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Prior Proposals to Consolidate Federal Financial Regulators

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Executive Summary

- Proposals to consolidate the federal financial regulators began almost as soon as the federal government created the Federal Reserve in 1913. The creation of the Federal Reserve meant that the federal government had two banking agencies with overlapping jurisdictions — the Office of the Comptroller of the Currency (OCC) and the Federal Reserve.

- Every one of the eleven decades since the creation of the Federal Reserve, except for the 1950s, has involved substantial public consideration of, and debate over, the need to consolidate federal financial regulators, usually without resulting in any significant action.

- The proposals to consolidate federal financial regulators generally fall into one of ten categories: (1) proposals to create a new agency (most frequently referred to as the Federal Banking Agency) that will assume the supervisory powers of the OCC, the FDIC, and the Federal Reserve; (2) proposals to transfer the supervisory powers of the OCC and the FDIC to the Federal Reserve; (3) proposals to transfer the supervisory powers of the FDIC and the Federal Reserve to the OCC; (4) proposals to transfer the supervisory powers of the OCC and the Federal Reserve to the FDIC; (5) proposals to only merge the OCC and the OTS while leaving the other regulators alone; (6) proposals to transfer the powers of the OTS to the OCC and the Federal Reserve as appropriate; (7) proposals to place all of the bank supervisory powers within the Treasury Department but not within the OCC; (8) proposals to consolidate the national bank supervisory powers into one agency and to consolidate the state bank supervisory powers into a separate agency; (9) proposals to create a twin peaks regulatory structure with one agency in charge of managing prudential risk and the other agency in charge of managing market conduct and consumer protection risks; and (10) other proposals that do not fall into any of the other nine categories.

- For the first 70 years, the consolidation proposals generally only involved the federal banking agencies. The Federal Home Loan Bank Board (FHLBB) regulated the Federal Home Loan Banks and the savings and loans institutions (S&Ls) that were members of the Federal Home Loan Banks. The FHLBB did not share jurisdiction over savings and loans with any other federal institution. Thus, thrifts did not have three federal regulators in the same way that the banks had three federal regulators. Until the 1970s, thrifts and S&Ls operated under different regulations and had different business models than banks. The lines between thrifts and S&Ls, on the one hand, and banks, on the other, began to blur as deregulation dismantled the differences in the regulations to which each was subject. These differences in regulatory regimes and business models explain why early consolidation proposals did not include merging the thrift and S&L regulators with the banking regulators.

- Of the ten categories for consolidation proposals, the type of proposal that has been made most frequently falls into category (1), proposals to create a new agency that will assume all of the supervisory powers of the OCC, the FDIC, and the Federal Reserve. While this proposal probably makes the most rational sense if the United States were building its regulatory structure from scratch while keeping the traditional institutional categories for financial services (banking, insurance, and securities), it has been too dramatic of a change to garner enough support within Congress, the Executive Branch, and the financial services industry to be enacted.

- At least three processes affect the success or failure of governmental reorganization efforts: (1) problem recognition, (2) generation of policy proposals, and (3) political events.[1] Change requires recognition that a problem exists. Recognition of a problem frequently arises either from the occurrence of a crisis or from a significant change in a "widely respected indicator."[2] The 2008 financial crisis awoke the world to the increase interdependence among financial institutions and the blurring of the lines among the banking, securities, and insurance sectors. It also highlighted the gaps in the US regulatory structure that contributed to weak or ineffective oversight of certain financial products and firms. As experts in certain fields develop knowledge about and experience in dealing with a problem, they devise new proposals for how to manage or resolve the problem.[3] Over the past 15 years, financial regulators and academics have begun to form a consensus that the institutional or functional approaches to regulating financial services no longer work and that regulatory structures need to be organized to address objectives or risks. Finally, the political process must be willing to address the problem in order for proposed reforms to succeed.[4] The passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act resulted from the willingness of both Congress and the Obama Administration to address some of the causes of the 2008 financial crisis. It is unclear if Congress and the Obama Administration are now willing to go further and to reform the US regulatory structure to bring it more in line with one based upon the regulation of risks.

- Historically, the general climate necessary to give rise to a regulatory consolidation proposal has tended to occur in narrow windows over the past 100 years. Six groups or clusters of proposals exist: (1) cluster one in 1915-1921, (2) cluster two in 1937-1939, (3) cluster three in 1961-1965, (4) cluster four in 1975-1977, (5) cluster five in 1983-1989, and (6) cluster six in 1993-1997. In most cases, these windows of opportunity closed before any reforms could be implemented.

[1] John W. Kingdon, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2nd ed., 1995) at 17-18.
[2] *Id*. at 16-17.
[3] *Id*. at 17-18.
[4] *Id*. at 18.

- Only two consolidations have occurred to date. The first consolidation was the merger of the Federal Savings and Loan Insurance Corporation (FSLIC) into the Federal Deposit Insurance Corporation (FDIC) in 1989. The second consolidation was the transfer of the supervisory powers of the Office of Thrift Supervision (OTS) to the Federal Reserve and to the Office of the Comptroller of the Currency (OCC) in 2010.

- The two consolidations that have occurred only came about because two crises created a consensus of opinion regarding the need for reform that was strong enough to overcome the opposition from the institutions most directly affected by the reform.

- The first consolidation that merged the FSLIC into the FDIC came about in response to the savings and loan crisis. The savings and loan crisis developed out of movement to deregulate the savings and loan industry. Deregulation was the dominant ideology within financial circles prior to the savings and loan crisis. The proponents of deregulation argued that it would reinvigorate both the banking and savings and loan industries. The profitability of both sectors suffered from the double digit inflation of the 1970s and early 1980s and from the regulatory limits on their business, such as interest rate caps. Banks sought deregulation in order to expand the scope of their businesses into areas that had previously been off-limits, such as securities and insurance. The existing firms in those sectors tried to oppose these efforts with mixed success. At the same time, for many savings and loans, deregulation allowed them to assume risks that they lacked the experience to evaluate and manage. These excessive risks led many savings and loans to fail, which placed significant strain on the FSLIC.

