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## ARTICLES

# AN ORDERLY LIQUIDATION AUTHORITY IS NOT THE SOLUTION TO TOO-BIG-TO-FAIL

*Roberta S. Karmel\**

### INTRODUCTION

The preamble to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) declares that one of the statute's primary purposes is "to end 'too big to fail', to protect the American taxpayer by ending bailouts."<sup>1</sup> Similarly, when President Obama signed this bill, he declared that "the American people will never again be asked to foot the bill for Wall Street's mistakes. There will be no more taxpayer-funded bailouts, period."<sup>2</sup> The primary techniques for preventing future bailouts of financial institutions in Dodd-Frank are the improved regulation of banks, especially by way of capital controls, the regulation of systemically significant financial institutions, and the creation of an orderly liquidation authority for failed firms.<sup>3</sup> Unfortunately, the political outlawing of "too big to fail" represents the triumph of hope over experience.

Although Dodd-Frank is an improvement over the financial regulatory system that preceded it, it will not abolish "too big to fail" because the major banks and other financial institutions in the capital markets are too big—bigger now than they were before the meltdown of 2008—and too complicated. Furthermore, these financial institutions have grown to their current size and shape because they were permitted, and even encouraged, to do so by the very same financial agencies that are now supposed to do a better job of regulating them. These regulators did so for a variety of reasons that have not been altered by Dodd-Frank.

First, politicians, regulators, and CEOs do not care to preside over failure, and generally have the ability to "kick that can down the road" for a long time. Large government bureaucracies find it easier to deal with large businesses than small businesses, but the consequences of closing down a

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1. H.R. 4173, 111th Cong., pmbl. (2d Sess. 2010).

2. Frank James, *Obama: Financial Bill Means 'No More . . . Bailouts, Period,'* NPR (July 15, 2010, 6:23 PM), <http://www.npr.org/blogs/thetwo-way/2010/07/15/128549117/obama-financial-bill-means-no-more-bailouts-period>.

3. See Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, §§ 171, 204, 804, 124 Stat. 1376, 1435, 1454, 1807 (2010) (codified at 12 U.S.C. §§ 5371, 5384, 5463 (2010)).

very large business are more severe, and regulators will generally go to great lengths to avoid such a bankruptcy. Second, in order to protect the federal deposit insurance fund (and similar insurance facilities), financial regulators have presided over shotgun marriages between distressed banks and other apparently stronger institutions, regardless of whether these combinations flouted restrictions against such marriages, or resulted in larger but weaker financial institutions. Third, growth and size gives banks advantages that they do not wish to forgo. The larger an organization, the greater the compensation a CEO can claim and the more influence the organization can exercise politically. Even when regulators have not been captured politically by the industries that they regulate, they have been complicit facilitators of bank growth because they believe that size makes banks sounder. Unfortunately, as a liquidator of a failed broker-dealer once said to me, "When you put two dogs together, all you get is a bigger dog." Fourth, globalization and regulatory competition have made regulators fearful of losing entities under their jurisdiction to other authorities. As a result, regulators have cooperated with the financial institutions that they regulate in expanding the size and types of businesses in which they are engaged.

In Part I, this Article will set forth the provisions of Dodd-Frank that deal with the mechanisms for closing banks and providing liquidity in a financial crisis, and suggest that, although the orderly liquidation procedures of Dodd-Frank might make the resolution of a failed mega-bank less chaotic, these procedures will not prevent any financial institutions from being too big to fail. In Part II, this Article will discuss the dynamics behind the creation of the mega-banks: the destruction of the statutorily imposed geographical restrictions on banking and the separation of commercial and investment banking through interpretations by the banking regulators that were first upheld by the courts, and much later endorsed by Congress. Part II will also recount how some of the biggest banks grew through mergers and acquisitions that were at times strategic, but at other times, could be more accurately described as an opportunistic response to the failure of another bank. My analysis has been informed by my own experiences as a financial regulator and lawyer for some of the players in this story of expansion. Part III of this Article will discuss various mechanisms that have been proposed for dealing with the size and complexity of the mega-banks.

I am pessimistic about the value of the Dodd-Frank provisions that were designed to prevent future bailouts in the absence of serious structural change in the banking world and changes to the financial regulators. Nevertheless, I recognize that we cannot go backward to simpler capital markets, and therefore, we have to rationalize financial structures in light of today's political and business realities. It is unrealistic to believe that there will not be financial bubbles in the future and also not to appreciate that the

size and structure of the financial industry means only governments can provide the necessary liquidity to stem a financial collapse. Putting restraints on the agencies that will be required to act in a crisis, instead of providing them with the tools to meet such a crisis, as the resolution procedures of Dodd-Frank do to some extent, is shortsighted and counterproductive. Moreover, the lack of any political will to tackle the economic and political power of the mega-banks means that they are and will remain too big to fail.

## I. STATUTORY MECHANISMS FOR CLOSING BANKS AND PROVIDING LIQUIDITY IN A FINANCIAL CRISIS

### A. THE FEDERAL DEPOSIT INSURANCE CORPORATION AS CONSERVATOR

The Federal Deposit Insurance Corporation (FDIC) was historically allowed to offer financial assistance to a bank before the bank became insolvent. This was a discretionary power.<sup>4</sup> This FDIC policy dictated that no request for such assistance should be granted unless the FDIC determined that the “financial impact on executive management, directors, shareholders and subordinated debt holders [was] comparable to what would have occurred if the bank had actually closed.”<sup>5</sup>

The decision to close a bank is made by its primary regulator; when such a decision is made the FDIC is appointed as conservator of the failed institution.<sup>6</sup> The FDIC can seize control of a commercial bank that is insolvent or approaching insolvency.<sup>7</sup> Under its prior statutes, it then had a variety of options.<sup>8</sup> It could engage in a purchase and assumption transaction by transferring the failing bank to a solvent institution,<sup>9</sup> capitalize a new bank or bridge bank,<sup>10</sup> become a receiver and liquidate the bank, or become a conservator and operate the bank with a view to rehabilitation.<sup>11</sup> Further, it was allowed to inject liquidity into troubled banks to prevent a receivership or conservatorship.<sup>12</sup>

One reason the FDIC has a variety of options in liquidating a failed bank is that it is obliged to resolve a failed bank under the “least cost”

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4. See 12 U.S.C. § 1823(c)(1) (2006).

5. Statement of Policy and Criteria on Assistance to Operating Insured Banks Which are in Danger of Failing, 48 Fed. Reg. 38,669, 38,670 (Aug. 25, 1983).

6. 12 U.S.C. § 1821(c); see also Lisa Lamkin Broome, *Redistributing Bank Insolvency Risks: Challenges to Limited Liability in the Bank Holding Company Structure*, 26 U.C. DAVIS L. REV. 935, 943 (1993).

7. 12 U.S.C. § 1831o(f)(2).

8. See Edward R. Morrison, *Is the Bankruptcy Code an Adequate Mechanism for Resolving the Distress of Systemically Important Institutions?*, 82 TEMP. L. REV. 449, 455–57 (2009).

9. See 12 U.S.C. §§ 1821(d)(2)(G), 1823(c)(2)(A)(iii).

10. See *id.* § 1821(m)–(n).

11. See *id.* § 1821(d)(2)(D)–(E).

12. See *id.* § 1823(c)(8).

method.<sup>13</sup> This means that the FDIC must resolve the failed bank in a way that is “least costly to the deposit insurance fund of all possible methods for meeting [its] obligations.”<sup>14</sup> Because of this need to protect the deposit insurance fund, the FDIC and other regulators customarily attempted to persuade another financial institution to assume the liabilities and acquire the assets of a failed or failing bank. Therefore, as banks failed in various financial crises over the years, the regulators made every effort to find marriage partners for insolvent banks and, in the process, helped to create the mega-banks that exist today.

Under Dodd-Frank, although the FDIC’s powers are curtailed in certain ways, the FDIC now has the power to resolve systemically important nonbanking financial institutions and financial institution holding companies in much the same way that the agency has previously resolved failed banks. Under the new liquidation authority, the Treasury Secretary would have the authority to appoint the FDIC as receiver of any financial company if certain conditions are satisfied.<sup>15</sup> Unfortunately, a large financial holding company is much more complicated than a bank, and in such a situation, liquidation of the failed firm, not rehabilitation, is the FDIC’s only option.

Absent the need to liquidate, the FDIC may provide a wide range of financial assistance for the resolution of a covered financial company: this includes making loans to; or purchasing debt, purchasing assets, assuming or guaranteeing obligations, taking liens on assets, and selling or transferring assets or liabilities of; the covered financial company.<sup>16</sup> Although the FDIC has broad authority to administer the resolution process, including the transfer of assets and liabilities to a third party or bridge financial company,<sup>17</sup> it remains to be seen whether the agency has the expertise or manpower to resolve a mega-bank holding company.

## B. LIQUIDITY FUNDING

In a financial crisis, some firms may be insolvent in that, even upon liquidation, the value of their assets will not sufficiently offset their liabilities. Other firms may suffer a liquidity crisis, so that if a liquidity provider is available, the value of their assets will rebound, and they will be able to continue in business. In the financial crisis of 2008, liquidity funding through various methods was given to systemically important financial institutions by the Federal Reserve Board (the Fed) and the FDIC.

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13. *Id.* § 1823(c)(4).

14. *See id.* § 1823(c)(4)(ii).

15. Dodd-Frank Act, Pub. L. No. 111-203, § 201(a)(8), 124 Stat. 1376, 1443 (2010) (codified at 12 U.S.C. § 5374 (2010)).

16. *Id.* § 210.

17. *See id.* § 210(1)(D), (G).

This liquidity funding was then augmented by funding from the Troubled Asset Relief Program (TARP).<sup>18</sup>

Although it was not clear that the Fed and the FDIC had statutory authority to rehabilitate insolvent financial institutions, they used what authority they could find to do so. Section 13(3) of the Federal Reserve Act<sup>19</sup> allows the Fed to make emergency loans to individual companies, subject to three requirements: first, “unusual and exigent circumstances” must exist; second, no fewer than five members of the Fed must approve the loans; and third, the Fed must obtain evidence that the borrower is unable to secure adequate credit from other banking institutions.<sup>20</sup> Historically, the Fed has rarely used this power; additionally, it was only an amendment to the banking laws after the 1987 stock market crash that allowed it to extend such credit to nonbanking institutions.<sup>21</sup> This amendment to the Fed’s powers also relaxed the collateral requirements for such loans.<sup>22</sup>

The Obama administration initially requested legislation to broaden the Fed’s powers under § 13(3),<sup>23</sup> but Dodd-Frank restricts such powers. Previously, the Fed was allowed to make loans to individual companies, but it can no longer unilaterally do so; but now, emergency lending must be approved by the Treasury and monitored by Congress. Emergency lending must also be backed by collateral that is sufficient to protect taxpayers.<sup>24</sup>

During the financial crisis, the FDIC used the “systemic risk exception” to its normal receivership rules to establish the Temporary Liquidity Guaranty Program. This program afforded federally insured depositories the ability to issue unsecured short-term debt with a federal government guarantee. After Dodd-Frank, however, the FDIC can only extend such credit to solvent banks. Further, the Fed and the FDIC must agree that a liquidity event has occurred and place limits on the guarantees to financial institutions so that they will not be a source of moral hazard.<sup>25</sup>

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18. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 2(1), 122 Stat. 3765, 3766 (codified at 12 U.S.C. § 5201 (2008)); see also James B. Stewart, *Eight Days: The Battle to Save the American Financial System*, NEW YORKER, Sept. 21, 2009, at 79.

19. Federal Reserve Act § 13(3), 12 U.S.C. § 343(A)–(E) (2006).

20. See Jeffrey N. Gordon & Christopher Muller, *Avoiding Eight-Alarm Fires in the Political Economy of Systemic Risk Management* 30 (Colum. L. and Econs., Working Paper No. 369, 2010); Eur. Corp. Governance Inst., Finance Working Paper No. 277, 2010, available at [http://ssrn.com/abstract\\_id=1553880](http://ssrn.com/abstract_id=1553880) (2010).

21. See *id.* at 33–34.

22. *Id.*

23. Federal Reserve Act § 13(3).

24. *Id.* § 13(3)(B)(i).

25. See Dodd-Frank Act, Pub. L. No. 111-203, § 1104, 124 Stat. 1376, 2120 (2010) (codified at 12 U.S.C. § 5611 (2010)).

The Emergency Economic Stabilization Act<sup>26</sup> provided for the government purchase of assets from distressed financial institutions up to the expenditure of \$800 billion. Although it was initially envisioned that the government would purchase toxic, illiquid assets held by financial institutions, these funds were actually used to buy preferred stock in nine major financial institutions for a total of \$125 billion, and to otherwise recapitalize failing financial firms. While much of the TARP money used to stabilize the financial system has been repaid, this program was widely criticized as a “bailout” and led to certain of the restrictions on the Fed and others to prevent future liquidity assistance to distressed financial institutions.

In my opinion, all of these restrictions portend that, when there is a future financial crisis, the financial regulators may have less, rather than more, flexibility both in determining how to deal with the crisis and in injecting liquidity that may be needed into the financial system. One problem is the funding mechanism for the new orderly liquidation authority. Although the Senate bill provided for a fund of \$50 billion, to be created over a period of five to ten years and to be held by the Treasury, the final version of Dodd-Frank provides for funding of any money expended by the FDIC in resolving troubled financial institutions only after the fact. In order to function as receiver, the FDIC is authorized to issue obligations and borrow funds in the first thirty days of a receivership for 10 percent of the book value of assets of the company in receivership, and thereafter the FDIC may borrow up to 90 percent of the fair value of the assets of the company that are available for repayment.<sup>27</sup> Next, the FDIC must establish an assessment process to repay the obligations issued by it as receiver in connection with the liquidation within sixty months. If it is not repaid, then the FDIC must levy an assessment on bank holding companies with consolidated assets of \$50 billion or more, and on nonbank financial companies supervised by the Fed as systemically significant financial institutions and other financial companies with assets of \$50 billion or more.<sup>28</sup>

The rationale of Dodd-Frank is firstly, that improved supervision and regulation by the financial regulators will prevent financial institution failures; and secondly, that individual firms that fail, notwithstanding these measures, should be liquidated. This rationale is very troublesome because the statute neither changes the basic structure of the financial services industry, nor significantly curbs the size, powers, or activities of financial holding companies, but continues to rely on the very same regulators who

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26. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 107, 122 Stat. 3765, 3817 (codified at 12 U.S.C. § 5217 (2008)).

27. Dodd-Frank Act, § 210(n)(6), 124 Stat. 1507 (codified at 12 U.S.C. § 5390). This ability to borrow is limited by agreement with the Treasury Secretary and a repayment plan.

