized the HOLA Qualified Thrift Lender Test, and added flexibility to federal thrifts' already liberal interstate branching powers. This combination of changes caused the Director of the OTS to proclaim that "[g]iven the unique operating flexibility provided by the federal charter, especially now that federal thrifts have broader lending authority, we believe thrifts will continue to serve an important function in providing credit to families, farms, and small businesses."[29]

The changes to federal savings institutions' lending authority allow them to engage in credit card lending without a percentage of assets limitation on the aggregate amount of that type of loan, and also permit federal thrifts to make education loans without being subject to a percentage of assets limit. Small business lending and agricultural lending authority of federal thrifts also were expanded.

The EGRPRA substantially liberated thrifts from a mandated concentration in mortgage finance with changes to the Qualified Thrift Lender ("QTL") test allowing investments in educational, small business, credit card, and credit card account loans to be counted, without limit, for purposes of satisfying the test. Consumer loans (other than credit card and education loans) were also permitted to count as qualified investments in an increased amount. Finally, in addition to these liberalizations of the QTL test, EGRPRA authorized savings institutions to *choose* between the revised QTL test or compliance with the Federal tax code "domestic building and loan association" ("DBLA") test for purposes of satisfying regulatory QTL requirements.

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[28] Pub. L. No. 104-208, 110 Stat. 3009-394 (Nov. 1, 1996); 12 U.S.C. § 226 note.

[29] Memorandum for Chief Executive Officers from Nicolas P. Retsinas, Director, OTS, regarding "Expanded Lending Authority for Federal Thrifts," Oct. 29, 1996.

Federal thrifts, which already enjoy significant intrastate and interstate branching flexibility, were given more by EGRPRA provisions which now allow them to look to either the tax DBLA test or the revised QTL test for purposes of meeting requirements regarding establishment, retention and operation of interstate branches.[30]

Section 2222 of EGRPRA requires OTS and the other federal agencies that regulate financial institutions to categorize their regulations by type and solicit public comment to identify areas of the regulations that are outdated, unnecessary or unduly burdensome. This review process implements EGRPRA's goal of minimizing "unnecessary government regulation consistent with safety and soundness, consumer

(Text continued on page 1-21)

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[30] For additional information, see OTS Staff Paper, "The Federal Thrift Charter Going Forward," at Appendix A *infra*.

protection, and other public policy goals." The agencies issue publications for comment at regular intervals, the first publication cycle ended September 2006.[31]

[6]—Gramm-Leach-Bliley Act of 1999

The Gramm-Leach-Bliley Act of 1999 ("GLBA")[32] shifted the focus to holding company activities. GLBA broadened the range of activities permissible for bank holding companies and reduced the range permissible for savings and loan holding companies. Reacting to concerns by some that a mixture of banking and commercial activities was undesirable as a matter of policy and risk, Congress focused on the unrestricted activities allowed for unitary savings and loan holding companies as a source of such an undesirable mix. As a result, only qualifying unitary holding companies in existence as of a specified date were allowed to retain the ability to engage in commercial as well as financial activities. Other existing savings and loan holding companies, and newly created unitary holding companies, were limited to financial and financially related activities. Thus, GLBA substantially narrowed the difference between permissible activities of bank holding companies and thrift holding companies.

With the transfer to the Federal Reserve of responsibility for oversight of thrift holding companies under Dodd-Frank in 2010,[32.1] the differences between the two types of holding companies may be expected to narrow further. It appears likely that the Federal Reserve will increasingly treat thrift holding companies as *de facto* bank holding companies with respect to the scope of their permissible activities as well as supervisory oversight and examinations criteria.

Specifically, the Federal Reserve has stated that it will evaluate new investments in and relationships with savings and loan holding companies under the policies and practices reflected in its Policy Statement on Equity Investments in Banks and BHCs, adopted at the height of the financial crisis in September 2008.[33] Generally aimed at providing safe harbors for private investors seeking to make minority investments in banks and BHCs, the Policy Statement lays out the circumstances under which such an investor would not be deemed to control a bank or BHC, including permissible levels of equity investment and board representation as well as business and other relationships between the investor and the bank. One significant liberalization

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[31] 68 Fed. Reg. 35589 (June 16, 2003).

[32] Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999); 12 U.S.C. § 1811 note.

[32.1] See § 2.01[7] *infra*.

[33] 12 C.F.R. § 225.144; "Policy Statement on Equity Investments," available at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20080922b1.pdf (last visited Dec. 6, 2012).

of prior policy is that an investor may be able to own up to 33% of the total equity, provided it owns no more than 15% of the voting equity. This would appear, however, to conflict with the Home Owners Loan Act ("HOLA"), which governs savings and loan holding companies, in that the HOLA conclusively presumes control if 25% or more of the total equity (not just the voting equity) is owned.

Indicative of the Fed's thinking, in December 2011 it announced a final notice confirming that most savings and loan holding companies will convert to using bank holding company reporting methodology, with respect to their non-banking activities.[33.1] In a similar vein, the Fed had earlier issued an Order delegating authority to specified staff members to approve certain actions by thrift holding companies, replacing the former OTS delegation structure. The new delegations closely track the existing delegations of authority for bank holding company approvals.[33.2]

[7]—USA PATRIOT Act of 2001

Section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, commonly known as the USA PATRIOT Act,[34] was intended to facilitate the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Pursuant to Section 326, the Treasury Department and several federal agencies, including the OTS, adopted a joint final rule requiring financial institutions to (1) implement reasonable procedures to verify the identity of any person seeking to open an account, to the extent reasonable and practicable, (2) maintain records of the information used to verify the person's identity, and (3) determine whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency.[35] The rule, which became effective on June 9, 2003, applies to all financial institutions, including savings associations. Each institution must comply with the rule's requirements by October 1, 2003.