- The movement to consolidate the FSLIC and the FDIC began in 1983 when the FDIC first proposed that the FSLIC should be merged into the FDIC. By 1983, the FSLIC already felt the strain of dealing with the increasing number of failing S&Ls. Because of the worsening savings and loan crisis, the FSLIC became insolvent for the first time in its history in 1986, which required the federal government to step into refinance it. In 1989, the FSLIC was once again insolvent. A consensus had formed within Congress that the way to deal with this problem was not to continue to prop up the FSLIC but to merge it with the FDIC.

- The second consolidation that transferred of the supervisory powers of the OTS to the OCC and the Federal Reserve came about as a response to the 2008 financial crisis. Congress had considered proposals to consolidate the OTS and the OCC beginning in 1995 but no strong consensus about the need for reform existed prior to the 2008 financial crisis. In addition, the thrift industry and certain investment banking conglomerates that owned thrifts strongly opposed the proposals to consolidate the OTS and the OCC prior to the 2008 crisis. The failure of the OTS to properly supervise the holding company structures of AIG, Countrywide Financial, IndyMac Bancorp, Inc., Washington Mutual, and Merrill Lynch, among others, and that allowed those institutions to get into severe financial difficulties that required federal government intervention in the 2008 financial crisis created the consensus in Congress that the OTS was no longer an effective supervisor and should have its responsibilities transferred to the OCC and the Federal Reserve.

- In general, opposition to regulatory consolidation proposals tends to coalesce around many of the same arguments, which include, but are not limited to, the following: (1) the system is not broken and does not need to be fixed, (2) diversity of regulators fosters competition and better regulation, (3) diversity of regulators avoids overregulation, and (4) reform will create uncertainty.

- Proposals to consolidate a large number of federal agencies have faced stiffer opposition than those that would only consolidate two or three because they would have directly affected more firms within the financial services industry and the jurisdictions of more congressional committees. Again, the only two consolidation proposals that ultimately were implemented, each involved only two agencies.

- Proposals that would consolidate federal regulators have faced opposition because financial firms have tended to prefer dealing with their existing regulators over the uncertainty of how a new regulator would operate and what negative effects the new regulatory regime would have on their businesses. This opposition would arise both in cases where the consolidation would be into a new agency, such as the Federal Banking Commission, or into an existing agency but one with whom a significant number of the affected financial firms had not previously dealt, such as the merger of the OTS into the OCC. In the latter case, the firms regulated by the agencies to be merged out of existence raised concerns that the resulting agency would be dominated by a regulator controlled by their competitors and that they would lose that the competitive advantages that they had previously enjoyed when the regulatory agencies were separate. Thus, the thrifts and certain financial conglomerates that owned thrifts opposed the transfer of the OTS's powers to the OCC and the Federal Reserve because they feared losing the competitive advantages that they had garnered over commercial banks from the differences in OTS's regulations compared to the OCC's regulations.

- Consolidation proposals that would have restricted or eliminated the power of certain congressional committees have faced strong opposition from those members of Congress affected. Congressional power stems in part from committee assignments. Proposals, like the merger of the SEC and the CFTC, might result in some committees losing oversight authority over the resulting agency. The agricultural committees in Congress that oversee the CFTC have strongly opposed bills that would merge the CFTC and the SEC into a single agency but would only allow the congressional banking and securities committees to have oversight of the new agency. The larger the number of agencies to be merged, the more congressional committees that might be affected. Proposals that attempt to mitigate the number of congressional committees affected would face less opposition within Congress.

- As the lines between banking, securities, and insurance have blurred causing the jurisdictions of the existing federal financial regulators to overlap within increasing frequency, the consolidation proposals have moved away from focusing merely on consolidating the federal banking regulators. Calls to merge the SEC and the CFTC began in 1988. In 2008, the Treasury Department issued its *Blueprint for a Modernized*

Financial Regulatory Structure that argued for a multi-peaks regulatory structure with agencies organized to meet a particular regulatory objective or mitigate a particular set of risks for all financial services firms rather than to regulate based on whether a firm or product was classified as banking, securities, or insurance.

- Proponents of consolidation argue that it would reap the following benefits: (1) the elimination or reduction of regulatory gaps, (2) the elimination or reduction of regulatory arbitrage and regulatory capture, (3) the elimination or reduction of regulatory overlap and duplication, (4) a reduction in regulatory costs from agencies achieving economies of scale, the reduction of duplication, and the reduction of compliance costs for the industry, (5) the creation of a level playing by the development of comparable regulatory standards for similar products and firms, (6) the creation of enhanced prudential standards by ending the race-to-the-bottom, and (7) the implementation of greater agency accountability because agencies would have more clearly defined responsibilities than they currently do today.

- Proposals for a twin peaks regulatory structure or a multiple peaks regulatory structure will face stiff opposition because they will affect a wide range of financial firms and a large number of congressional committees. Nevertheless, the view that consolidation is needed is growing. Creating a sufficiently favorable climate for reform to succeed will require strong leadership and a strategy to build the necessary coalitions within the Congress and in the financial services industry to push for change.

Introduction

The history of U.S. federal financial regulation in the 20th Century is the repeated creation of new agencies to address what were perceived at the time to be unique problems followed by calls for the consolidation of federal financial regulators as their overlapping regulatory responsibilities become more apparent. Prior to the 20th Century, only one financial regulator existed at the federal level – the Office of the Comptroller of the Currency (OCC).[5] The calls for consolidating federal regulators, however, began almost as soon as more than one federal financial regulator came into existence in 1913.[6] Every one of the eleven decades since the creation of the Federal Reserve, except for the 1950s, has involved substantial public

[5] The OCC was created by the National Currency Act of 1863, which created the national banking system and gave the OCC the power to charter national banks. Office of the Comptroller of the Currency, US Dept. of the Treasury, OFFICE OF THE COMPTROLLER OF THE CURRENCY: A SHORT HISTORY 1, 3-4 (2011), http://www.occ.gov/about/what-we-do/history/OCC%20history%20final.pdf [hereinafter, OCC History]; JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES VOL. I: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS (1492-1900) 217-218 (2002) [hereinafter Markham v. I]. In 1864, the National Bank Act was enacted to further strengthen the OCC and the national banking system. OCC History at 5.
While the National Bank Act gave the OCC the power to monitor nationally chartered banks, it did not also authorize the OCC to monitor state chartered banks. The National Bank Act, thus, created the dual banking system that continues to exist in the United States today.
[6] The second federal financial regulator created by Congress was the Federal Reserve System. It was created by the Federal Reserve Act in 1913 to act as the central bank for the United States.

consideration of and debate over the need to consolidate federal financial regulators, usually without resulting in any significant action.