28. *See id.* § 210(o)(1).

failed to prevent the 2008 meltdown. Although Dodd-Frank makes many improvements in the regulation of financial institutions, in my opinion, these improvements are insufficient to prevent future financial bubbles and their inevitable puncture. Financial crises have different immediate causes, and therefore are difficult to predict; further, financial bubbles come from psychological delusions and generally are pricked by recognition of reality. Why should regulators, however well intentioned, be presumed to have the vision and foresight that market place participants are lacking?

## II. HOW THE MEGA-BANKS GREW

### A. OVERVIEW

According to Henry Kaufman, the greatest failing of Dodd-Frank was one of design:

[T]he act did not deal correctly with the problem of the extraordinary concentration of assets held by a small number of large financial institutions. . . .

The new legislation supposedly heightens surveillance over these giant institutions, and allows regulators to engineer their orderly dissolution. This sounds plausible, but on closer examination amounts only to a new protective ring around these institutions, an arrangement posing huge risks. . . . For where will their assets end up, if not in the hands of the federal government, or one of the remaining giants?<sup>29</sup>

I could not agree more.

In another article, I have argued that the Public Utility Holding Company Act should be examined to provide a model for breaking up the mega-banks, just as the public utility holding companies were broken up after the 1929 stock market crash.<sup>30</sup> I will not repeat that analysis here. Rather, I will tell the story of how the federal bank regulators expanded the business models of banks by punching holes in the Glass-Steagall Act (Glass-Steagall)<sup>31</sup> wall that separated commercial and investment banking—a wall that was finally knocked down by the Gramm-Leach-Bliley Act (Gramm-Leach-Bliley)<sup>32</sup>—and how these same regulators approved the mergers and acquisitions that led to the creation of the three mega-banks that dominate banking today. The sad fact is that the regulatory failures of the Fed, the Office of the Comptroller of the Currency (OCC or

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29. Henry Kaufman, *America Must Start Again on Financial Regulation*, FIN. TIMES, Dec. 17, 2010, at 11.

30. Roberta S. Karmel, *Is the Public Utility Holding Company Act a Model for Breaking Up the Banks that are Too-Big-to-Fail?*, 62 HASTINGS L. J. 821 (2011).

31. Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified at 12 U.S.C. §§ 24, 335, 377, 378).

32. Financial Services Modernization Act of 1999, Pub. L. No. 106-102, § 101(a), 113 Stat. 1338 (codified in scattered sections of 12 & 15 U.S.C.).



the Comptroller) and the FDIC allowed banks to grow into the gargantuan, complex, and unwieldy holding companies that became too big to fail.

During the period of 1980 to 1994, regulators approved a record number of mergers<sup>33</sup>: the Fed approved 4,507, the OCC approved 972, and the FDIC approved 868.<sup>34</sup> Furthermore, the regulators failed to regulate the blatant use of bank holding companies as a vehicle for circumventing interstate banking and activities restrictions. These regulatory actions, and in many cases omissions, resulted in expansionary branching and hyperactive merger activity.

Today, the three largest bank holding companies are Bank of America Corporation (Bank of America), JPMorgan Chase & Co. (JPMorgan Chase), and Citigroup Inc. (Citigroup).<sup>35</sup> These three companies were allowed or encouraged to acquire major investment banking organizations.<sup>36</sup> Notably, the predecessors to these companies include the top merger-active firms during the period of 1980 to 1994, including the top six: Citicorp, BankAmerica Corp. (BankAmerica), Chemical Banking Corp. (Chemical Bank), NationsBank Corp. (NationsBank), J.P. Morgan & Co. Inc. (J.P. Morgan), and Chase Manhattan Corp. (Chase). Bank of America's predecessors include BankAmerica and NationsBank. During the financial crisis, Bank of America acquired Merrill Lynch & Co. (Merrill Lynch). JPMorgan Chase is an amalgamation of Chemical Bank, J.P. Morgan, and Chase. During the financial crisis, JPMorgan Chase, with financial assistance from the Fed, acquired Bear Stearns & Co. Citigroup has, as one of its predecessors, Citicorp. Citicorp already owned Smith Barney & Co. and Solomon Bros.; and as a result of its acquisition of Travelers Group, it challenged Congress to enact Gramm-Leach-Bliley. The aggressive merger activity of these predecessor banks, all of which were approved by bank regulators, contributed to the development of today's three largest bank holding companies. Each of these banks was deemed "too big to fail," and each was assisted or rescued by the federal government during the financial crisis of 2008.

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33. Stephen A. Rhoades, *Bank Mergers and Industrywide Structure, 1980-94*, at 1 (Bd. of Governors of the Fed. Reserve Sys., Staff Studies Series No. 169, 1996).

34. *Id.* at 19.

35. The Fed's June 30, 2011 performance reports indicate that Bank of America had total assets of \$2,264,435,837,000, JPMorgan Chase had total assets of \$2,246,764,000,000, and Citigroup had total assets of \$1,956,626,000,000. *Top 50 Bank Holding Companies*, NAT'L INFO. CTR., <http://www.ffiec.gov/nicpubweb/nicweb/Top50Form.aspx> (data as of June 30, 2011) (to access the performance reports, follow the hyperlink of the relevant company; then under "Bank Holding Company Performance Report (BHCPR)," highlight "2011-6-30" and click "Create Report"; then follow the "Your request for a financial report is ready" hyperlink after it appears).

36. See *infra* text accompanying notes 277-83, 307-09, 340-46.

## B. DESTRUCTION OF GEOGRAPHICAL AND ACTIVITIES RESTRICTIONS

Some of the important restrictions on banks designed to prevent excessive concentration of financial power were the prohibitions against branching interstate and intrastate. These restrictions were based on a desire to control banks at a community level, to have and encourage close relationships between bankers and borrowers within those communities, and to avoid centralized financial power.<sup>37</sup> When the federal banking system was established in 1864, the National Banking Act allowed banks to be either chartered as a state or a national bank, but national banks were not permitted to branch.<sup>38</sup> In 1927, Congress authorized national banks to open a limited number of branches in local communities if the law of that state permitted state-chartered banks to do so; then, by way of a 1933 amendment, it provided national banks with full equality to branch throughout their home state to the same extent the state permitted its own banks to branch.<sup>39</sup>

In the 1940s and 1950s, banks formed bank holding companies as a device around the restrictions on interstate and intrastate branching. The holding company structure allowed a bank to effectively create a branch in different states or communities even though branching was not allowed.<sup>40</sup> The Douglas Amendment of the Bank Holding Company Act of 1956 (BHCA)<sup>41</sup> partially closed this end run around geographic restrictions by prohibiting a bank holding company from acquiring an interstate bank unless there was explicit statutory authorization by the state where the bank to be acquired was located.<sup>42</sup>

In the early 1990s, Congress finally ended branching restrictions by passing the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal).<sup>43</sup> A number of reasons were given for the statute, including: the concern that geographic banking restrictions hindered the

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37. Patrick Mulloy & Cynthia Lasker, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Responding to Global Competition*, 21 J. LEGIS. 255, 255 (1995).

38. See generally National Banking Act of 1863, ch. 58, 12 Stat. 665 (repealed 1953); see also *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 655–58 (1924) (holding that national banks are prohibited from branching).

39. McFadden Act, ch. 191, 44 Stat. 1224 (1927) (codified as amended at 12 U.S.C. § 36 (2006)); Mulloy & Lasker, *supra* note 37, at 257.

40. Mulloy & Lasker, *supra* note 37, at 257 (quoting Riegle-Neal Interstate Banking and Branching Act of 1994, S. REP. NO. 103-240, at 6 (1994)).

41. Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133, 135 (1956) (codified as amended at 12 U.S.C. § 1842(d) (2000)), *repealed in part by* the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994) (codified in scattered sections of 12 U.S.C.).

42. Mulloy & Lasker, *supra* note 37, at 258. As some states recognized the benefits holding companies offered in terms of attracting new investment capital to their states, this restriction slowly eroded but in some cases was limited by reciprocity requirements. *Id.*

43. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 108 Stat. 2338.

competitiveness of the U.S. banking industry; and the belief that interstate branching would promote diversification of bank assets and loan portfolios, and that greater customer convenience and choice would result.<sup>44</sup> Riegle-Neal allowed bank holding companies to acquire separate banks in multiple states as long as the Fed found the holding company adequately capitalized and managed. In addition, the OCC was authorized by Riegle-Neal to approve the establishment and operation of interstate national bank branches,<sup>45</sup> and the FDIC was similarly authorized to approve interstate branches of insured state nonmember banks.<sup>46</sup>

Some of the cases that will be discussed below relate to efforts by the banking regulators to allow national banks to expand across state lines, thus undermining the restriction on interstate banking. The most important activities and conflict of interest restrictions for purposes of this Article, however, were those in Glass-Steagall, which was passed in 1933 as an important part of the New Deal effort to restore public confidence in the country's financial system. It was linked with the passage of the Federal Deposit Insurance Act,<sup>47</sup> which provided federal insurance for retail bank accounts. This legislation had two types of provisions separating investment and commercial banking. Direct combinations were regulated under § 16 of the Banking Act of 1933, which prohibited national banks and state banks that were members of the Federal Reserve System from purchasing, underwriting, or dealing in securities, except as provided in the Act.<sup>48</sup> Additionally, § 21 prohibited institutions involved in underwriting, selling, or distributing securities from also taking deposits.<sup>49</sup>

The second type of provision prevented indirect combinations. Section 20 prohibited Federal Reserve System member banks from being affiliated with any organization engaged in the issuance, underwriting, public sale, or distribution of non-exempt securities.<sup>50</sup> Section 32 prohibited Federal Reserve System and state member banks from sharing personnel with entities primarily engaged in the issuance, underwriting, public sale, or distribution of securities.<sup>51</sup>

The restrictions that were placed on bank holding companies were driven by two impetuses: the threat of concentration that widespread interstate banking posed, and the fear that the economic system would be

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44. Mulloy & Lasker, *supra* note 37, at 266, 269.

45. 12 U.S.C. § 36(c) (2006).

46. *Id.* § 1828(d)(4) (amended 2010).

47. Pub. L. No. 81-797, 64 Stat. 873 (1950) (codified as amended 12 U.S.C. §§ 1811–1835a (2006)).

48. 12 U.S.C. § 335 (1934) (amended 1999).

49. *Id.* § 378 (amended 1978).

50. *Id.* § 377 (repealed 1999).

51. *Id.* § 78 (repealed 1999).

dominated by colossal banking and industrial conglomerates.<sup>52</sup> Therefore, restrictions on the nonbank activities of bank holding companies were designed to prevent a bank holding company from performing activities that could not be performed directly by a bank. Many commercial businesses feared that firms affiliated with banks could gain a competitive advantage over unaffiliated competitors in the same industry if they were in a position to receive preferential credit treatment from the banks.<sup>53</sup> Also, business and policy leaders feared that access to credit would be tied to the purchase of services from a bank's nonbank affiliates.<sup>54</sup>

As a result, the BHCA severely restricted nonbank activities and only permitted those activities incidental to banking or performing services for banks, such as ownership of the bank's premises, auditing and appraisal, and safe deposit services.<sup>55</sup>

In general, the law required that nonconforming nonbank businesses be divested over a period of years, but the [Fed] was given the power to allow retention of activities in the areas of banking, finance, or insurance, if these activities were “. . . so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto. . . .”<sup>56</sup>

During the 1970s, 1980s, and 1990s, the bank regulators and Congress engaged in a general deregulation of banking that, over time, permitted banks, especially large-money-center banks, to engage in most aspects of the securities business. Illustrative of the de-regulatory initiatives of the banking authorities are a series of rulings, many of which were contested by the Securities Industry Association (SIA),<sup>57</sup> a trade association that relaxed the activities restrictions of the banking statutes. In 1974, the OCC interpreted Glass-Steagall to allow banks to offer computer-assisted stock purchasing services to checking account employees. Then, in 1982, the OCC allowed such services to be extended to existing banking and also nonbanking clients. Further, this interpretation applied to the brokerage activities of the bank itself, as well as a bank subsidiary.<sup>58</sup>

The SIA eventually challenged the brokerage activities of national banks in *Clarke v. Securities Industry Association*. The case involved two

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52. J. Nellie Liang & Donald T. Savage, *The Nonbank Activities of Bank Holding Companies*, 76 FED. RES. BULL. 280, 281 (1990).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* (alteration in original).

57. In 2006, the SIA and the Bond Market Association merged to create the Securities Industry and Financial Markets Association. Jeffrey H. Birnbaum, *Merger of Wall Street Groups Creates a Lobbying Powerhouse*, WASH. POST, Nov. 27, 2006, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/26/AR2006112600647.html>.

58. *Cf. Inv. Co. Inst. v. Camp*, 401 U.S. 617, 634–35 (1971) (describing the OCC's “position that the operation of a bank investment fund is consistent with [Glass-Steagall] because participating interests in such a fund are not ‘securities’”).

national banks, Union Planters National Bank of Memphis (Union Planters) and petitioner Security Pacific National Bank of Los Angeles (SPN), that had applied to the OCC for permission to open offices offering discount brokerage<sup>59</sup> services to the public.<sup>60</sup> Both banks wanted to offer discount brokerage services at their branch offices and other locations inside and outside of their home states.<sup>61</sup> Union Planters sought permission to acquire an existing discount brokerage operation, and SPN hoped to establish an affiliate named Discount Brokerage.<sup>62</sup> Upon review of the applications, the Comptroller approved both SPN's and Union Planters' applications.<sup>63</sup>

SPN's application to the OCC raised the issue of whether the operation of a discount brokerage violated the National Bank Act's branching provisions.<sup>64</sup> The Comptroller approved SPN's application, concluding that "the non-chartered offices at which Discount Brokerage will offer its services will not constitute branches under the McFadden Act because none of the statutory functions will be performed there."<sup>65</sup> The SIA brought suit arguing that bank discount brokerage offices were offices within the meaning of § 36(f), and were subject to the geographical restrictions imposed by § 36(c).<sup>66</sup>

The Supreme Court held that respondent had standing to maintain the lawsuit, and that the Comptroller did not exceed his authority in approving SPN's application.<sup>67</sup> First, the Court emphasized the great weight given to the Comptroller's interpretations.<sup>68</sup> Second, the Court rejected the SIA's argument that the Comptroller's interpretation of the National Bank Act

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59. A discount brokerage house executes trades on behalf of customers at a reduced commission but does not offer investment advice. *Discount Broker Definition*, INVESTOPEDIA, <http://www.investopedia.com/terms/d/discountbroker.asp> (last visited Sept. 29, 2011).

60. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 390–91 (1987).

61. *Id.* at 391.

62. *Id.*

63. *Id.* at 392.