The substantive requirements of the joint final rule were codified as part of the Treasury Department's regulations.[36] The OTS also included a provision in its own regulations to cross-reference this final

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[33.1] See http://www.federalreserve.gov/newsevents/press/bcreg/20111223a.htm (last visited May 30, 2012).

[33.2] See http://www.federalreserve.gov/newsevents/press/bcreg/20110812a.htm (last visited May 30, 2012).

[34] Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001); 18 U.S.C. § 1 note.

[35] 68 Fed. Reg. 25,089 (May 9, 2003).

[36] 31 C.F.R. § 103.121.

rule and clarify its applicability to savings associations.[37] In addition, the OTS issued a staff summary and checklist for thrifts to help them comply with the rule and update their existing anti-money laundering programs.[38]

[8]—Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[39] ("Dodd-Frank"), a wide-ranging legislative response to the financial crisis of 2008, brought about major changes in bank and thrift regulation. Most notably, it abolished the Office of Thrift Supervision ("OTS"), which many in Congress viewed as an ineffective regulator, and transferred its responsibilities to other agencies, primarily the Office of the Comptroller of the Currency ("OCC"), with respect to federally chartered thrifts and the FDIC with respect to state-chartered thrifts. These changes became effective on the "transfer date," July 21, 2011.[40] The OTS continued to exist for ninety days after the transfer date solely for the purpose of winding up its affairs.[41]

Specifically, the Dodd-Frank Act mandated that on the transfer date, the supervision of savings and loan holding companies, as well as all rulemaking authority relating to them, be transferred to the Federal Reserve Board ("Board"). Shortly after the transfer date, the Board issued Regulations LL and MM[42] to implement this authority. Dodd-Frank explicitly preserves all existing OTS regulations, unless and until they are changed. Regulations LL and MM for now carry forward the predecessor OTS regulations pending the Board gaining greater familiarity with savings institutions holding companies.[43] While the Board issued Regulations LL and MM in final form, the Board solicited further comments. The Board also acquired the OTS's rulemaking authority relating to tying arrangements and to transactions with affiliates and extensions of credit to executive officers, directors and principal shareholders. The Office of the Comptroller of the Currency took over all OTS functions relating to federal savings

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[37] 12 C.F.R. § 563.177(b).

[38] See Appendices E, F *infra*.

[39] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010); 12 U.S.C. § 5301 note. For further discussion of the relevant changes brought about by the Dodd-Frank Act, see Doyle, DeSimone and Scott, "Savings and Loan Holding Companies and Their Subsidiaries to Be Subject to New Regulatory Regimes," 127 Banking L.J. 750 (2010).

[40] Dodd-Frank Act § 311. The law provided that the transfer date might be extended up to six months. However, the actual transfer took place effective July 21, 2011.

[41] Dodd-Frank Act §§ 313, 325.

[42] 12 C.F.R. pts. 238 and 239, respectively.

[43] For further discussion see Section 2.01[7] *infra*.

associations and all rulemaking authority relating to savings associations. Finally, all OTS functions relating to state savings associations were transferred to the FDIC.[44] In addition, the Act transferred the OTS's consumer financial protection functions to the newly created Consumer Financial Protection Bureau ("CFPB"). The CFPB nominally is part of the Federal Reserve System; however, this is so for budgetary reasons. Since the Federal Reserve is self-funding, the CFPB's budget will be part of the Federal Reserve's and thus will not be subject to the Congressional appropriations process that would otherwise apply. In terms of its rule-making functions, however, the CFPB functions independently of the Federal Reserve.[45]

The thrust of the CFPB's mandate is to regulate consumer financial products consistently, without regard to the type of entity that offers them. The CFPB has begun to issue supervisory guidance that affects the activities of savings institutions. For example, in March 2012 the CFPB issued guidance for examination of all depository institutions under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008[46] ("S.A.F.E. Act").[47]Shortly thereafter, the CFPB published its annual regulatory agenda, which reflects an ambitious schedule of current and proposed rulemaking in areas that will have a significant impact on the operation of thrift institutions, such as home mortgage disclosure, Regulation Z, which implements the Truth in Lending Act, Regulation E, prepaid debit cards, and numerous others.[48] Dodd-Frank amended most of the statutes discussed in this book to reflect the transfer of the OTS's responsibilities to the agencies mentioned above. Under the Act's savings provisions, all OTS regulations, orders, interpretations and guidelines will continue in effect and may be enforced by the appropriate federal regulator.

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[44] Dodd-Frank Act § 312.

[45] Dodd-Frank Act § 1061(b)(3); see also Dodd-Frank Act § 1062 (designated transfer date).

[46] Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008); 12 U.S.C. §§ 1501 *et seq*. See http://files.consumerfinance.gov/f/201203_cfpb_update_SAFE_Act_Exam_Procedures.pdf (last visited May 30, 2012). The SAFE Act established a federal registration base, the Federal Registry, to cover persons licensed to originate mortgages. Originally this was under the individual agencies; however, the Dodd-Frank Act transferred authority for the Federal Registry to the CFPB, *available at* http://www.ffiec.gov/safeact.htm (last visited May 30, 2012).

[47] Available at http://files.consumerfinance.gov/f/201204_cfpb_semiannual-regulatory-agenda_2012-spring.pdf (last visited Dec. 6,2012).

[48] Dodd-Frank Act § 316(b).