To understand why the U.S. federal government has rarely consolidated financial regulators, this paper identifies and evaluates over thirty major proposals by government commissions, private entities, and government agencies or officials to consolidate the separate federal financial regulatory agencies. For each consolidation proposal, the paper describes the agencies to be consolidated, the reasons for the proposed consolidation, the procedures outlined for implementing the proposed consolidation, and the advantages and disadvantages entailed in the proposed consolidation as well as any cost-benefit analyses conducted concerning the proposed consolidation.

This paper also provides organizational charts that illustrate how the federal financial regulatory structure would change if the proposal had been implemented. Most of the federal financial regulators are independent agencies or government corporations. Those entities do not report to and are not controlled by the president of the United States. The president's power over the independent agencies and government corporations are very limited. The president generally has the authority to appoint with the advice and consent of the Senate members to the commissions or boards that run the independent agencies and government corporations. The president also has some limited power to remove those members. In many instances, the president can designate which of the members will serve as the chair for the board or commission.

As a result, the organizational charts do not show the independent agencies or government corporations as reporting to the president. They do illustrate which federal financial regulators are executive branch agencies that report to president.

In some instances, the charts show formal committees or councils for fostering cooperation among the federal financial regulators. The federal financial regulators have always had the power to informally work together and have frequently done so. The charts do not attempt to illustrate these informal channels for coordination and cooperation among federal financial regulators.

In connection with the cost-benefit analyses of the proposals, it is important to note that cost-benefit analysis only became common for administrative agencies undertaking reforms of financial services regulations following 1994 and the enactment of the Unfunded Mandates Reform Act of 1995 (UMRA).[7] Even after the enactment of the UMRA, congressional proposals were not required to undergo formal cost-benefit analyses before being considered.

Prior to the enactment of the UMRA, only executive agencies under the President had to comply a series of Presidential Executive Orders requiring that cost-benefit analyses be conducted before they took action. These requirements began with Executive Order 12,291 of February 17, 1981

[7] Unfunded Mandates Reform Act of 1995, 2 USC. 1501 et. seq. (2014); Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC's Stalled Mutual Fund Reform Effort*, 12 STAN. J. L. BUS. & FIN. 1, 6-7 (2006).

and Executive Order 12,498 of January 4, 1985 issued by President Ronald Reagan.[8] President Bill Clinton's Executive Order 12,866 of September 30, 1993 superseded Reagan's Executive Orders and continues to be in effect today.[9] The Executive Orders expressly exempt independent regulatory agencies as defined in the Paperwork Reduction Act of 1980 from having to comply with the cost-benefit analysis requirements.[10] As a result, federal financial regulators, such as the Board of Governors of the Federal Reserve Board (Federal Reserve), the Commodities Futures Trading Commission (CFTC), the Federal Deposit Insurance Corporation (FDIC), and the Securities and Exchange Commission (SEC), were not required to submit cost-benefit analyses to the Office of Management and Budget under the Executive Orders.[11]

The history of the legal requirements for cost-benefit analyses is important because it means that very few formal economic cost-benefit analyses on the proposals to consolidate federal financial regulators exist, particularly for any proposals prior to 1994. Instead, the analyses of the proposals tend to lay out the pros and cons in more qualitative terms.

In addition, many of the proposals only provided a rough outline of what agencies should be consolidated and none of the details regarding how the consolidation would actually be implemented. Proposals that became embodied in draft legislation usually contained more details regarding the mechanics for undertaking the regulatory consolidation than those that were included in longer studies concerning a range of financial or administrative reforms. Thus, the level of detail regarding the pros and cons or benefits and costs of the proposals discussed in this paper will vary considerably and will depend, in large part, upon how well the details of the proposal were thought out when the proposal was originally made.[12]

Finally, the paper will describe what happened with each proposal. Were parts of it implemented? If so, why? If not, why not? The purpose of this analysis is to understand the sources and nature of the opposition to proposals to consolidate the federal financial regulators that any new consolidation proposal is likely to also face.

I. Proposals Between 1915 and 1921

A. The Proposals

The Federal Reserve appears to have been the first federal governmental entity to propose consolidating the federal banking regulators. Just two years after it was created, the Federal Reserve Advisory Council at their first meeting held on November 16, 1915 voted to recommend

[8] Exec. Order No. 12,291, 3 C.F.R. 127 (1981), http://www.archives.gov/federal-register/codification/executive-order/12291.html; Exec. Order No. 12,498, 3 C.F.R. 323 (1985), http://www.archives.gov/federal-register/codification/executive-order/12498.html.
[9] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993), http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf; Sherwin, *supra* note 7, at 27
[10] Sherwin, *supra* note 7, at 10.
[11] Sherwin, *supra* note 7, at 29
[12] It is beyond the scope of this paper to fill in the details of how the proposal might have been implemented by those making the proposal. In most cases, the historical record is too sparse to even hazard an educated guess.

that the Federal Reserve Board seek legislation to merge the functions of the Office of the Comptroller of the Currency into the Federal Reserve.[13] While only nine of the twelve members of the Advisory Committee attended the meeting, they reportedly approved this recommendation unanimously.[14] The Advisory Committee claimed that the creation of the Federal Reserve had rendered the OCC unnecessary and that there would be duplication of work if the OCC continued to exist, particularly in relation to the examination of national banks.[15] The Federal Reserve Board discussed this recommendation by the Advisory Council but did not act upon it.[16]