64. *Id.* at 391. The McFadden Act limited the "general business" of a national bank to its headquarters and any branches permitted by § 36. *Id.* (citing 12 U.S.C. §§ 36, 81). Section 36(c) provided that a national bank was permitted to branch only its home state and only to the extent that a bank of the same state is permitted to branch under state law. 12 U.S.C. § 36(c). The term "branch" was defined as "any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." *Id.* § 36(j).

65. *Clarke*, 479 U.S. at 391.

66. *Id.* at 392–93.

67. *Id.* at 394.

68. *Id.* at 403.

It is settled that court should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to meaning of these laws.

*Id.* (citing *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626–27 (1971)).

contradicted the plain language of 12 U.S.C. § 81 when it broadly interpreted § 81 as delineating that “national banks may locate their business only at their headquarters or licensed branches within the same state.”<sup>69</sup> The Court reasoned that § 81 did not need to be read to encompass all the businesses in which the bank engages, but could be read to cover only those activities that were part of the bank’s core banking functions.<sup>70</sup> Therefore, the Court found that the Comptroller’s position that “the amendment [to the National Bank Act] simply codified the accepted notion that the ‘usual business’ of a bank was the ‘general banking business.’”<sup>71</sup> Because the Court deferred to the Comptroller’s liberalization of the restrictions on national banks, this decision gave a green light to the further deregulation of banking by the OCC and the Fed.

In a key ruling regarding the sale of securitized mortgages, the OCC determined that the sale of mortgage pass through certificates by SPN was not in violation of Glass-Steagall.<sup>72</sup> The Comptroller concluded that

the Bank’s program, as described in the Prospectus and Prospectus Supplement dated January 23, 1987, is squarely based on long-standing precedent that is fully supported by applicable law and subsequent court decisions interpreting these laws. In pooling its mortgage loans and selling interests therein, the Bank is merely engaging in a permitted sale of its mortgage assets. We cannot conclude that the Glass-Steagall Act is intended to preclude banks from conducting this activity.<sup>73</sup>

The SIA challenged this ruling in *Securities Industry Association v. Clarke*, claiming that the Comptroller’s ruling was “arbitrary, capricious, an abuse of discretion, in excess of his statutory authority and otherwise not in accordance with the law, and that it is, therefore, null and void.”<sup>74</sup> Although the district court granted the SIA’s motion for summary judgment, finding that the Comptroller’s decision violated federal law,<sup>75</sup> the Second Circuit vacated the judgment and remanded the case with instructions to dismiss the complaint.<sup>76</sup> The Second Circuit noted the Supreme Court’s explicit guidance in *Clarke v. Securities Industry Association* that “courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.”<sup>77</sup>

The Second Circuit extensively reviewed the Comptroller’s findings. The Comptroller found that national banks had the authority to sell their

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69. *Id.* at 405–06.

70. *Id.* at 406.

71. *Id.*

72. *Sec. Indus. Ass’n v. Clarke*, 885 F.2d 1034, 1036 (2d. Cir. 1989).

73. *Id.* at 1038.

74. *Id.*

75. *Id.*

76. *Id.* at 1052.

77. *Id.* at 1042.

mortgage loans generally on three grounds: (1) “since the enactment of the National Bank Act of 1864, national banks have had the express power to ‘carry on the business of banking . . . by negotiating promissory notes . . . and other evidences of debt’”; (2) the Supreme Court had held that the sale of mortgages was within the incidental powers of national banks; and (3) under 12 U.S.C. § 371(a), national banks were permitted to “make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate.”<sup>78</sup> Therefore, the Comptroller determined “it is clearly established that national banks may sell their mortgage assets under the express authority of 12 U.S.C. §§ 24 (Seventh) and 371(a).”<sup>79</sup> In addition, the Comptroller determined that SPN’s use of mortgage-backed pass through certificates was either a new way of selling bank assets or an activity incidental to an authorized banking practice.<sup>80</sup> Furthermore, the Comptroller determined that the prohibitions and concerns of Glass-Steagall were not implicated.<sup>81</sup>

Although the Comptroller’s interpretation was arguably broad,<sup>82</sup> the Second Circuit held that the Comptroller had correctly determined that SPN’s sale of the certificates was within the “business of banking.”<sup>83</sup> The Second Circuit found that the Comptroller’s conclusion that SPN’s activity was encompassed by its power to carry on the business of banking, and that the Comptroller’s interpretation of § 16 was supported by *Bankers Trust I*. In *Bankers Trust I*, the Supreme Court distinguished between activities that fell within “the business of banking” and the “business of dealing.” The Court held that activity that falls within the “business of banking” was not prohibited by Glass-Steagall’s § 16.<sup>84</sup> Here, the Second Circuit found that it was reasonable for the Comptroller to determine that SPN’s activities were within the “business of banking,” and therefore, not prohibited by Glass-Steagall.<sup>85</sup> This key ruling on the securitization of mortgages transformed the business of mortgage lending from an originate-to-hold model to an originate-to-distribute model and essentially allowed banks to become underwriters of securities.

The Fed was also active in allowing banks and bank holding companies to expand their business activities in derogation of the geographical and activities limitations of the federal banking laws, and courts have generally

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78. *Id.* at 1044.

79. *Id.*

80. *Id.* at 1044–45.

81. *Id.* at 1045.

82. See Edward J. Markey, *Why Congress Must Amend Glass-Steagall: Recent Trends in Breaching the Wall Separating Commercial and Investment Banking*, 25 NEW ENG. L. REV. 457, 471–72 (1990).

83. *Sec. Indus. Ass’n v. Clarke*, 885 F.2d at 1047–48.

84. *Id.* at 1048 (citing *Sec. Indus. Ass’n v. Bd. of Governors of the Fed. Reserve Sys. (Bankers Trust I)*, 468 U.S. 137, 158 n.11 (1984)).

85. *Id.*

deferred to the Fed's interpretations. Of particular significance to this Article, the Fed exercises certain supervisory and examination functions over state-chartered member banks.<sup>86</sup> These powers include "the administration of federal laws regulating the formation and activities of bank holding companies."<sup>87</sup> In addition, the Fed administers the Bank Merger Act which involves mergers where "the acquiring, assuming, or resulting bank, is a state chartered member bank[,]" and involves the issuance of securities by state-chartered member banks.<sup>88</sup> Like the OCC, the Fed enabled banks to enter the discount brokerage business when BankAmerica Corp. (BankAmerica), a bank holding company predecessor to Bank of America, applied for approval to acquire 100 percent of the voting shares of The Charles Schwab Corp. and its retail brokerage subsidiary, Charles Schwab & Co. (Schwab). The Fed approved BankAmerica's application, thereby raising the issue of whether the Fed had the statutory authority under § 4(c)(8) of the BHCA to authorize a bank holding company to acquire a nonbanking affiliate engaged principally in retail securities brokerage.<sup>89</sup>

The SIA petitioned for review of the Fed's decision. First, the SIA argued that the Fed could "not approve an activity as 'closely related' to banking unless it [found] that the activity facilitated other banking operations."<sup>90</sup> Second, the SIA argued that § 20 of Glass-Steagall prohibited a bank holding company from owning any entity that is engaged principally in retail securities brokerage services.<sup>91</sup> Nevertheless, the Second Circuit held that the Fed acted within its statutory authority and affirmed the Fed's order; upon appeal the Supreme Court affirmed.<sup>92</sup>

To qualify for the § 4(c)(8) exception, the Fed was required to determine (1) whether the proposed activity was "closely related" to banking, and (2) whether allowing BankAmerica to engage in the activity may reasonably be expected to produce public benefits that outweigh any adverse effects.<sup>93</sup> First, the Fed determined that the securities brokerage services offered by Schwab were "closely related" to banking because (1) at the time, banks offered, as an accommodation to their customers, brokerage services that were virtually identical to the services offered by Schwab; (2) bank trust department trading desks performed the same functions as brokers; and (3) banks engaged in the widespread use of sophisticated techniques and resources to execute purchase and sell orders for their customers and were therefore equipped to offer the type of retail brokerage

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86. MICHAEL P. MALLOY, *BANKING LAW AND REGULATION* § 1.03[B] at 1-54 (2d ed. 2011).

87. *Id.* at 1-54 to -55 (citing 12 U.S.C. §§ 1841 et seq.).

88. *Id.* at 1-55 (citing 12 U.S.C. § 1828(c)(2)(B); 15 U.S.C. § 781(i)).

89. *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 468 U.S. 207, 208 (1984).

90. *Id.* at 213.

91. *Id.*

92. *Id.* at 219.

93. *Id.* at 210-11.



services provided by Schwab.<sup>94</sup> For these reasons, the Fed concluded that a securities brokerage business that is “essentially confined to the purchase and sale of securities for the account of third parties, and without the provision of investment advice to the purchaser or seller is ‘closely related’ to banking within the meaning of § 4(c)(8) of the [BHCA].”<sup>95</sup> Second, the Fed determined that the public benefits likely to result from BankAmerica’s acquisition of Schwab outweighed the possible adverse effects.<sup>96</sup> It reasoned that the acquisition would result in increased competition, convenience, and efficiencies in the retail brokerage business,<sup>97</sup> and that these public benefits outweighed any possible adverse effects of undue concentration of resources, decreased competition, or unfair competitive prices.<sup>98</sup> Third, the Fed concluded that BankAmerica’s acquisition of Schwab was not prohibited because Schwab was not “engaged principally in any of the activities prohibited to member bank affiliates by the Glass-Steagall Act.”<sup>99</sup>

The Supreme Court rejected the SIA’s first argument that § 4(c)(8) required that a proposed activity must facilitate other banking operations before it may be found to be “closely related” to banking, reasoning that the statute does not specify any factors that the Fed must consider in making that determination.<sup>100</sup> Since the Fed’s interpretation is entitled to the “greatest deference,” the Court held that the court of appeals properly deferred to the Fed’s determination.<sup>101</sup> The Court also rejected the SIA’s second argument that the term “public sale” of securities in § 20 applied to brokerage businesses, reasoning that statutory interpretation and legislative history supported the Fed’s interpretation that brokerage services were not prohibited by the statute.<sup>102</sup>

Another milestone in dismantling the Glass-Steagall wall was the Fed’s grant of authority to banks to sell and underwrite commercial paper. Although the Fed initially lost its argument that commercial paper was not a “security” under Glass-Steagall,<sup>103</sup> it won the argument that agency sales of commercial paper were not “underwriting.”<sup>104</sup> In *Bankers Trust I*, Bankers Trust Company (Bankers Trust), a state commercial bank that was a member of the Federal Reserve System began serving as agent for several

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94. *Id.* at 211–12.

95. *Id.* at 213.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 214–15.

101. *Id.* at 215–16.

102. *Id.* at 217–21.

103. *Bankers Trust I*, 468 U.S. 137, 139–40 (1984).

104. *Sec. Indus. Ass’n v. Bd. of Governors of the Fed. Reserve Sys. (Bankers Trust II)*, 807 F.2d 1052, 1062 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987).

of its corporate customers and marketing their commercial paper.<sup>105</sup> The SIA petitioned the Fed for a ruling that such activities were unlawful under §§ 16 and 21.<sup>106</sup> The Fed ruled that commercial paper fell outside the proscriptions of Glass-Steagall.<sup>107</sup>

The Fed reasoned that if a particular kind of financial instrument evidenced a transaction that was more functionally similar to a traditional commercial banking operation than to an investment transaction, then the instrument should not be viewed as a “security” for purposes of Glass-Steagall.<sup>108</sup> Applying this “functional analysis” to commercial paper, the Fed concluded that such paper more closely resembled a commercial bank loan than an investment transaction and that it was, therefore, not a “security” for purposes of Glass-Steagall.<sup>109</sup> Having come to this conclusion, the Fed “did not consider whether Bankers Trust’s involvement with commercial paper constituted ‘underwriting’ within the meaning of [Glass-Steagall].”<sup>110</sup>

In response, first, the SIA argued that commercial paper constituted a “note” within the meaning of § 21, and alternatively, that it was encompassed by the inclusive term “other securities.”<sup>111</sup> Second, the SIA argued that the role played by Bankers Trust in placing the commercial paper of third parties was precisely the type of activity prohibited by Glass-Steagall.<sup>112</sup> The Fed reasoned that Congress intended a narrower definition, and that Glass-Steagall was meant to prohibit the underwriting of only those notes that share “that characteristic of an investment that is the common feature of each of the other enumerated instruments.”<sup>113</sup> The Supreme Court rejected the Fed’s reasoning because the legislative history strongly suggested that Congress’ use of “security” encompassed “note.”<sup>114</sup> The Court specifically pointed to the Securities Act of 1933, which defines the term “security” to include “any note.”<sup>115</sup> The Court held that commercial paper was a “security” under Glass-Steagall and, therefore, was subject to its proscriptions.<sup>116</sup> The Court remanded the case to the lower court to determine whether Bankers Trust’s placement of commercial paper constituted the “underwriting” or “business of issuing, underwriting, selling or distributing” that Glass-Steagall prohibited.<sup>117</sup>

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105. *Bankers Trust I*, 468 U.S. at 140.

106. *Id.* at 140.

107. *Id.* at 141.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 149.

112. *Id.*

113. *Id.* at 149–50.

114. *Id.* at 150.

115. *Id.* at 150–51.

116. *Id.* at 160 n.11.

117. *Id.* at 160 n.12.

Upon remand, the Fed found that Bankers Trust's placement of commercial paper constituted a § 16 violation—the “selling” of a security without recourse and solely upon the order and for the account of customers.”<sup>118</sup> Although the district court granted summary judgment for the SIA, holding that Bankers Trust's activities involved “underwriting” and “distributing” that was prohibited by § 21,<sup>119</sup> the Court of Appeals for the District of Columbia reversed the lower court's decision, reinstating the Fed's decision.<sup>120</sup>

The circuit court began its analysis by stating that the Fed's decision was to be given “substantial deference.”<sup>121</sup> First, the court looked at whether the commercial banking activities of Bankers Trust fell within the parameters of § 16.<sup>122</sup> The court found reasonable the Fed's determination that Bankers Trust's activities fell within § 16's requirement that

the business of dealing in securities and stock by the [bank] shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [bank] shall not underwrite any issue of securities of stock.<sup>123</sup>

In response, the SIA, first, argued that the permissive language in § 16 did not apply to the activities of Bankers Trust because the exception only applied to “the business of dealing in securities and stock” and that “dealing is typically understood to encompass the purchasing and selling of stock in the secondary market.”<sup>124</sup> The court rejected this argument because the Securities Act of 1934 defines “dealer” as a person who engages in the dealing of securities without exclusion of the primary offering market.<sup>125</sup> Second, the SIA argued that the Fed erred in concluding that the activities of Bankers Trust were upon the order of customers because (1) it had to be limited to preexisting customers of the bank, and (2) the bank solicited the business of issuers and gave financial advice about the terms and timing of the issue of commercial paper.<sup>126</sup> The court rejected this argument, determining that (1) § 16 did not restrict the placement of securities to preexisting customers,<sup>127</sup> and (2) there was no evidence supporting the claim that Bankers Trust recruits or solicits the business of issuers.<sup>128</sup> Third,

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118. *Bankers Trust II*, 807 F.2d 1052, 1055 (D.C. Cir. 1987), *cert. denied*, 483 U.S. 1005 (1987).

119. *Id.*

120. *Id.*

121. *Id.* at 1056.

122. *Id.* at 1057.

123. *Id.* at 1058.

124. *Id.*

125. *Id.* at 1059.

126. *Id.*

127. *Id.*

128. *Id.* at 1060.

the SIA argued that the activities of Bankers Trust amounted to “underwriting,” and were therefore barred from the § 16 exemption.<sup>129</sup> Nevertheless, the court found reasonable the Fed’s conclusion that “an ‘underwriting’ defeats the section 16 exemption only if it includes a public offering.”<sup>130</sup>

Lastly, the SIA asked the court to analyze the activities approved by the Fed to determine whether they posed the “subtle hazards” that Glass-Steagall sought to eliminate.<sup>131</sup> The court determined that the investment of bank funds in speculative securities was not at issue because Bankers Trust did not purchase the commercial paper of its customers, did not inventory the paper overnight, and did not make loans to provide financing to an issuer where an offering of paper fell short of its goal.<sup>132</sup> Accordingly, the court of appeals reversed the district court’s order.

An even more important event in cracking open the Glass-Steagall wall was the Fed’s approval of so-called § 20 subsidiaries that happened when the Fed approved applications by large bank holding companies to utilize subsidiaries as the vehicle through which to underwrite and deal in certain securities.<sup>133</sup> The Fed approved the applications of Citicorp, J.P. Morgan & Co. Inc., Bankers Trust New York Corp., Chase Manhattan Corp., Chemical New York Corp., Manufacturer’s Hanover Trust Corporation, and Security Pacific Corp., to engage in limited securities activities through wholly-owned subsidiaries.<sup>134</sup> In response, the SIA petitioned for review, arguing that the approved activities violated § 20 of Glass-Steagall.<sup>135</sup>

The Fed’s determination that the approved securities were “closely related” to banking was not contested on appeal.<sup>136</sup> Rather, the main issue was whether the approval of the activities contravened Glass-Steagall.<sup>137</sup> First, the Fed reasoned that Congress did not intend in § 20 to proscribe bank affiliates from engaging in bank eligible activities since § 16 authorized banks to engage in underwriting and dealing in governmental securities.<sup>138</sup> Therefore, the Fed argued that “it would be anomalous not to permit the bank’s subsidiary to engage in the activities lawfully permitted by the bank.”<sup>139</sup> Second, the Fed determined that an affiliate was “engaged

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129. *Id.* at 1062.

130. *Id.*

131. *Id.* at 1066.

132. *Id.* at 1067.

133. *Sec. Indus. Ass’n v. Bd. of Governors of the Fed. Reserve Sys. (Bankers Trust III)*, 839 F.2d 47, 49 (2d. Cir. 1987).

134. *Id.* at 50.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 51. Bank eligible securities are governmental securities; bank ineligible securities are those types of securities that under § 16 banks cannot themselves deal in or underwrite. *Id.*

139. *Id.*

principally” in such activity only when there was “substantial activity.”<sup>140</sup> The Fed concluded that subsidiaries would not be engaged substantially in bank-ineligible activities if, over a two-year period, such activities contributed to no more than 5–10 percent of the total gross revenues of those subsidiaries, and if those activities in connection with any type of bank-ineligible security constituted no more than 5–10 percent of the market for that particular security.<sup>141</sup>

The SIA made two arguments. First, the SIA argued that the Fed erroneously construed Glass-Steagall, reasoning that § 20 limits both bank eligible and bank ineligible securities activities by a member bank affiliate.<sup>142</sup> Second, the SIA contested the Fed’s construction of “engaged principally.”<sup>143</sup> The court acknowledged that it was required to uphold the Fed’s interpretation of Glass-Steagall if it was reasonable but determined that the Fed’s decision was ambiguous.<sup>144</sup> The court nevertheless concluded that § 20 did not proscribe activities by bank affiliates in bank eligible securities. First, the court examined the legislative history and determined that Congress, concerned primarily with bank affiliates’ activities in bank ineligible securities, did not want to limit all securities activities.<sup>145</sup> Second, the court examined prior judicial construction and determined that the Fed’s interpretation of § 20 was not precluded by the “subtle hazards” analysis<sup>146</sup> because Congress did not believe that the risks were significant when banks engaged in activities relating to bank eligible securities as allowed under § 16.<sup>147</sup> Therefore, the court concluded that the Fed’s construction of § 20, that “securities” did not encompass those securities which § 16 allowed banks themselves to underwrite, was reasonable.<sup>148</sup>

In another important interpretation of § 20, the Fed concluded that the combined provision of securities brokerage services and investment advice by a member bank’s affiliate did not contravene § 20’s prohibition of the public sale of securities.<sup>149</sup> The SIA petitioned the court to review the Fed’s decision.<sup>150</sup> Nevertheless, the court held that the Fed’s decision was a

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 52–53.

145. *Id.* at 60–61.

146. *Id.* at 61. The “subtle hazards’ analysis [was] developed in *Camp* and [is] used by the Supreme Court in . . . Glass-Steagall Act cases.” *Id.* “[T]he Court noted the hazards that Congress sought to prevent when [Glass-Steagall] was passed and then examined whether a particular activity would implicate them.” *Id.*

147. *Id.*

148. *Id.* at 62.

149. *Sec. Indus. Ass’n v. Bd. of Governors of the Fed. Reserve Sys.*, 821 F.2d 810, 811 (D.C. Cir. 1987).

150. *Id.* at 810.

reasonable interpretation of the language and denied the petition for review.<sup>151</sup>

In the case, National Westminster Bank PLC and its subsidiary NatWest Holdings, Inc. (collectively, NatWest) sought permission from the Fed to provide institutional customers with investment advice and securities brokerage services through a newly formed subsidiary, County Services Corporation (CSC).<sup>152</sup> CSC would restrict its brokerage services to buying and selling securities solely as agent for the account of its customers, and would hold itself out as a separate and distinct corporate entity from NatWest.<sup>153</sup> The Fed approved NatWest's application reasoning (1) that CSC's proposed activities were "closely related" to banking, (2) that the proposal may be reasonably expected to result in public benefits outweighing any possible adverse effects, and (3) that NatWest's acquisition of CSC would not violate Glass-Steagall because the combination of investment advice and execution services did not constitute a "public sale" of securities.<sup>154</sup>

The SIA argued that CSC's proposed services violated § 20 because (1) CSC was offering investment advice, and (2) the activities implicated the "subtle hazards" that Glass-Steagall was designed to protect against.<sup>155</sup> Upon review, the court noted, once again, that the Fed's decision was entitled to "substantial deference" so long as its interpretation of statute was reasonable.<sup>156</sup> First, the court held that the Fed's construction of a "public sale" was reasonable and that the addition of investment advice to brokerage activities did not implicate any activities which were traditionally associated with underwriting.<sup>157</sup> The court rejected the SIA's argument that CSC's provision of investment advice to its customers transformed the proposed activities into the public sale of securities because it was not a critical attribute of underwriting.<sup>158</sup> Second, the court held that the "subtle hazards" analysis was unnecessary because CSC did not conduct activities that were prohibited by Glass-Steagall—it did not "hold and sell particular investments," or "purchase and sell [securities] on [its] own account."<sup>159</sup>

Similarly, when Chase Manhattan Corporation applied for permission for its affiliate, Chase Commercial Corporation (Chase Commercial) to underwrite and deal in commercial paper, the Fed approved.<sup>160</sup> The Fed

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151. *Id.*

152. *Id.* at 811.

153. *Id.* at 811–12.

154. *Id.* at 812.

155. *Id.* at 815.

156. *Id.* at 813.

157. *Id.* at 814.

158. *Id.*

159. *Id.* at 816.

160. *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 847 F.2d 890, 893 (D.C. Cir. 1988).

reasoned that Chase Commercial's § 20 activity would not be substantial in light of the revenue and market share limitations that it agreed to impose, and that its proposal was consistent with the BHCA.<sup>161</sup> Again, the SIA petitioned for review. In denying the SIA's petition, the D.C. Circuit Court of Appeals stated that its review of the Fed's decision was quite deferential, and thus, the court concluded that the Fed's interpretation of § 20 was reasonable.<sup>162</sup> First, the court held that "the language and structure of [Glass-Steagall] strongly support[ed]" the Fed's interpretation.<sup>163</sup> Second, the court held that "neither the legislative history nor the broad purposes of [Glass-Steagall] compel[led] the conclusion that the order was based on an impermissible construction of the statute."<sup>164</sup>

### C. MERGER AND ACQUISITION APPROVALS

#### 1. Framework for Approvals

Financial regulators not only cooperated with the banks in tearing down the Glass-Steagall wall, but they also approved numerous acquisitions and mergers of financial holding companies, sometimes even in derogation of prohibitions against such combinations.

All bank consolidations required the approval of at least one of the federal banking agencies: the FDIC, the Fed, or the OCC.<sup>165</sup> Under § 3 of the BHCA, the Fed must approve all acquisitions and mergers of bank holding companies.<sup>166</sup> The OCC is the primary banking agency for a national bank; the Fed, for a state bank that is a member of the Federal Reserve System; and the FDIC, for a state bank that is not a member of the Federal Reserve System.<sup>167</sup> If the bank consolidation involves both holding companies and bank levels triggering both acts, then multiple regulatory agencies may be involved.<sup>168</sup>

In deciding whether to approve a merger involving a bank holding company under the BHCA, the Fed is required to consider:

- (1) [T]he financial history and condition of the company or companies and the banks concerned;
- (2) their prospects;
- (3) the character of their management;
- (4) the convenience, needs, and welfare of the communities and the area

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161. *Id.*

162. *Id.* at 894.

163. *Id.*

164. *Id.*

165. 12 U.S.C. § 1828(c) (1964). The OCC reports merger decisions in the *Quarterly Journal*, the FDIC reports in *Merger Decisions*, and the Fed reports in the *Federal Reserve Bulletin*. Rhoades, *supra* note 33, at 2.

166. *See* 12 U.S.C. § 1842(a).

167. Rodgin Cohen, *The New Phase of Bank Consolidation: Regulatory Issues and Considerations*, 27 WAKE FOREST L. REV. 63, 66 n.17 (1992) (citing 12 U.S.C. § 1828(c)(2)(A)-(C) (1988)).

168. *Id.* at 66.

concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.<sup>169</sup>

The Fed must also notify and request the OCC or the appropriate state banking supervisory authority, depending upon whether the bank is a national or state bank, to review the application and provide their opinions and recommendations.<sup>170</sup>

Similarly, in deciding whether to approve an application for a merger under the Bank Merger Act of 1960, the appropriate agency is required to consider:

[T]he financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of . . . [the Federal Deposit Insurance Act] . . . . [T]he appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly) . . . .<sup>171</sup>

In addition, an application may be not be approved unless the agency finds, after reviewing all the factors coupled with the reports from the U.S. Attorney General and two other banking agencies, “the transaction to be in the public interest.”<sup>172</sup>

Generally speaking, the federal regulatory agencies focus on four issues when analyzing bank acquisition applications: (1) capital adequacy; (2) credit quality; (3) competition; and (4) Community Reinvestment Act (CRA) compliance.<sup>173</sup>

## 2. Chemical Bank and the Chase Bank Merger (1996)

Chemical Banking Corp. (Chemical Bank) filed various applications seeking the Fed’s approval for the merger of Chemical Bank with The Chase Manhattan Bank, N.A. (Chase Bank).<sup>174</sup> The Fed allowed an extensive time period for public comment, and held a public meeting to afford interested persons the opportunity to present oral testimony on the proposed applications.<sup>175</sup> In addition, as required by the Bank Merger Act,

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169. J. William Via, Jr., *The Administration of the Bank Merger and Holding Company Acts: Confusion Compounded*, 51 VA. L. REV. 1517, 1519 (1965) (citing 12 U.S.C. § 1842(c) (1964)).

170. *Id.*

171. *Id.* at 1518 (alteration in original) (citing 12 U.S.C. § 1828(c)).

172. *Id.* (citing 12 U.S.C. § 1828(c) (1964)).

173. Cohen, *supra* note 167, at 68 (citing 12 U.S.C. §§ 2901, 2906 (1988)).

174. *Chemical Banking Corporation*, 82 FED. RES. BULL. 239, 239 (1996).

175. *Id.* at 240.



the Fed requested reports on the competitive effects of the merger from the U.S. Attorney General, the FDIC, and the OCC.<sup>176</sup>

Chemical Bank had total consolidated assets of approximately \$178.5 billion and operated banks in New York, Delaware, New Jersey, and Texas.<sup>177</sup> It was the fourth-largest commercial banking organization in the country, representing 2.6 percent of total U.S. banking assets.<sup>178</sup> It also engaged in nonbanking activities nationwide.<sup>179</sup> Chase Bank had total consolidated assets of approximately \$118.8 billion and operated banks in New York, Delaware, New Jersey, and Florida.<sup>180</sup> It was the eighth-largest commercial banking organization of the United States, representing 1.9 percent of total U.S. banking assets.<sup>181</sup> The merger of the two entities created the largest commercial banking organization in the United States at the time.<sup>182</sup>

Under 12 U.S.C. § 1842(c)(2), the Fed cannot approve an application for a bank holding company to acquire another bank holding company if the effect of the acquisition “may be substantially to lessen the competition . . . unless [the Fed] finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.”<sup>183</sup> In accord, the Fed examined (1) competitive considerations; (2) financial, managerial, and future prospects considerations; and (3) convenience and needs considerations.<sup>184</sup>

In order to determine the effect of the merger on competition, first, the Fed determined the area of effective competition by examining both product market and geographic market.<sup>185</sup> The Fed concluded that the cluster of banking products and services represented the appropriate line of commerce for analyzing the effects of this merger application, and that the geographic market for the cluster of services was local in nature.<sup>186</sup> Second, the Fed engaged in the competitive analysis by looking at numerous factors, including “the competitive structure of the relevant markets, their attractiveness to potential entrants, and the number of competitors that would remain.” It found that the consummation of the Chemical-Chase merger would not exceed the threshold standard for the Department of Justice Merger Guidelines in any of the banking markets in which Chemical

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (citing 12 U.S.C. § 1842(c)(2) (1964)).

184. *Id.* at 240–44.

185. *Id.* at 241.

186. *Id.* at 240.