Not everyone accepted the Advisory Committee's rationale for their resolution. Others thought that the Advisory Committee members, who were all presidents or chief executive officers of some of the largest banks in the United States at the time, made this recommendation because they were unhappy that the Comptroller of the Currency, John Skelton Williams, was aggressively enforcing the national banking laws.[17] One 1915 op-ed noted that Comptroller Williams had angered the banks by "[c]ompelling the Riggs bank, in Washington, D.C., to obey the national banking laws and take its secret agents out of the federal treasury department; compelling banks that wished to squeeze the public when the war began in August, 1914, to keep their checking accounts on a specie payment basis and to keep down interest rates; calling attention to banks that are charging usurious interest rates."[18]

The Federal Reserve Advisory Council's recommendation also provoked some members of Congress to threaten to abolish the Advisory Council. Rep. Carter Glass (D-VA6), Chairman of the House Committee on Banking and Currency, supported a movement in Congress to amend the Federal Reserve Act to eliminate the Advisory Council.[19] The council had been created to placate the large banks when their attempts to gain direct control over the Federal Reserve when it was created were thwarted.[20] This congressional opposition seems to have had the desired

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[13] *Meeting of the Advisory Council*, 1 FED. RESERVE BULL. 394 (Dec. 1, 1915)] [hereinafter *Advisory Council Meeting*]. The actual resolution that the Federal Reserve Advisory Committee adopted was: "That the work of the Office of the Comptroller of the Currency be absorbed and administrated by the Federal Reserve Board." *Id*.

[14] *May Abolish Comptroller of the Currency*, WILMINGTON MORNING STAR (WILMINGTON, NORTH CAROLINA), Nov. 17, 1915, at 1; The nine members of the Advisory Council who were present and voted were Daniel G. Wing, President of the First National Bank of Boston; W. S. Rowe, President of the First National Bank of Cincinnati, Ohio; George J. Seay, Governor of the Federal Reserve Bank of Richmond, Charles A. Lyerly, President of the First National Bank of Chattanooga, Tennessee; James B. Forgan, President of the First National Bank of Chicago, Illinois; C. T. Jaffray, President of the First National Bank of Minneapolis, Minnesota; E. F. Swinney, President of the First National Bank of Kansas City, Missouri; J. Howard Ardrey, Cashier (chief executive officer) of City National Bank, and Archibald Kains, Governor of the Federal Reserve Bank of San Francisco. *Advisory Council Meeting, supra* note 13, at 394; FEDERAL RESERVE BOARD, SECOND ANNUAL REPORT (1915).

[15] WILMINGTON MORNING STAR, *supra* note 14; *Would Abolish Comptroller of the Currency*, GREENSBORO DAILY NEWS (GREENSBORO, NORTH CAROLINA), Nov 17, 1915, at 1.

[16] WILMINGTON MORNING STAR, *supra* note 14; GREENSBORO DAILY NEWS (GREENSBORO, NORTH CAROLINA), *supra* note 16.

[17] See op-ed *Threat Made Good*, THE LINCOLN STAR (LINCOLN, NEBRASKA) Nov. 29, 1915 at 6 (reprinted from the Sioux City Tribune).

[18] *Id.* The op-ed went on to comment that Comptroller Williams had testified before Congress that banks were borrowing money from the Treasury Department at an interest rate of 4 percent and loaning it out at interest rates ranging from 50 to 200 percent. *Id.*

[19] *Flareback is Threatened*, THE CINCINNATI ENQUIRER (CINCINNATI, OHIO), Nov. 29, 1915 at 5.

[20] *Id.*

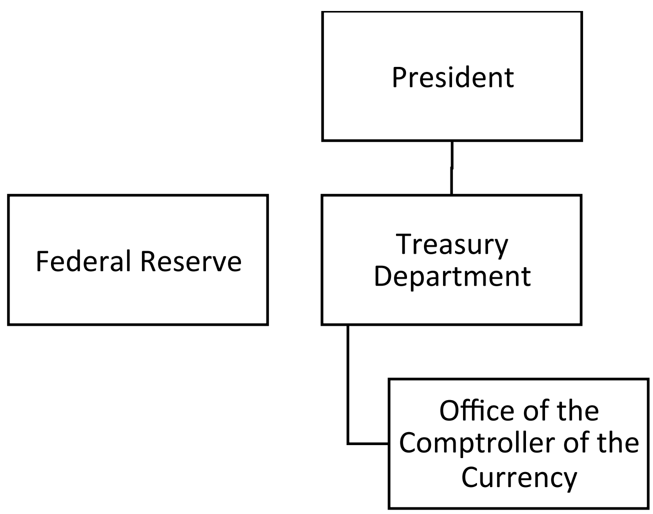
effect as the Federal Reserve Advisory Council did not continue to pursue the abolition of the OCC at its next meeting in May 1916.

Instead, those banks that opposed the actions of Comptroller Williams appear to have moved their efforts to Congress. As early as 1916, newspapers were reporting that bills were going to be introduced into Congress to eliminate the OCC. The congressional efforts to abolish the OCC during the early years of the Federal Reserve's existence peaked in 1919 to 1921 when four bills were introduced to abolish the Office of the Comptroller of the Currency and transfer its supervisory functions to the Federal Reserve.

1. Structural Reorganization

The bills proposing the consolidation of the OCC into the Federal Reserve included the House of Representatives bill no. 15983 and Senate bill no. 5537 in the 3rd Session of the 65th Congress, Senate bill no. 1370 in the 66th Congress, and the House of Representatives bill no. 4906 in the 67th Congress.[21] All of the bills to transfer the powers of the OCC to the Federal Reserve were motivated by dissatisfaction with how the Comptroller was performing his job, although the source of that dissatisfaction differed between the 65th Congress and the 67th Congress.