Bank and Chase Bank would compete directly, and that many competitors would remain in these markets.<sup>187</sup> Lastly, the U.S. Attorney General, the OCC, and the FDIC did not find that the consummation of the merger would result in a significant adverse effect on competition in the relevant banking markets.<sup>188</sup>

In addition to competitiveness, the Fed looked at capital adequacy, and at managerial and future prospect considerations. The Fed determined that both Chemical Bank and Chase Bank significantly exceeded the minimum capital levels.<sup>189</sup> The Fed found that Chemical Bank and Chase Bank could achieve cost savings and operational efficiencies as a result of the merger through the consolidation of business, and that both holding companies had competent and experienced management.<sup>190</sup>

As required by the CRA, the Fed also looked at the convenience and needs of the communities to be served.<sup>191</sup> Chemical Bank received an overall CRA performance of “outstanding” from the Fed’s 1995 bank examination.<sup>192</sup> Chase Bank received an overall CRA performance of “satisfactory.”<sup>193</sup> The Fed also examined the CRA reports for the subsidiary banks of Chemical Bank and Chase Bank, and analyzed the merged entity’s future plans to enact certain measures to improve the services it would provide to its communities.<sup>194</sup>

After reviewing all these factors, the Fed approved the proposed merger as effective on January 5, 1996. Although this merger did not involve a bank or a derogation of any geographical or activities statutory restrictions, it did pave the way for the JPMorgan Chase mega-bank.

### **3. Travelers Group and Citicorp Merger (1998)**

Travelers Group (Travelers) was a holding company for securities and insurance companies, and Citicorp was a bank holding company under the BHCA. Travelers sought the Fed’s approval for it to become a bank holding company by merging with Citicorp and acquiring all of its subsidiary banks.<sup>195</sup> Travelers also requested to acquire Citicorp’s nonbanking subsidiaries and investments.<sup>196</sup>

Travelers engaged not only in activities that were permissible for bank holding companies, but also in nonbanking activities that were not

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187. *Id.* at 243.

188. *Id.*

189. *Id.*

190. *Id.* at 243–44.

191. *Id.* at 244–57.

192. *Id.* at 245.

193. *Id.*

194. *Id.* at 245–46.

195. *Travelers Group Inc.*, 84 FED. RES. BULL. 985, 985 (1998).

196. *Id.*

permissible for bank holding companies.<sup>197</sup> Approximately 70 percent of Travelers' total assets and 60 percent of its total revenue were related to activities that were permissible for bank holding companies under the BHCA.<sup>198</sup> Additionally, Travelers engaged in certain domestic and international nonbanking activities that bank holding companies were forbidden from conducting; it proposed to either divest of these activities, or to conform them to BHCA requirements.<sup>199</sup> Further, Travelers controlled several domestic subsidiaries that § 20 of Glass-Steagall prohibited from bank affiliation.<sup>200</sup> Travelers planned to conform them to Glass-Steagall requirements.<sup>201</sup>

At the time of the merger, Citicorp had total consolidated assets of \$331 billion, and was the third-largest commercial banking organization in the United States and the twenty-second-largest commercial banking organization in the world.<sup>202</sup> The consummation of the merger created what was then, the "largest commercial banking organization in the United States and the world."<sup>203</sup>

The Fed determined that Travelers' proposal to become a bank holding company was consistent with the nonbanking limitations in the BHCA because new bank holding companies had two years to conform or divest themselves of impermissible activities.<sup>204</sup> Many commentators urged the Fed to hold off on the approval of Travelers until after legislation was passed repealing Glass-Steagall.<sup>205</sup> Instead, the Fed decided to condition approval of the merger upon Travelers' conformance to the requirements of Glass-Steagall. Notably, Sandy Weill, Citicorp's CEO, rigorously lobbied for the repeal of Glass-Steagall after the Fed approved the merger. Shortly thereafter, Gramm-Leach-Bliley, to which many referred as the "Citigroup Authorization Act," was passed in 1999.<sup>206</sup>

Nonetheless, the Fed still examined (1) competitive considerations; (2) financial, managerial, and future prospects considerations; and (3)

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197. *Id.*

198. *Id.* Such activities included "securities underwriting, dealing, brokerage, and advisory activities; mortgage lending and consumer finance activities; consumer advisory activities; and credit related insurance activities." *Id.*

199. *Id.* ("These activities include[d] underwriting property and casualty, life and commercial insurance and annuities[.]").

200. *Id.* These subsidiaries "engage[d] in securities underwriting and dealing activities, distributing shares of open-end mutual funds, and controlling open-end mutual funds." *Id.*

201. *Id.*

202. *Id.* at 985–86.

203. *Id.* at 986.

204. *Id.* at 987.

205. *Id.* at 986.

206. BARRY RITHOLTZ WITH AARON TASK, BAILOUT NATION: HOW GREED AND EASY MONEY CORRUPTED WALL STREET AND SHOOK THE WORLD ECONOMY 213 (2009); MONICA LANGLEY, TEARING DOWN THE WALLS: HOW SANDY WEILL FOUGHT HIS WAY TO THE TOP OF THE FINANCIAL WORLD . . . AND THEN NEARLY LOST IT ALL 341 (2003).

convenience and needs considerations.<sup>207</sup> The Fed determined that Citicorp and Travelers both exceeded the relevant capital requirements, and that all their subsidiaries were well capitalized.<sup>208</sup> The Fed also looked at the managerial structure of the merged entity, and found that both Citicorp and Travelers had “appropriate risk processes in place,” and that Citigroup was “expected to have a risk management structure sufficient to manage the risk of a diverse organization.”<sup>209</sup> The Fed determined that the consummation of the merger would not result in a significant adverse effect on competition because Travelers did not own a commercial bank.<sup>210</sup> Lastly, the Fed determined that Citicorp, Travelers, and their respective subsidiaries, received “satisfactory” CRA ratings.<sup>211</sup>

#### **4. The Chase Bank and J.P. Morgan & Co. Inc. Merger (2000)**

Chase Manhattan Corporation (Chase) was a bank holding company that filed an application with the Fed requesting to merge with J.P. Morgan & Co. Inc. (J.P. Morgan), and to acquire J.P. Morgan’s subsidiary bank, Morgan Guaranty Trust Company of New York (Morgan), which was located in New York, New York.<sup>212</sup> The Fed allowed an extensive time period for public comment, but declined a request for a public hearing.<sup>213</sup> In addition, as required by the Bank Merger Act, the Fed requested reports on the competitive effects of the merger from the U.S. Attorney General, the FDIC, and the OCC.<sup>214</sup>

Chase was the third-largest commercial banking organization in the United States: with \$396 billion in total consolidated assets, it controlled about 6 percent of the total assets of all FDIC-insured commercial banks.<sup>215</sup> Controlling 23.2 percent of the total New York state deposits, it was also New York’s largest banking organization.<sup>216</sup> Morgan was the fifth-largest commercial banking organization in the United States: with \$226.3 billion in total consolidated assets, it controlled about 4 percent of the total assets of all FDIC-insured commercial banks.<sup>217</sup> Additionally, it controlled 1.9 percent of all New York state deposits, thereby making it the fifteenth-largest New York banking organization.<sup>218</sup> After the merger, Chase

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207. *Travelers Group Inc.*, *supra* note 195, at 989–1003.

208. *Id.* at 989–90.

209. *Id.* at 990.

210. *Id.*

211. *Id.* at 993.

212. *J.P. Morgan & Co. Inc.*, 87 FED. RES. BULL. 77, 77 (2001).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

remained the third-largest commercial banking organization in the nation, but with total consolidated assets of \$662.3 billion.<sup>219</sup>

In order to determine the effect of the merger on competition, first, the Fed determined the area of effective competition by examining both the product market and the geographic market.<sup>220</sup> The Fed concluded that the cluster of banking products and services represented the appropriate line of commerce for analyzing the effects of this merger application, and that the geographic market for the cluster of services was local in nature.<sup>221</sup> The Fed determined that Chase and Morgan competed directly in the Metropolitan New York/New Jersey banking market, the West Palm Beach, Florida banking market, and the Wilmington, Delaware banking market.<sup>222</sup> Second, the Fed reviewed the competitive effects in each of the banking markets by considering

the number of competitors that would remain in the markets, the relative shares of total deposits in depository institutions in the markets . . . controlled by Chase and Morgan, the concentration level of market deposits and the increase in this level as measured by the Herfindahl Hirschman Index under the Department of Justice Merger Guidelines.<sup>223</sup>

The Fed concluded that the merger would not result in a significant adverse effect on competition in any of the markets where Chase and Morgan competed directly, or in any other relevant banking market.<sup>224</sup> Chase was the largest depository institution in the New York market before consummation of the merger, and would remain so after.<sup>225</sup> Also, Chase and Morgan, then the second- and sixth-largest depository institutions in Wilmington, respectively, would merge into an entity that would continue to be the second-largest depository institution in the state of Delaware. In the West Palm Beach banking market, however, Chase was the fortieth-largest depository institution and Morgan, the twenty-ninth. Even though the consummation resulted in Chase becoming the twenty-fifth-largest depository institution in that market, the Fed determined that the market would remain moderately concentrated with numerous other competitors despite the rise in ranking within that market.<sup>226</sup> The Department of Justice determined there was no significant adverse effect on competition in any of the relevant banking markets, and the FDIC and the OCC did not object to the merger.<sup>227</sup>

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219. *Id.*

220. *Id.* at 78.

221. *Id.*

222. *Id.*

223. *Id.* at 78–79.

224. *Id.* at 79.

225. *Id.*

226. *Id.*

227. *Id.*

The Fed also analyzed the capital adequacy and managerial resources of Chase and Morgan.<sup>228</sup> The Fed observed that Chase and Morgan, and their subsidiary depository institutions, were well capitalized and would remain well capitalized after consummation of the merger.<sup>229</sup> The Fed also found that the merger would result in a client base and resources that were more diversified,<sup>230</sup> and that both Chase and Morgan were adequately supervised.<sup>231</sup> Therefore, the Fed concluded that the considerations relating to the financial and managerial resources, and the future prospects, of the organizations and their supervisory factors were consistent with approval.<sup>232</sup>

Again, as required by the CRA, the Fed looked at the convenience and needs of the communities to be served.<sup>233</sup> Both Chase and Morgan received “outstanding” ratings,<sup>234</sup> while Chase and Morgan’s subsidiaries received “outstanding” or “satisfactory” ratings.<sup>235</sup> Based on its findings and analysis, the Fed approved the Chase and Morgan merger on December 11, 2000.

#### **D. FURTHER ANALYSIS OF THE GROWTH OF THE THREE LARGEST BANK HOLDING COMPANIES**

##### **1. Bank of America**

As of June 30, 2011, Bank of America Corporation (Bank of America) was the largest bank holding company in the United States and one of the “big four” banks. Over the course of its history, it grew rapidly by using various holding companies to circumvent prohibitions on branch expansion. In addition, Bank of America acquired a number of large companies, including Continental Illinois National Bank and Trust Company (Continental), NationsBank Corp. (NationsBank), Countrywide Financial (Countrywide), and Merrill Lynch & Co. (Merrill Lynch);<sup>236</sup> each of these acquisitions contributed to it becoming the massive conglomerate that was deemed “too big to fail.” In 2008, the federal government infused Bank of America with a \$45 billion federal bailout through TARP, in addition to guaranteeing \$300 billion in potential losses.<sup>237</sup>

In 1945, Bank of America, National Trust and Savings Association (Bank of America NT&SA), predecessor to BankAmerica Corp. (BankAmerica) and Bank of America, was the largest bank in the United

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228. *Id.* at 79–80.

229. *Id.* at 79.

230. *Id.* at 80.

231. *Id.*

232. *Id.* at 80–81.

233. *Id.* at 81.

234. *Id.*

235. *Id.*

236. RITHOLTZ, *supra* note 206, at 219.

237. *Id.* at 273.

States. During this time period, there were many state and federal restrictions on branch banking.<sup>238</sup> National banks were only allowed to establish branches in states that granted state banks the right to establish branches, and needed to get approval from the OCC.<sup>239</sup> As a result, the holding company became a vehicle for banks to establish branches in states that prohibited branch banking, and for interstate branch banking.<sup>240</sup> In addition, holding companies were used for mergers and consolidations of other banks, and acquisitions of nonbanking companies.<sup>241</sup> Bank of America NT&SA used its holding company, Transamerica, to circumvent the prohibitions on interstate branching and further its expansion goals.<sup>242</sup> After its formation in 1928, Transamerica acquired a controlling interest in forty-six banks in five states, acquired 128 other banks which it converted into branches, acquired and closed seventy-seven additional banks with 123 branches, and acquired 23 percent of the outstanding stock of the Citizens National Trust and Savings Bank of Los Angeles (Citizens), which had thirty-four branches.<sup>243</sup> By 1949, Transamerica was the largest holding company.<sup>244</sup>

The government attempted to reign in Bank of America NT&SA's growth on several occasions, but to no avail. First, the government tried to close the loophole that circumvented prohibitions on interstate branch banking by introducing a series of anti-bank holding laws and regulations,<sup>245</sup> none of which would survive.<sup>246</sup> After Transamerica's

238. *Transamerica—The Bankholding Company Problem*, 1 STAN. L. REV. 658, 661–63 (1949).

239. *Id.* at 661.

240. *Id.* at 662. Regulators attempted to curtail expansion by: the limitation on banks from buying securities for their accounts, making it difficult for one bank to obtain control of another by buying stock; the Clayton Act's prohibition of control by interlocking directorates; the mergers and consolidations requirement of approval by two-thirds of a bank's shareholders; and the prohibition on banks from using a merger to acquire a nonbanking company. *Id.* at 662–63.

241. *Id.*

242. *Id.* at 659–61. "The holding company is not only a mechanically simple method of expansion and consolidation, but it is also an excellent device for the circumvention of restrictions on the growth of banks." *Id.* at 661.

243. *Id.* at 658–59 (citation omitted); STANDARD AND POOR'S, CORP. RECORDS, C-E 916 (1949).

244. *Transamerica—The Bankholding Company Problem*, *supra* note 238, at 658–59.

245. These attempts are illustrated below:

The Board secured the introduction of H.R. 2776 and S. 792 (anti-bank holding company bill) in March 1945, which was withdrawn after extensive opposition developed. Substituted therefor was H.R. 6225 which died in Committee. On March 6, 1947, S. 829 was introduced by Senator Tobey and is still awaiting Congressional action.

Note, *Judicial Invalidation of Federal Reserve Policy Against Bank Holding Company Expansion*, 57 YALE L. J. 297, 299–300 n.14 (1947) (internal citations omitted).

[T]he Secretary was endeavoring to plug up the loophole that had served Giannini in the past when state or federal officials had sought to halt his branch expansion. During two successive Congresses the Treasury sent to Capitol Hill bills outlawing bank

acquisition of Citizens, the Fed tried to reign in Bank of America NT&SA's expansion by instructing Transamerica to refrain from engaging in any future bank-buying negotiations except on the Fed's recommendations.<sup>247</sup> Bank of America NT&SA's founder, A.P. Giannini, however, refused to comply.<sup>248</sup>

The Fed also tried to curb Bank of America NT&SA's growth by conditioning the admission of individual banks into the Federal Reserve System.<sup>249</sup> When the Fed rejected Bank of America NT&SA's application to open a branch at Lakewood Village, Louisiana, Giannini encouraged the formation of a state-chartered institution called Peoples Bank.<sup>250</sup> The bank was admitted to the Federal Reserve System under the provision that Transamerica, Bank of America NT&SA, or any affiliate of either, could not acquire stock in it without the Fed's approval; if this provision was violated, Peoples Bank ran the risk of forfeiting its Fed and FDIC membership.<sup>251</sup> Nevertheless, Transamerica bought stock in Peoples Bank, and Peoples Bank challenged the legality of the provision in court.<sup>252</sup> Ultimately, the Supreme Court held that Peoples Bank had nothing to fear given the Fed's failure to enforce the provision depriving it of its membership.<sup>253</sup>

In 1948, the Fed issued a complaint against Transamerica for violating the Clayton Act, which prohibited a corporation from acquiring the stock of another corporation that substantially lessened competition or created a monopoly.<sup>254</sup> In 1952, after almost two years of hearings, the Fed ordered Transamerica to divest all of its subsidiary banks and dispose of all of its Bank of America NT&SA stock.<sup>255</sup> The Fed's action was overturned by the court of appeals, which held that the Fed failed to prove its monopoly charges against Transamerica.<sup>256</sup>

In addition to Bank of America NT&SA's expansion domestically, it also wanted to open branches internationally.<sup>257</sup> The Fed rejected Bank of

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holding companies. The bills did not pass, and with new branches denied the Bank of America, Giannini told Transamerica to resume buying banks.

MARQUIS JAMES & BESSIE R. JAMES, *BIOGRAPHY OF A BANK: THE STORY OF BANK OF AMERICA N.T. & S.A.* 495 (1954).

246. JAMES & JAMES, *supra* note 245, at 495.

247. *Id.* at 497.

248. *Id.*

249. *Id.* at 498.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 501; PAULINE B. HELLER & MELANIE L. FEIN, *FEDERAL BANK HOLDING COMPANY LAWS* § 17.01[7] (2010).

255. JAMES & JAMES, *supra* note 245, at 501.

256. *Id.*; Karmel, *supra* note 30, at 844 n.142.

257. JAMES & JAMES, *supra* note 245, at 484.



America NT&SA's applications to open branches in Germany, although it approved its application for Thailand due to special circumstances.<sup>258</sup> As a result, Bank of America NT&SA created a wholly-owned subsidiary, Bank of America International.<sup>259</sup> The subsidiary was able to invest in the stock of a foreign bank and establish new branches with the consent of both the Fed and the foreign country.<sup>260</sup> Although Bank of America International only opened one branch in Germany, it illustrates yet another example of the Fed's failure to impose regulations to curtail the banks expansionary efforts.<sup>261</sup>

In 1957, the Fed finally managed to force Transamerica and Bank of America NT&SA to separate. Nevertheless, in 1968, BankAmerica was formed as a holding company for Bank of America NT&SA and its subsidiaries.<sup>262</sup>

In the 1980s, Continental was Chicago's largest bank and one of the top ten banks in the United States.<sup>263</sup> In 1982, Penn Square Bank, N.A. (Penn Square) in Oklahoma failed.<sup>264</sup> Continental had purchased \$1 billion in oil and gas loans from Penn Square and experienced large losses from those purchases.<sup>265</sup> The failure of Penn Square contributed to Continental's vulnerability and deposit run.<sup>266</sup>

Regulators were worried about the impact of Continental's potential failure on at least three other financially vulnerable banks: First Chicago, Manufacturer's Hanover Trust Corporation (Manufacturer's Hanover), and Bank of America NT&SA.<sup>267</sup> In fact, Manufacturer's Hanover's shares precipitously dropped after rumors spread about it experiencing funding difficulties.<sup>268</sup> Because the FDIC was unable to find a merger partner and considered a deposit payoff undesirable, the FDIC purchased \$4.5 billion in bad loans, becoming 80 percent owner of Continental.<sup>269</sup> In 1991, Continental came out of receivership.<sup>270</sup> Ironically, despite being one of the

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258. *Id.* at 484–85.

259. *Id.* at 485.

260. *Id.*

261. *Id.* at 485–86.

262. *Bankamerica Corporation*, in 8 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 46 (Paula Kepos ed., 2006).

263. *Continental Illinois National Bank and Trust Company*, in MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 456 (1998), available at <http://www.fdic.gov/bank/historical/managing/history2-04.pdf>.

264. *Continental Illinois and "Too Big to Fail,"* in HISTORY OF THE EIGHTIES—LESSONS FOR THE FUTURE 241 (1997), available at [http://www.fdic.gov/bank/historical/history/235\\_258.pdf](http://www.fdic.gov/bank/historical/history/235_258.pdf).

265. *Id.* at 241.

266. *Id.* at 241–44.

267. *Id.* at 251.

268. *Id.* (citing WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY 626–27, 632–33 (1987)).

269. RITHOLTZ, *supra* note 206, at 218; MILTON FISK, THE STATE AND JUSTICE: AN ESSAY IN POLITICAL THEORY 199 (1989).

270. RITHOLTZ, *supra* note 206, at 218.

reasons why regulators ended up saving Continental, BankAmerica acquired Continental for \$1.9 billion.<sup>271</sup>

BankAmerica took a major hit in 1998 because it had lent DE Shaw \$1.4 billion prior to the Russian bond default that caused DE Shaw to suffer a significant loss.<sup>272</sup> NationsBank seized this opportunity and acquired BankAmerica for \$64.8 billion; it renamed itself Bank of America.<sup>273</sup> The resulting entity had combined assets of \$570 billion and 4,800 branches across twenty-two states.<sup>274</sup> Despite the size of this newly forged behemoth, federal regulators only forced Bank of America to divest seventeen branches in New Mexico.<sup>275</sup>

In 2007, Bank of America invested “\$2 billion in Countrywide Financial, the nation’s biggest mortgage lender and loan servicer.”<sup>276</sup> On January 11, 2008, Bank of America announced it would buy Countrywide for \$4.1 billion.<sup>277</sup> Shortly thereafter, the housing market collapsed. Nonetheless, Bank of America’s purchase of Countrywide made it the controlling mortgage loan originator and servicer in the United States.<sup>278</sup>

On September 14, 2008, Bank of America bought Merrill Lynch, including its portfolio of toxic assets, for \$50 billion.<sup>279</sup> During negotiations, Bank of America CEO Ken Lewis expressed uncertainty about proceeding with the merger and argued that the “‘material adverse effect’ clause in the merger document could be triggered by Merrill Lynch’s deteriorating situation.”<sup>280</sup> Lewis claimed the Fed Chairman Ben S. Bernanke and Treasury Secretary Henry Paulson strong-armed him into completing the deal by threatening to remove top executives.<sup>281</sup> Shareholders approved the deal, but in January 2009, it was revealed that

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271. *Id.*; *Bank of America/Continental: Friends for Life*, THE ECONOMIST, Feb. 5, 1994, at 77 (“Bank of America’s decision to pay \$1.9 billion for Chicago’s Continental Bank is of the happier variety.”).

272. *See In re BankAmerica Corp. Sec. Litig.*, 78 F. Supp. 2d 976, 983–84 (E.D. Mo. 1999).

273. Eric R. Quinones, 2 *Banking Goliaths Created*, CINCINNATI POST, Apr. 13, 1998, at 1A (discussing that although the deal was technically an acquisition, it provided the structure of a merger).

274. WALTER JUREK, MERGER AND ACQUISITION SOURCEBOOK 3–188 (1999).

275. 71 BUREAU OF NAT’L AFFAIRS, BNA’S BANKING REPORT 283 (1998).

276. RITHOLTZ, *supra* note 206, at 219.

277. *Id.*

278. *Bank of America Corp. Ratings Unaffected by Acquisition of Countrywide*, 28 STANDARD AND POOR’S CREDITWEEK 6 (2008).

279. RITHOLTZ, *supra* note 206, at 219.

280. *See* Hugo Duncan, *Washington ‘Bullied’ Bank of America into Saving Merrill Lynch from Collapse*, EVENING STANDARD, Feb. 5, 2009, at 32.

281. ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS AND THEMSELVES 535 (2010) (“Ken Lewis threatened to withdraw from the deal, but Paulson and Bernanke pressed him to complete it or risk losing his job.”).

Merrill Lynch suffered massive losses in the fourth quarter.<sup>282</sup> Consequently, the government gave Bank of America an additional \$20 billion in Treasury support and \$118 billion of government guarantees.<sup>283</sup>

As Barry Ritholtz explains in his book *BAILOUT NATION*, Bank of America could spin out into five major pieces: Bank of America, Merrill Lynch, Countrywide, a toxic holding company, and the rest of its holdings.<sup>284</sup> This is a result of Bank of America's aggressive expansion both domestically and internationally via branch banking, and its acquisition of large, complex companies. Countrywide was the nation's largest mortgage loan originator and lender; with its acquisition, Bank of America obtained control of 20–25 percent of the home loan market in the United States, making it the largest mortgage originator in the country.<sup>285</sup> Merrill Lynch was one of the leading investment banks, and its acquisition made Bank of America the largest financial services company in the world.<sup>286</sup> In addition, Bank of America also acquired MBNA, the world's largest issuer of credit cards, and China Construction Bank, China's second-largest bank. The final product is a mammoth holding company in the United States comprised of a mishmash of companies: one that was too big to fail . . . and still is.

## 2. JPMorgan Chase

JPMorgan Chase is one of the “big four” banks, and one of the largest holding companies in the United States.<sup>287</sup> The merger of J.P. Morgan & Co. Inc. (J.P. Morgan) and Chase Manhattan Corporation (Chase) resulted in the culmination of “four of the largest and oldest money center banking institutions in New York City”: J.P. Morgan, Chase, Chemical Bank Corp., (Chemical Bank) and Manufacturer's Hanover Trust Corporation (Manufacturer's Hanover).<sup>288</sup> Above all, however, JPMorgan Chase is comprised of more than 1,000 predecessor institutions, including Chemical Bank.<sup>289</sup>

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282. Heidi N. Moore, *Bank of America Merrill Lynch: A \$50 Billion Deal from Hell*, WALL ST. J. BLOGS (Jan. 22, 2009, 2:16 PM), <http://blogs.wsj.com/deals/2009/01/22/bank-of-america-merrill-lynch-a-50-billion-deal-from-hell/>.

283. Joint Press Release, Bd. of Governors of the Fed. Reserve Sys., Fed. Deposit Ins. Corp., & U.S. Dep't of Treasury, Treasury, Federal Reserve, and the FDIC Provide Assistance to Bank of America (Jan. 16, 2009), *available at* <http://www.federalreserve.gov/newsevents/press/bcreg/20090116a.htm>.

284. RITHOLTZ, *supra* note 206, at 274–75.

285. Associated Press, *BofA Completes Deal for Countrywide Financial*, USA TODAY, July 1, 2008, *available at* [http://www.usatoday.com/money/economy/2008-07-01-364004665\\_x.htm](http://www.usatoday.com/money/economy/2008-07-01-364004665_x.htm).

286. TREVOR SYKES, SIX MONTHS OF PANIC: HOW THE GLOBAL FINANCIAL CRISIS HIT AUSTRALIA 77 (2010).

287. Shawn Tully, *Will the Banks Survive?*, FORTUNE, Mar. 16, 2009, at 62, *available at* [http://money.cnn.com/2009/02/27/news/economy/tully\\_banks.fortune/index.htm](http://money.cnn.com/2009/02/27/news/economy/tully_banks.fortune/index.htm).

288. *History of Our Firm*, JPMORGAN CHASE & CO., <http://www.jpmorganchase.com/corporate/About-JPMC/jpmorgan-history.htm> (last visited Sept. 25, 2011).

289. *Id.*

Over the course of its history, Chemical Bank circumvented state and federal regulatory efforts to expand into a massive multibillion-dollar bank holding company. For example, in the early 1820s, the New York State Assembly needed to approve the charter of banks in New York. During that time, the legislature was hostile toward banks, and it was difficult to obtain a state charter. It was, however, much easier to get a bank charter approved if it was part of another business. Therefore, the founders of the bank incorporated the New York Chemical Manufacturing Company to produce a variety of chemicals, and petitioned the legislature to amend its charter to permit the company to conduct banking activities. In 1844, the chemical company was liquidated when the New York Chemical Manufacturing Company's original charter expired, and the company was reincorporated as a bank under the more liberal banking laws passed in 1838.<sup>290</sup>

Another example is when the Chemical Bank facilitated its expansion into other financial areas by forming a bank holding company, Chemical New York corporation.<sup>291</sup>

In 1982, Chemical Bank announced that it would merge with Florida National Banks of Florida, Inc. once interstate banking between New York and Florida was permitted.<sup>292</sup>

In 1986, Chemical Bank announced a merger with Horizon Bancorp, a bank holding company in New Jersey. The actual merger was effected in 1989, when interstate banking between New York and New Jersey was permitted. Horizon was renamed Chemical Bank New Jersey.<sup>293</sup>

In 1987, Chemical Bank acquired Texas Commerce Bankshares, one of the largest bank holding companies in the Southwest. Texas Commerce was the best capitalized, and had the largest affiliate system, amongst the major Texan banks. This interstate merger, the largest in U.S. history, allowed Chemical Bank to expand into another major banking market.<sup>294</sup>

In 1991, Chemical Bank surpassed its Texas merger by consummating, what was at the time, the largest bank merger in U.S. history. Its merger with Manufacturer's Hanover,<sup>295</sup> which brought the sixth- and ninth-largest U.S. banks together, was called the "first major bank merger among equals," and created the nation's second-largest bank.<sup>296</sup>

Finally, in 1995, Chemical Bank and the Chase announced what would be the largest bank merger in U.S. history. Through a \$10 billion stock

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290. *Chemical Banking Corporation*, in 14 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 101 (Tina Grant ed., 1996).

291. *Id.* at 102.

292. *Id.* at 103.

293. *Id.*

294. *Id.*

295. In 1961, Manufacturer's Hanover was created through the merger of Manufacturers Trust Company and Central Hanover Bank & Trust Company. *J.P. Morgan Chase & Co.*, in 38 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 257 (Jay P. Pederson ed., 2001).