Figure 1
Existing Banking Regulators in 1913-1922



Two Republicans, Rep. Louis T. McFadden (PA-14), and Senator John Weeks (MA), introduced the first two bills to move the powers of the OCC to the Federal Reserve. They were unhappy with how Comptroller John Skelton Williams and Treasury Secretary William McAdoo (who were both Democrats) had treated the Riggs National Bank.[22] Between 1915 and 1919, Treasury

[21] H.R. 4906, 67th Cong., 1st Sess. (1921); S. 1370, 66th Cong., 1st Sess. (1919); S. 5537, H.R. 15983, 65th Cong., 3d Sess. (1919).
[22] Howard H. Hackley, *Our Baffling Banking System. Part II*, 52 VA L. Rev. 771, 800 (Jun. 1966); William H. Seall, Dennis C. Thelen & Thomas M. Ward, *Economic Institutions and Value Survey: Legal Conflicts within the*

Secretary McAdoo and Comptroller Williams had charged the officials of the Riggs Bank with mismanagement while Riggs officials charged that McAdoo and Williams were motivated to act against Riggs by personal malice and had conspired to "ruin" Riggs.[23] Rep. McFadden and Senator Weeks sided with the Riggs Bank officials and felt that one way to correct the abuses of power of McAdoo and Williams was move the OCC's powers to the Federal Reserve.

H.R. 4906 in 1921 appears to have been prompted by a different set of grievances with the Office of the Comptroller of the Currency. The Federal Reserve had refused to admit some state banks as members of the Federal Reserve System.[24] The Federal Reserve Governor William P.G. Harding testified before the House Committee on Banking and Currency that the Federal Reserve had denied the applications of some state banks for membership in the Federal Reserve because of the "unsatisfactory" financial condition of the banks.[25] Those state banks, however, overcame the Federal Reserve's rejection of their applications by convincing the OCC to allow them to convert their charters to national bank charters, which allowed them to automatically become members of the Federal Reserve System.[26] Comptroller Williams felt justified in doing this as he thought that the Federal Reserve had been captured by the large banks and discriminated against small, rural banks.[27] Governor Harding, however, felt that the Federal Reserve had been right to reject the state banks because, at least in some cases, the state banks rejected by the Federal Reserve to whom the OCC granted national charters, reportedly were in financial difficulties within six months of receiving their federal charters.[28]

2. Proposed Implementation

The bills to transfer the powers of the OCC to the Federal Reserve were very short and did not go into the details of how the transfer should be implemented. The one item that they did specify was that the employees of the OCC should be transferred to the Federal Reserve at their existing grades and salaries.[29]

Banking Industry, 42 NOTRE DAME L. REV. 707, 770 (1967); *Riggs Bank in Suit Attacks Treasury Heads: McAdoo and Williams*, N.Y. TIMES (April 13, 1915); *Bankers Name Burleson: William's Opponents Say He Was Mediator in Riggs Case*, N.Y. TIMES (July 12, 1919).

[23] *Riggs Bank in Suit, supra* note 22.

[24] Seall, et. al., *supra* note 22, at 770.

[25] *Amendment to Abolish Office of the Comptroller of the Currency, Etc.: Hearings Before the H. Comm. on Banking and Currency*, 67th Cong. 39 (1921) (statement of William P.G. Harding, Governor of the Federal Reserve Board) [hereinafter Harding Testimony].

[26] *Id*.

[27] Bernard Shull, *Financial Crisis Resolution and Federal Reserve Governance: Economic Thought and Political Realities*, Levy Economics Institute, Bard College, Working Paper No. 784 (Jan. 2014) at 7-8.

[28] Harding Testimony, *supra* note 25, at 39. Governor Harding never identified the banks that he indicated had these financial problems. As a result, there is no way to verify his statement.

[29] See, e.g., S. 5537, H.R. 15983, 65th Cong., 3d Sess. (1919). In 1921, Senator Lee S. Overman (D-NC) sharply criticized the Federal Reserve for increasing its salaries by 50 percent between 1919 and 1921 while the federal government and most state and local governments were cutting employees' salaries because of the 1920-21 recession. Theodore Tiller, *Senate to Look Into Salaries of Workers in the Reserve Banks*, Greensboro Daily News (Greensboro, North Carolina), October 15, 1921 at 1; *John Skelton Williams on Administration of the Federal Reserve Board*, The Commoner (Lincoln, Nebraska), March 7, 1922 at 7. The highest Federal Reserve salary in 1921 was $50,000, which was paid to the president of the Federal Reserve Bank of New York and which would be equivalent to about $665,500 in 2014. Tiller at 1; US Dept. of Labor, Bureau of Labor Statistics, CPI Inflation

B. Arguments for and Against the Proposals

The proponents of these proposals viewed their primary benefit as curbing the abuses of the OCC. These bills would have allowed the Federal Reserve complete control over which banks became members of the Federal Reserve System. Such control would have promoted a uniform set of standards for the banks that became members of the Federal Reserve. The OCC would not be able to grant weaker banks membership in the Federal Reserve by converting their state charters into national charters. The bills would have eliminated the ability of the banks to engage in regulatory arbitrage by playing the OCC against the Federal Reserve.

One of the potential disadvantages of the bills was that they might have made agency capture easier because the banks would only have to capture one agency, the Federal Reserve, not two. If Comptroller Williams was correct and the Federal Reserve was controlled by the large banks, then the large banks might have used their power to stifle competition by having the Federal Reserve deny membership to potential competitors. These actions ultimately might harm the banking sector and society by reducing the amount of available credit and raising the prices for banking products and services.

In addition, making the Federal Reserve the sole banking regulator would have concentrated a great deal of power in the Federal Reserve. The Federal Reserve had control of monetary and credit policy since its inception. To also make it the sole federal supervisor for banks would have further expanded its power and influence over the financial sector. In the following decades, fears about placing too much power in the hands of the Federal Reserve led proponents of regulatory consolidation to favor proposals that made the OCC, the FDIC, or a new agency the sole banking supervisor rather than the Federal Reserve.

C. What Happened to the Proposals?

Ultimately none of the proposed bills were enacted. The Democrats controlled both the House and the Senate in the 65th Congress and bills proposed by Republican Rep. McFadden and Senator Weeks did not enjoy bipartisan support. While the Republicans did gain control of the House of Representatives during the 66th Congress in 1919-1921, the Democrats retained control of the Senate. As a result, the Democratically controlled Senate was unlikely to vote for bills that would transfer power away from Democratic President Woodrow Wilson and the Executive Branch to the Federal Reserve.

Calculator, http://www.bls.gov/data/inflation_calculator.htm [hereinafter BLS CPI Inflation Calculator] (input "$50,000" and select "1921" then click on the Calculate button). For comparison, the salary of the president of the United States in 1921 was $75,000, which would be equivalent to over $998,000 in 2014. BLS CPI Inflation Calculator. In response, the Federal Reserve noted that the average salary employees at the Federal Reserve Bank of New York was $1,440 (or equivalent to about $19,100 in 2014) while the average salary in ten of the largest banks in New York was between $1,620 and $2,265 (or equivalent to about $21,560 to $30,140 in 2014). *Federal Reserve Defends Salaries*, N.Y. TIMES, November 2, 1921, at 30; BLS CPI Inflation Calculator. The Federal Reserve also stated that "it would be impossible to secure the services of competent and efficient officers for the Federal Reserve banks were their salaries to be measured by the salaries paid to the political officers of the Government." *Federal Reserve Defends Salaries* at 30.

II. Brownlow Committee Report, 1937

In the mid-1930s both President Franklin Roosevelt and members of Congress began to consider how all of the agencies of the federal government should be reorganized, not just the banking regulators. The president and the Congress felt some sort of reorganization was needed because both the number of agencies and the breadth of their activities had exploded under the New Deal. While looking broadly at reorganizing the federal agencies, both the presidential and congressional efforts did touch upon the need for the consolidation of the existing banking regulators.

A. The Proposal

The presidential effort started in 1936 when President Roosevelt created the Committee on Administrative Management.[30] This committee was comprised of three members -- Louis Brownlow, Charles Merriam, and Luther Gulick.[31] It became known as the Brownlow Committee or the Brownlow Commission.[32] The congressional efforts led to the creation of three committees to explore reorganizing the federal agencies – the House Select Committee on Government Organization in 1936, the Senate Select Committee to Investigate the Executive Agencies of the Government in 1936, and the Joint Committee on Government Reorganization in 1937.[33] While the House Select Committee on Government Organization and the Joint Committee on Government Reorganization monitored and held hearings on the President Roosevelt's reorganization plans, neither committee appears to have developed its own reorganization plan. The Brookings Institute produced a study recommending the consolidation of the federal banking regulators for the Senate Select Committee to Investigate the Executive Agencies of the Government that is discussed in Part III of this paper.

While both efforts were concerned about regulatory inefficiencies and duplication, they ultimately came to different conclusions about what solutions could best address the perceived problems. Not surprisingly these different conclusion were shaped by the branch of government

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[30] THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE (Washington, DC: Govt. Printing Office, 1937), *reprinted in* BASIC DOCUMENTS OF AMERICAN PUBLIC ADMINISTRATION 1776-1950 (Frederick C. Mosher, ed., 1976) [hereinafter Brownlow Report]; US GENERAL ACCOUNTING OFFICE, THE DEBATE ON THE STRUCTURE OF THE FEDERAL REGULATION OF BANKS 7 (April 14, 1977) [hereinafter GAO 1977 Report]; James W. Fresler, *The Brownlow Committee Fifty Years Later*, 47 PUBLIC ADMIN. REV. 291, 291 (July/Aug. 1987); Alasdair S. Roberts, *Why the Brownlow Committee Failed: Neutrality and Partisanship in the Early Years of Public Administration*, 28 ADMIN. & SOC. 3, 3 (May 1996), http://ssrn.com/abstract=1318398.

[31] Fresler, *supra* note 30, at 291; Roberts, *supra* note 30, at 3.

[32] Roberts, *supra* note 30, at 3. Some news reports referred to it as the Brownlow Commission. See Charles P. Stewart, *Byrd to Push Reorganization Plan*, NEWS-JOURNAL (MANSFIELD, OHIO), Nov 18, 1938 at 14; David Burnham, *Government Officials Say Regulating Agencies Are the Cause of Government Getting Out of Hand*, THE INDEPENDENT RECORD (HELENA, MONTANA), Jan 19, 1975, at 21.

[33] L. F. Schmeckebier, *Organization of the Executive Branch of the National Government of the United States: Changes between August 1, 1936, and May 31, 1937*, 31 AM. POL. SCI. REV. 699, 700 (Aug. 1937). The House Select Committee was created by House Resolution No. 60 of the 74th Congress on Jan. 14, 1936, which was amended by House Resolution No. 106 on February 2, 1936. *Id.* The Senate Select Committee was created by Senate Resolution No. 217 of the 74th Congress on February 24, 1936. *Id.* The Joint Committee was created by Public Resolution No. 4 of the 75th Congress on February 3, 1937. *Id.*