296. *Chemical Banking Corporation*, *supra* note 290, at 103.

swap merger, the top U.S. bank with \$297 billion in assets and \$20 billion in investable equity, the fourth-largest amount globally, would be formed. This institution took the Chase Manhattan name.<sup>297</sup> The Fed's deliberations in approving the Chase-Chemical merger are discussed above.<sup>298</sup>

Chase Manhattan Corporation was largely comprised of two banks: the Bank of Manhattan Company and Chase National Bank. Chase Manhattan's earliest predecessor, the Manhattan Company, was formed in 1799. Aaron Burr, although outwardly organizing the company to supply New York with clean water to fight the yellow fever, tacitly sought to establish a bank.<sup>299</sup> To do so, he surreptitiously inserted a clause into the company charter, authorizing it to use any leftover capital to engage in other business.<sup>300</sup> As a result, the company was able to create the Bank of Manhattan Company. By the time the Bank of Manhattan merged with Chase, it was operating sixty-seven New York City branches and was "widely regarded as one of the most successful and prestigious regional banks in America."<sup>301</sup>

Chase National Bank became one of the biggest of its time through its offering of trust services, and through a series of major mergers of banks in New York City. Since Chase National Bank was weak on branch banking, it merged with Bank of Manhattan Company to capitalize on the latter's extensive branch network throughout New York City.<sup>302</sup>

When Glass-Steagall was enacted in 1933, J.P. Morgan & Co., electing to pursue commercial banking, "spun off its investment banking business as Morgan Stanley & Co. Incorporated."<sup>303</sup>

In 1940, J.P. Morgan & Co. incorporated in New York, and became J.P. Morgan & Co., Inc. In 1959, it merged with Guaranty Trust Company to form Morgan Guaranty Trust Company of New York (Morgan). In 1969, Morgan became the principle subsidiary of a newly formed bank holding company that was also named J.P. Morgan & Co., Inc. (J.P. Morgan).<sup>304</sup>

J.P. Morgan navigated the investment banking sector outside the United States, where Glass-Steagall could have no effect, during the late 1960s and 1970s. By the late 1980s, however, U.S. restrictions began to loosen.<sup>305</sup>

JPMorgan Chase & Co. was formed in 2000, when Chase Manhattan acquired J.P. Morgan in a deal valued at about \$32 billion.<sup>306</sup> JP Morgan Chase would later acquire Bear Stearns & Co. Inc. At the start of 2007, Bear Stearns & Co. Inc. was the fifth-largest investment bank in the United

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297. *Id.*

298. See discussion *supra* Part II.C.2.

299. *J.P. Morgan Chase & Co.*, *supra* note 295, at 253.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 258.

304. *Id.*

305. *Id.*

306. *Id.*

States; by the end of 2007, however, its market capitalization plummeted, prompting the Fed to step in to prevent a wider systemic crisis by offering JP Morgan Chase a deal. In 2008, JPMorgan Chase acquired Bear Stearns for a \$236 million stock swap,<sup>307</sup> thereby entrenching itself globally across a broad range of businesses, which included prime brokerage, cash clearing, and energy trading.<sup>308</sup>

Also in 2008, JPMorgan Chase acquired the deposits, assets, and certain liabilities of Washington Mutual's (Wamu) banking operations from FDIC receivership, thereby allowing Chase's consumer branch network to expand into California, Florida, and Washington State. This acquisition created the nation's second-largest branch network.<sup>309</sup>

### 3. Citigroup

Citigroup is one of the "big four" banks, and the third-largest holding company in the United States. The company is comprised of several firms that eventually amalgamated into Citicorp,<sup>310</sup> which subsequently merged with Travelers in 1998.<sup>311</sup> The resulting mammoth new entity was renamed Citigroup.<sup>312</sup> As a result of this multibillion megamerger, Citigroup became one of the largest, most complex, and unwieldy holding companies in the nation.<sup>313</sup> This part of the Article focuses on Sandy Weill, the former CEO of Citigroup, and his creation of a "financial supermarket" using the "growth-by-acquisition" strategy.<sup>314</sup> Weill's acquisition rampage led to both Citigroup's massive growth and its precipitous downfall.<sup>315</sup> After the financial crisis of 2008, Citigroup needed a \$45 billion cash infusion from the federal government.<sup>316</sup> Notwithstanding this massive bailout, Citigroup

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307. THE ECONOMIST, THE WORLD OF BUSINESS: FROM VALUABLE BRANDS AND GAMES DIRECTORS PLAY TO BAIL-OUTS AND BAD BOYS 12 (2009).

308. *History of Our Firm*, *supra* note 288.

309. *Id.*

310. Citicorp was a multinational banking corporation operating in more than 100 countries.

311. Travelers covers a variety of businesses including credit services, consumer finance, brokerage, and insurance.

312. Andrew Martin & Gretchen Morgenson, *Can Citigroup Carry Its Own Weight?*, N.Y. TIMES, Nov. 1, 2009, at BU1, available at <http://www.nytimes.com/2009/11/01/business/economy/01citi.html>.

313. RITHOLTZ, *supra* note 206, at 212 (describing the merger as "the moment when [Citigroup] went from being a very large bank to becoming an unmanageable Goliath").

314. *Id.* In fact, Weill is commonly known as "the architect of the firm's 'financial supermarket' strategy." *Id.*

315. *Id.*; Madlen Read & Sara Lepro, *Citigroup Breaks Up, "Financial Supermarket" Model Dead*, HUFFINGTON POST (Jan. 14, 2009, 10:41 AM), [http://www.huffingtonpost.com/2009/01/14/citigroup-breaks-up-finan\\_n\\_157766.html](http://www.huffingtonpost.com/2009/01/14/citigroup-breaks-up-finan_n_157766.html) ("Citigroup was the quintessential financial supermarket, cobbled together over decades by Sandy Weill—the former CEO who is both lauded for bringing Citigroup its biggest profits ever and criticized for creating an unsustainably massive, impossible-to-manage conglomerate.").

316. Martin & Morgenson, *supra* note 312.

was forced to spin off many of its businesses,<sup>317</sup> and essentially revert back to its pre-Glass-Steagall days.<sup>318</sup> Nevertheless, the repeated failure of regulators to reign in the banks contributed to Citigroup becoming a gargantuan holding company that was deemed too big to fail.

The story of Sandy Weill's growth-by-acquisition strategy begins with Cogan, Berlind, Weill & Levitt (CBWL), an investment banking and brokerage firm in the 1960s.<sup>319</sup> In the 1970s, the long bull market came to an end and many firms were failing due to poor management and back-office breakdowns.<sup>320</sup> Under Weill's direction, CBWL acquired a number of failing firms at discounted prices, thereby allowing it to grow both in size and prestige.<sup>321</sup> In 1970, CBWL acquired portions of McDonnell & Co., a sixty-five-year-old elite securities firm with twenty-six branch offices nationwide.<sup>322</sup> The McDonnell acquisition expanded CBWL's retail brokerage business outside of New York City.<sup>323</sup> In the same year, CBWL also acquired Hayden Stone, a nationwide brokerage house with sixty-two branches.<sup>324</sup> Subsequently, CBWL changed its name to CBWL-Hayden Stone to capitalize on the former firm's prestige.<sup>325</sup> In 1973, CBWL-Hayden Stone acquired H. Hentz & Co., a prestigious retail brokerage firm with a number of branch offices nationwide.<sup>326</sup> In all three of these acquisitions, the New York Stock Exchange (NYSE) played a critical role in facilitating these fire sales to CBWL.<sup>327</sup> Furthermore, in the acquisition

317. *Id.* (describing Citigroup "shedding segments of the company – like insurance and the brokerage business – that aren't part of [the global business focus]"). "In trying to right itself, Citigroup plans to undo much of what it did during a period some insiders call the lost decade – with events that included merging with Travelers Group in 1998 and a huge, dizzying expansion of its asset base." *Id.*

318. Due to failing structured investment vehicles, the company split into two segments, Citicorp, consisting of the profitable assets, and Citi Holdings, comprised of toxic assets. *See* Associated Press, *Citigroup Unit Being Revamped for Sale*, N.Y. TIMES, June 2, 2010, at B2.

"Citi is basically going back to close to what it was 30 years ago when I first started in banking," says Ezra Zask, a director at the consulting firm LECG, who was a global trading manager at Mellon Bank in the late-1980s as Citi was expanding its banking operations. "It's like a 30-year experiment that didn't quite work."

Lauren Tara LaCapra, *Citi's Breakup Leaves Street Skeptical*, THE STREET (Jan. 16, 2009, 5:18 PM), <http://www.thestreet.com/story/10458265/1/citis-breakup-leaves-street-skeptical.html>.

319. DUFF McDONALD, *LAST MAN STANDING: THE ASCENT OF JAMIE DIMON AND JPMORGAN CHASE 17* (2009). Its predecessor was Carter, Berlind, Potoma & Weill, but Potoma was disciplined by the NYSE and ousted, and Carter subsequently left. LaCapra, *supra* note 318.

320. *See, e.g.*, LANGLEY, *supra* note 206, at 37.

321. MCDONALD, *supra* note 319, at 17–18.

322. LANGLEY, *supra* note 206, at 37–38.

323. *Id.* at 38. Wall Street jokingly called the firm "Corned Beef With Lettuce." MCDONALD, *supra* note 319, at 17–18.

324. LANGLEY, *supra* note 206, at 39–40; MCDONALD, *supra* note 319, at 18.

325. LANGLEY, *supra* note 206, at 40–41.

326. *Id.*

327. *Id.* at 38–45 (describing the NYSE's role in finding an acquirer to buy these failing firms).

of Hayden Stone, the NYSE even agreed to provide CBWL with a \$7.6 million cash infusion and to assume all of Hayden Stone's liabilities.<sup>328</sup>

Following this growth-by-acquisition trend, CBWL went on to acquire Shearson Hammill & Co. in 1974;<sup>329</sup> Lamson Brothers in 1976; Faulkner, Dawkins & Sullivan in 1977; and Loeb Rhoades, Hornblower & Company in 1979.<sup>330</sup> The resulting entity was named Shearson Loeb Rhoades.

In 1981, Prudential Insurance Corporation of America acquired Bache Halsey Stuart Shields, creating a financial powerhouse.<sup>331</sup> Instead of firms consolidating horizontally by buying out their competitors to expand their operations, the Prudential-Bache acquisition created a financial conglomerate comprised of an insurance company and a securities firm.<sup>332</sup> In order to compete, Shearson Loeb Rhoades allowed American Express to buy it for \$1 billion.<sup>333</sup> The company renamed itself Shearson/American Express.<sup>334</sup> In 1985, Weill resigned from American Express.<sup>335</sup>

Not to be deterred by his struggles at American Express, Weill became the CEO of Commercial Credit, a subsidiary of Control Data Corporation in 1986.<sup>336</sup> Again, Weill employed the growth-by-acquisition tactic and started building Commercial Credit into a behemoth.<sup>337</sup> Commercial Credit acquired Primerica Corporation, the receivables and insurance branches of Landmark Financial Services, and the consumer-lending operations of Barclays American/Financial.<sup>338</sup> The firm continued under the name Primerica.<sup>339</sup> Weill ultimately used Primerica as the vehicle to acquire Travelers, which eventually merged with Citicorp to form Citigroup.<sup>340</sup>

In April 1998, Travelers merged with Citicorp, the parent company of Citibank, to create Citigroup. At the time, Citicorp was the world's largest supplier of credit cards, and Citibank was the second-largest bank in the United States. The result was a "financial supermarket"—a one-stop shop for insurance, investment banking, banking, brokerage, and other financial services.<sup>341</sup> Ritholtz marked this as "the moment when Citi went from being a very large bank to becoming an unmanageable Goliath."<sup>342</sup>

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328. *Id.* at 40.

329. The firm changed its name to Shearson Hayden Stone. *Id.* at 48.

330. *Id.* at 51. In 1979, the firm changed its name to Shearson Loeb Rhoades. *Id.* at 58–59.

331. *Id.* at 61.

332. *Id.*

333. Ken Auletta, *A Superpower Called American Express*, N.Y. TIMES MAG., Feb. 24, 1985, at 38.

334. *Id.*

335. LANGLEY, *supra* note 206, at 88.

336. *Biography of Sanford I. Weill*, ACADEMY OF ACHIEVEMENT, <http://www.achievement.org/autodoc/page/wei0bio-1> (last updated May 4, 2010, 2:02 PM).

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. David Weidner, *R.I.P. the Financial Supermarket: Commentary*, MARKETWATCH (Jan. 13, 2009, 4:55 PM), <http://www.marketwatch.com/story/citigroups-financial-supermarket-reach>



The merger of Travelers and Citicorp directly challenged Glass-Steagall, and under the terms of the Act, Citigroup had two years to divest any prohibited assets.<sup>343</sup> Opponents of Glass-Steagall included Robert E. Rubin, former Treasury Secretary who would eventually become a Citigroup board member, and Citigroup's CEOs Reed and Weill.<sup>344</sup> Rubin testified in Congress that the Act should be repealed; similarly, Weill and Reed aggressively lobbied to overturn Glass-Steagall.<sup>345</sup> In 1999, Congress passed Gramm-Leach-Bliley, which repealed Glass-Steagall. Significantly, many referred to the Act as the "Citigroup Authorization Act."<sup>346</sup>

After the financial crisis of 2008, the federal government infused the struggling bank with a \$45 billion bailout, and the FDIC guaranteed 90 percent of its losses on its \$335 billion portfolio. In 2009, Citigroup announced that it would split itself into two companies: Citicorp and Citi Holdings, Inc. Citicorp would continue with the traditional banking businesses, including retail banking worldwide, investment banking, and transaction services for institutional clients. Citi Holdings, Inc. would own the toxic assets including asset management and consumer lending, such as residential and commercial real estate loans, auto loans, and student loans. This marked the end of the Citigroup's "financial supermarket"<sup>347</sup> as the firm shrunk back to one third of its original size. The final result is that the federal government came to own an astounding 36 percent interest in Citigroup.

Ritholtz writes, "In just about every imaginable way, Citigroup's wounds were self-inflicted. From the gargantuan company that was assembled, to the push for repeal of key regulations, to the way it ran daily operations—Citi was a classic case of 'Be careful what you wish for.'"<sup>348</sup> Citigroup grew rapidly due to Weill's growth-by-acquisition strategy—buying firms cheap and swallowing up their businesses. In addition, the NYSE facilitated and encouraged many of these acquisitions, and the legislature repealed the one Act that could have prevented the colossal bank failures in 2008. The culmination of all of these events led to the creation of a "financial supermarket" that was too big to tame.

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es-its-expiration-date; LaCapra, *supra* note 318 (describing the "financial supermarket" model as "a giant, one-stop shopping center for financial services . . . created through a series of mergers.").

342. RITHOLTZ, *supra* note 206, at 212.

343. LANGLEY, *supra* note 206, at 340.

344. *See* RITHOLTZ, *supra* note 206, at 212–14.