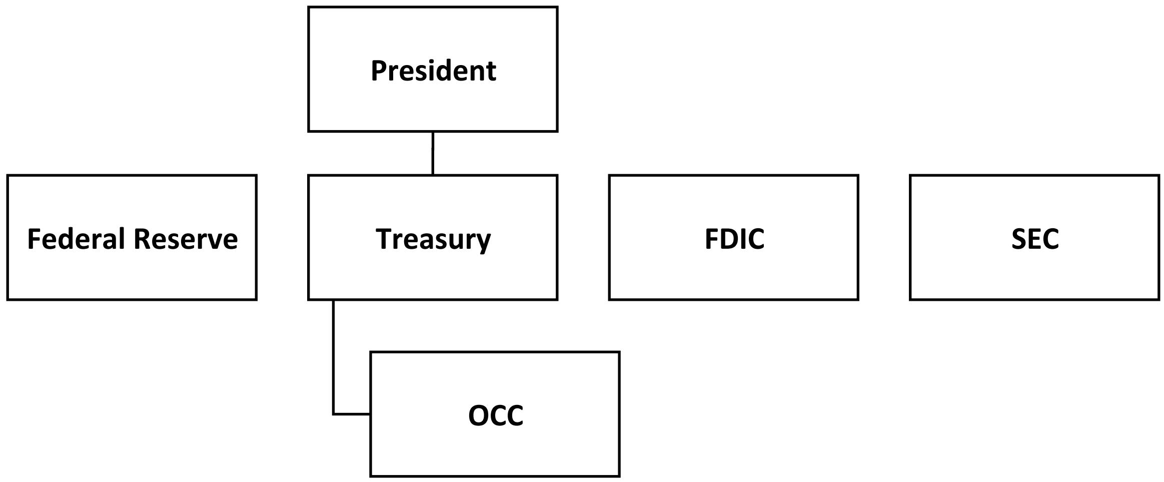
that was proposing them. The Brownlow Committee was more willing to convert independent agencies into ones controlled by the President and to grant the President more authority to unilaterally reorganize the executive agencies than the studies produced for the Select Committee. These two efforts created a contentious discussion over the larger proposals concerning how the federal agencies should be organized that affected the more discrete debate over whether the federal banking regulators should be consolidated and, if so, how. Parts II and III of this paper will analyze the issues raised by the more expansive discussion on the reorganization of federal agencies in the context of the banking regulators.

1. Structural Reorganization

The Brownlow Committee made general recommendations regarding reorganizing all of the federal administrative agencies so that they would be consolidated into twelve cabinet level departments that reported directly to the President.[34] The committee made no specific recommendations regarding the consolidation of the banking regulators (the Federal Reserve, the OCC, and the FDIC) nor did it indicate into which department the Securities and Exchange Commission should be placed. On the other hand, the Brownlow Committee did not say that the existing agencies or bureaus should keep their then existing organizational structures and functions when assigned to one of the twelve departments. The descriptions of what each of the twelve departments would be responsible for indicates that the Brownlow Committee would have been comfortable with functions of an independent agency being divided up among departments in order to better align those functions with the most relevant department. The Brownlow Committee expressly stated that it was not its place to assign the agencies to the twelve departments but instead that should be done "by the Executive, on the basis of careful research and discussion with those most intimately involved."[35]

[34] Brownlow Report, *supra* note 30, at 31-33. The twelve departments included the Department of State, the Department of the Treasury, the Department of War, the Department of Justice, the Post Office Department, the Department of the Navy, the Department of Agriculture, the Department of Commerce, the Department of Labor, the Department of Conservation (the committee's new name for the Department of the Interior), and two new departments, the Department of Social Welfare and the Department of Public Works. *Id.* at 32-33.
[35] *Id.* at 33.

Figure 2
Existing Federal Financial Regulators in 1937



Nevertheless, it seems likely that the FDIC would have ended up in the Treasury Department with the OCC, given the way the Brownlow Committee described the areas for which each of the twelve departments would be responsible, and an argument can be made that the SEC should have been placed within the Treasury Department as well.[36] The Treasury Department was to deal with a wide range of financial matters for both the U.S. government and the U.S. economy.[37] In addition, the overlap between the functions of the FDIC and the OCC make it easier to conclude the two entities would have been placed into the same department.

The Brownlow Committee made a distinction between federal "business corporations" and federal "government corporations." Business corporations were chartered by some agency of the federal government but which were privately owned.[38] Government corporations were chartered by Congress and were owned by the government.[39] At the time of the Brownlow Committee's report, about 90 federal government corporations existed while over 14,000 federal business corporations existed.[40]

With regard to federal business corporations, the Brownlow Committee recommended that specialized agencies exist within the appropriate department to charter and supervise such corporations.[41] Thus, the Brownlow Committee probably would have kept the OCC as an independent bureau within the Treasury Department.

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[36] GAO 1977 Report, *supra* note 30, at 7; Brownlow Report, *supra* note 30, at 33-34.
[37] *Id.* at 32. The Treasury was to "advise the President with regard to fiscal affairs and the Congress on revenue bills" and to "handle the collection of revenues, the administration of credits and the debt, the settlement of claims, the making of payments, the keeping of central accounts, and the procurement of general supplies." *Id.*
[38] *Id.* at 40.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 41.

The Brownlow Committee probably would have also placed the FDIC in the Treasury Department. The committee expressly recommended that government corporations should be placed into the most relevant department when it wrote: "Each 'government corporation' should also likewise be brought under supervision and control through transfer into regular departments."[42] The Brownlow Committee did not recommend merging the FDIC and the OCC. In fact, the Brownlow Committee's recommendations regarding how government corporations, like the FDIC, should be organized within one of the twelve departments would have supported the idea of keeping the FDIC as a semi-autonomous entity within the Treasury Department in order to preserve its independence.[43] The Brownlow Committee, however, made no specific recommendation about incorporating the FDIC into the Treasury and what organizational form that should take.

The Brownlow Committee also made no specific recommendations regarding where the SEC should be placed within the executive branch, although it did state that independent commissions should be placed within one of the twelve departments.[44] The SEC might have fit within the Treasury Department, the Department of Commerce, or the proposed Department of Public Welfare. The Brownlow Committee assigned the responsibility for protecting consumers to the proposed Department of Social Welfare and it assigned dealing with the "problems of commerce and industry" to the Department of Commerce. The Brownlow Committee did not expressly define what it meant the "problems of commerce and industry" but in the list of the other things that the Department of Commerce would be tasked with addressing it mentioned "commercial and industrial production and distribution" and enforcing laws regarding manufacturing, merchandising, communications, and transportation.[45] All of the commerce and industry responsibilities of the Department of Commerce are aimed at helping or regulating the producers of goods and services.