345. *See id.* at 213.

346. *Id.*; LANGLEY, *supra* note 206, at 341.

347. Read & Lepro, *supra* note 315.

348. RITHOLTZ, *supra* note 206, at 216.

### III. MECHANISMS FOR DEALING WITH SIZE AND COMPLEXITY

The Dodd-Frank structural mechanisms for dealing with the size and complexity of the mega-banks are very limited. Dodd-Frank requires the Fed to consider, in the case of a bank acquisition by a bank holding company, whether the acquisition “would result in greater or more concentrated risks to the stability of the U.S. banking or financial system.”<sup>349</sup> In the case of a nonbank acquisition, the Fed is required to consider whether the acquisition poses any risks to the stability of the U.S. banking or financial system.<sup>350</sup> There is a comparable provision for other financial regulators that may approve a bank acquisition.<sup>351</sup> Additionally, although prior approval is not generally needed when a financial holding company acquires a company that engages in an activity that is financial in nature, Fed prior approval will now be needed if the acquisition exceeds \$10 billion in assets.<sup>352</sup>

If the Fed finds that a systemically important company poses a grave threat to financial stability, with the approval of two-thirds of the members of the Financial Stability Oversight Council (FSOC), the Fed must take action to mitigate the risk.<sup>353</sup> Such action could include “limit[ing] the ability of the company to merge with . . . or otherwise become affiliated with another company”; restricting offers of a financial product; ordering termination of, or imposing restrictions on, activities; or “requir[ing] the company to sell or otherwise transfer assets or off-balance sheet items to unaffiliated entities.”<sup>354</sup> The only other significant structural reform is the Volcker Rule, which prohibits any “banking entity”<sup>355</sup> from “engag[ing] in proprietary trading; or from acquir[ing] or retain[ing] any equity, partnership, or other ownership interest in or sponsor[ing] a hedge fund or a private equity fund.”<sup>356</sup>

More drastic curtailment of concentration and growth limits has been left either to studies or to future Fed rulemaking. Six months after the passage of Dodd-Frank, the FSOC was required to complete a study on the prohibition on acquisitions by firms where the total assets of the resulting

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349. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 604(d), 124 Stat. 1376, 1601 (2010) (codified at 12 U.S.C. § 5301 et seq. (2010)) (amending Bank Holding Company Act of 1956, 12 U.S.C. § 1842(c)(7)).

350. *Id.* § 604(e)(1).

351. *Id.* § 354.

352. *Id.* § 604(e)(2).

353. *See id.* § 716(l).

354. *Id.* § 121.

355. “Banking entity” is defined as “any insured depository institution,” or “any company that controls” such an institution, or any company “that is treated as a bank holding company” under the International Banking Act. *Id.* § 619(h)(1).

356. *Id.* § 619 (stating that the “Volcker Rule” is implemented by § 619 of Dodd-Frank).

company would exceed 10 percent of aggregate U.S. liabilities.<sup>357</sup> The FSOC released this study on January 17, 2011.<sup>358</sup> Pursuant to the requirements of Dodd-Frank, the FSOC made recommendations to the Fed on what rules should be passed in order to best implement the concentration limit.<sup>359</sup> The FSOC made three recommendations. The first two were largely procedural, and involved a new definition of “liabilities” so that all financial companies would be on equal footing with regard to the concentration limit,<sup>360</sup> and a change in the way the aggregate liabilities of financial companies is calculated so that short-term unexpected events do not introduce unintended volatility into the market.<sup>361</sup> The third recommendation covered the exception to the concentration limit for acquisitions of banks in default or in danger of default. The application of the exception is subject to the Fed’s approval. The FSOC recommends that the exception should be broadened from “banks” to “failing insured depository institutions.”<sup>362</sup> The issue with this exception, in both its original form and the form the FSOC recommends, is that it could make the concentration limit superfluous. As covered in the earlier sections of this Article, many of the acquisitions made by the too-big-to-fail behemoths were of struggling banks and other financial institutions. Furthermore, requiring the Fed to consent to the deal is not adequate protection as many of these acquisitions were either approved, or, in some instances, suggested, by the Fed. This is akin to leaving the fox guarding the henhouse.

Within nine months of the FSOC study, the Fed must issue rules, taking into account the FSOC’s recommendations, limiting merger and acquisition transactions that would result in a company holding greater than 10 percent of the aggregate consolidated liabilities of all financial companies.<sup>363</sup> Within eighteen months after the enactment of Dodd-Frank, the Fed must issue concentration limits for large interconnected bank holding companies with more than \$50 billion in assets and for systemically important nonbank financial companies. Among other things, these rules must prohibit such companies “from having credit exposure to any unaffiliated company that exceeds 25 percent of the capital stock and surplus” of the company.<sup>364</sup>

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357. *Id.* § 622(e)(1).

358. FIN. STABILITY OVERSIGHT COUNCIL, STUDY AND RECOMMENDATIONS REGARDING CONCENTRATION LIMITS ON LARGE FINANCIAL COMPANIES (Jan. 17, 2011), *available at* [http://www.treasury.gov/initiatives/Documents/Study on Concentration Limits on Large Firms 01-17-11.pdf](http://www.treasury.gov/initiatives/Documents/Study%20on%20Concentration%20Limits%20on%20Large%20Firms%2001-17-11.pdf).

359. *Id.* at 3.

360. *Id.* at 16–20.

361. *Id.* at 20–21.

362. *Id.* at 21–22.

363. Dodd-Frank Act, Pub. L. No. 111-203, § 622(e)(2), 124 Stat. 1376, 1633–34 (2010) (codified at 12 U.S.C. § 1852(e)(2) (2010)).

364. *Id.* § 165(e)(2).

Others have proposed more drastic limitations on size in order to address the disproportionate wealth and power that is concentrated in a handful of large banks in the financial sector. Simon Johnson and James Kwak have asserted that, without taking action that is focused on the size of these institutions, there is no reason to believe the same situation the world faced in 2008 will not occur again at the end of the next boom and bust cycle.<sup>365</sup> Although the Obama administration had used lofty language, its proposals, and what resulted from them, did little to get at the main problem: “the enormous growth of top-tier financial institutions and the corresponding increase in economic and political power.”<sup>366</sup> After the government rescue in 2008–2009, Wall Street banks effectively emerged with “less competition, a strengthened governmental guarantee, and no new restrictions on the pursuit of profits.”<sup>367</sup> The idea that certain banks were “too big to fail” has resulted in a small number of the powerful banks being able to adopt riskier policies than their competitors because they, and their creditors and counterparties, know that the government will not allow them to fail.<sup>368</sup>

Johnson and Kwak believe the goal should be a financial system where banks can fail without adversely affecting the entire economy.<sup>369</sup> They dismiss the technocratic approaches of the Obama administration, and Dodd-Frank, and instead, drawing support from many, including Alan Greenspan, propose a solution: financial institutions should not be allowed to grow so big that they cannot fail, and those that already are that big should be broken up.<sup>370</sup> The argument continues that if there were no banks that were too big to fail, there would be no implicit guarantee that the government would support some banks and not others. Without such a guarantee, creditors and counterparties would be more likely to ensure that banks do not take on too much risk, and consequently, banks would not be likely to take on excessive risks that could lead to the next financial crisis.<sup>371</sup>

Johnson and Kwak propose a solution that incorporates the existing financial regulations of minimum capital requirements and oversight, with a cap on size, whereby “no financial institution would be allowed to control or have ownership interests in assets worth more than a certain percentage of U.S. GDP. . . . [This number] should be low enough that banks below that threshold [can fail] without [imposing] serious risk[s] to the financial system.”<sup>372</sup> The suggestion is no more than 2 percent for investment banks,

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365. SIMON JOHNSON & JAMES KWAK, 13 BANKERS 190 (2010).

366. *Id.* at 191.

367. *Id.* at 191–92.

368. *Id.* at 193.

369. *Id.* at 194.

370. *Id.* at 208.

371. *Id.* at 211.

372. *Id.* at 214.

and no more than 4 percent for all other banks. Since 1994, the United States has had a rule prohibiting any single bank from holding more than 10 percent of total retail deposits; however, this was waived in 2009 for JPMorgan Chase, Bank of America, and Wells Fargo. Another suggestion is that limits on size should not be set by regulators, who could adjust the limits as “memories of the recent crisis fade,” but rather by Congress, which will then leave the task of enforcing the limits to the regulators.<sup>373</sup> Size limits could create a financial system that is less vulnerable to systemic risk, competitive distortions, and the failure of a single bank.

On the other hand, some have argued that smaller banks are not necessarily less risky banks.<sup>374</sup> Also, large financial institutions provide certain advantages to the economy, especially with regard to the funding of large, cross-border companies.<sup>375</sup> Therefore, other solutions to the too-big-to-fail problem have been proposed, such as increased capital requirements and better prudential regulation.

Another idea has been proposed by Joseph Stiglitz, who criticizes policies of the Bush and Obama administrations that viewed the megabanks as not only too big to fail, but also too big to be resolved or financially restructured under normal procedures, whereby shareholders would be wiped out and bondholders would be converted to shareholders.<sup>376</sup> His solution for the problem of banks deemed “too big to fail” is to break them up for the reason that banks too big to fail are too big to exist.<sup>377</sup> Without evidence that these large banks operate so much more efficiently than smaller institutions that it would be costly to restrict their size, Stiglitz sees no reason not to break up these large banks. Indeed, the too-big-to-fail banks are also too big to be managed; and their competitive advantage comes from their “monopoly power” and from “implicit government subsidies” and guarantees, not from their size.<sup>378</sup>

Stiglitz suggests the big banks return to traditional banking, while their “commingled activities” including insurance, investment banking, and other activities not essential to the function of commercial banking, be spun off.<sup>379</sup> While he views size limits as subject to regulatory lapses, he suggests a “three-pronged attack”: (1) breaking up institutions that are too big to fail; (2) “restricting . . . activities in which [the] remaining institutions can be engaged”; and (3) correlating “deposit insurance and capital adequacy

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373. *Id.* at 214–15.

374. Edward F. Greene et al., *A Closer Look at ‘Too Big to Fail’: National and International Approaches to Addressing the Risks of Large, Interconnected Financial Institutions*, 5 CAPITAL MARKETS L.J. 117, 124 (2010).

375. *Id.* at 124–25.

376. JOSEPH E. STIGLITZ, *FREEFALL* 164 (2010).

377. *Id.* at 164–65.

378. *Id.* at 165.

379. *Id.* at 166–67.

restrictions to [even out] the playing field.”<sup>380</sup> He acknowledges that activity restrictions might “result in lower returns for big banks,” as there should also be an elimination of incentive structures in employee compensation that “encourage excessive risk-taking and shortsighted behavior.”<sup>381</sup> Stiglitz also thinks that the Fed and the Treasury Department need clearer authority to resolve financial institutions when the failure of an institution would put the entire economy at risk.<sup>382</sup> This would need to happen in conjunction with the break-up of institutions that are too big to even exist.<sup>383</sup> There is a need for affirmative prevention measures, rather than just resolution authority to prevent the same thing from happening again.<sup>384</sup>

The idea of narrow banking was proposed long before the recent crisis. In 1987, Robert Litan suggested that state and federal regulators should not allow financial product diversification unless banking and nonbanking activities were carried out in separate, but related corporations.<sup>385</sup> His idea of “narrow” or “safe” banking was the separation of deposit taking from risk-bearing activities. This would eliminate the potential risk that depositors’ funds would be used to bail out the risky, nonbanking activities, or used by the nonbank affiliates, where it would have the greater potential to be lost.<sup>386</sup> Narrow banks operating with separation requirements would only be permitted to “invest[] in high-quality, marketable instruments,” and would be restricted from “channel[ing] funds to support affiliated corporations or their customers.”<sup>387</sup> This would prevent a situation where the failure of a nonbanking affiliate would trigger a deposit run on the bank, necessitating federal intervention.<sup>388</sup> Narrow banking would also address the problems associated with the large financial institutions and their concentration of economic power, and resolve conflict of interest issues.<sup>389</sup> Litan’s separation and narrow banking ideas were proposed in the context of how financial product diversification could progress rapidly while protecting the greater financial system against the risks that product diversification entails.<sup>390</sup>

A more recent version of a similar proposal has the title of “limited purpose banking,” limiting banks to their original purpose of acting as an

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380. *Id.* at 166.

381. *Id.* at 167.

382. *Id.* at 168.

383. *Id.* at 164–65 (“There is an obvious solution to the too-big-to-fail banks: break them up. If they are too big to fail, they are too big to exist.”).

384. *Id.* at 168.

385. ROBERT E. LITAN, WHAT SHOULD BANKS DO? 145 (1987).

386. *Id.* at 6.

387. *Id.* at 167.

388. *Id.*

389. *Id.*

390. *Id.* at 168.

intermediary between borrowers and lenders, and savers and investors.<sup>391</sup> Under this proposal, all financial and insurance companies with limited liability, that are engaged in financial intermediation, would operate solely as the intermediary, never owning the assets itself or borrowing to invest in anything except specific assets needed to run their operations, thereby acting similarly to a “pass-through mutual fund.”<sup>392</sup> The role of an intermediary requires no risk taking at all. Under limited purpose banking, banks would be free to sell and act as the intermediary for customers that want to invest in any type of mutual fund, including two new types: “cash mutual funds and insurance mutual funds.”<sup>393</sup> Additionally, under the limited purpose banking proposal, all state and federal regulatory authorities would be replaced by a single regulatory authority, the “Federal Financial Authority,” which would “verify, supervise custody, fully disclose, and oversee the rating and trades of all securities” that are “purchased, held and sold by the [limited purpose banking] mutual funds.”<sup>394</sup>

With the limited exception of the Volcker Rule,<sup>395</sup> ideas for curbing the size, concentration, and complexity of the big banks were rejected in Dodd-Frank. Instead, the statute embraced better capital adequacy requirements and better supervision by financial regulators, and an orderly resolution authority in the event such regulation fails to prevent the failure of one or more financial institutions. In view of the role that the financial regulators played in creating the mega-banks, it is not surprising that efforts to cut them down to a smaller size were resisted. Moreover, the actions by these agencies in implementing Dodd-Frank are strengthening the dominant position of the mega-banks.<sup>396</sup>

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391. LAURENCE J. KOTLIKOFF, JIMMY STEWART IS DEAD 123 (2010).

392. *Id.* at 123–24.

393. *Id.* at 126.

394. *Id.* at 126–27.

395. *See supra* text accompanying note 356.

396. Karen Weise, *Banks ‘Too Big to Fail’ Could Get Bigger*, BLOOMBERG BUSINESSWEEK, Apr. 7, 2011, [http://www.businessweek.com/magazine/content/11\\_16/b4224025246331.htm](http://www.businessweek.com/magazine/content/11_16/b4224025246331.htm).