It, however, would seem more appropriate to place the SEC into the Treasury Department than the Commerce Department or the Social Welfare Department as it deals more with financial rather than commercial activities and it is more concerned about investors than consumers. In addition, prior to the enactment of the Banking Act of 1933, more commonly known as the Glass-Steagall Act, banks in the United States had been allowed to engage in securities activities and to affiliate with securities firms. Thus, the officials in the Treasury Department and the OCC in particular should have had some familiarity with securities industry issues.

The Brownlow Committee wanted all executive branch agencies, independent agencies that reported to Congress, and government corporations consolidated into the twelve executive departments that it outlined in its report. It did not discuss excluding any independent agencies or government corporations from this reorganization. If there truly would be no exceptions to this organizing principle, then the Federal Reserve would have had to be placed within one of the twelve departments. The Treasury Department would have been the most likely one to house the Federal Reserve.

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[42] *Id.* at 38-41.
[43] *Id.* at 41.
[44] *Id.* at 37.
[45] *Id.* at 32.

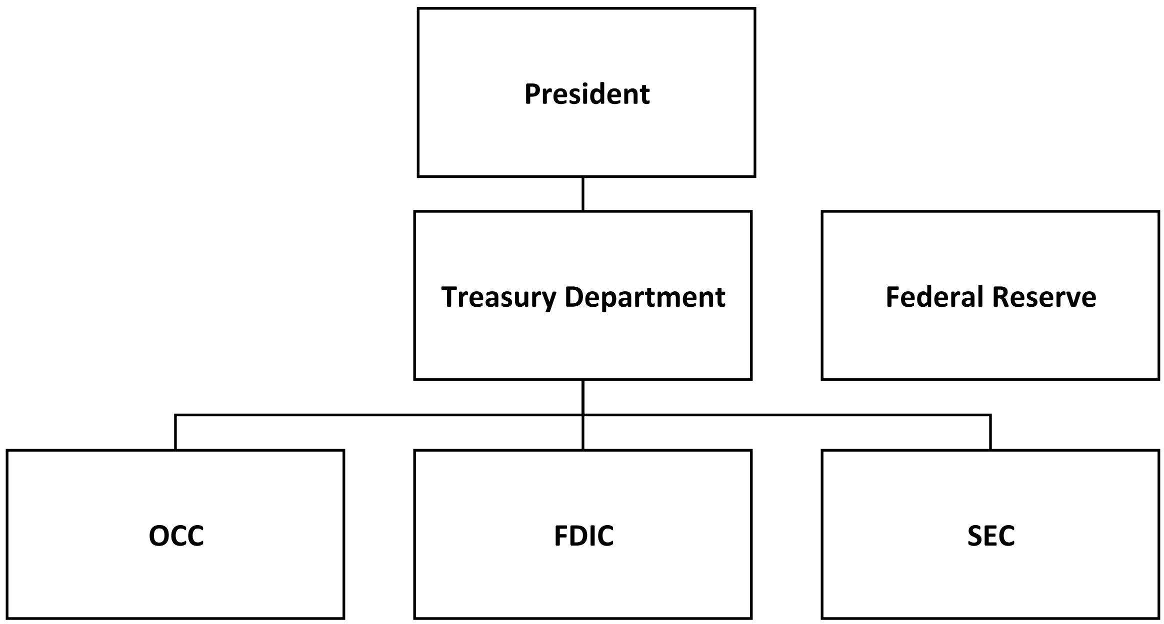
The Federal Reserve, however, was expressly set up to be an independent central bank and insulated from political influences on its management of monetary and credit policy. Thus, placing it within an executive branch department would undermine one of the core attributes that the Federal Reserve needed to perform as intended. In addition, any attempt to include the Federal Reserve in the Treasury Department as part of a Brownlow inspired reorganization would have met with fierce opposition given the unique position of the Federal Reserve within the U.S. government structure and the economy. The Brownlow Committee sidestepped all of these problems by not mentioning the Federal Reserve anywhere in its report.

The Brownlow Committee also made a number of recommendations regarding how the administrative and judicial functions of the independent commissions and the government corporations should be integrated into the departments. It recommended that administrative functions of the former government corporations within the department should be headed by a single person, instead of a board.[46] The committee felt that a single administrator could act like a chief executive officer of a business and make decisions more quickly and efficiently than a board could. The boards of the former government corporations would only continue in a judicial capacity within whatever department the agency was placed.[47] The board of directors would no longer have any administrative authority. This recommendation would not have greatly affected the FDIC as it already was headed by a chairman who managed the day-to-day administration of the agency. It would, however, have constrained the matters in which the FDIC Board of Directors had a voice. The FDIC's Board of Directors operated in some ways like the board of directors of any private corporation. They were the governing body for the FDIC and set its strategic goals. If the Brownlow Committee recommendations had been adopted, the FDIC's Board of Directors might not have continued to have a say in the management of the FDIC.

Similarly, the Brownlow Committee recommended segregating the administrative functions of the former independent commissions, like the SEC, from their judicial functions once they were part of a department.[48] The administrative functions would become part of bureau or division within the department, headed by a career civil servant.[49] The judicial function, however, would be an independent entity within the department that could draw upon the department's administrative support functions (budget, human resources, etc.) while its work would be insulated from the President and the rest of the department in order to maintain the impartiality and independence of its decisions.[50]

[46] *Id.* at 41.
[47] *Id.*
[48] *Id.* at 36-37.
[49] *Id.* at 37.
[50] *Id.*

Figure 3
Possible Structure for Federal Financial Regulators After Implementing the Brownlow Committee's Recommendations



2. Proposed Implementation

Reorganization of Regulatory Powers: The Brownlow Committee provided no specifics about the proposed timetables for these reorganizations. It did not comment on whether the reorganizations should be done all at once or in phases.

Personnel Issues: While the Brownlow Committee did not expressly state what would happened to the existing agencies' staffs during the reorganization, it implied that most, if not all, of them would simply be moved with their agency to whatever department into which their agency was being incorporated. It did recommend that the civil service merit system's rules and payment systems should be extended to apply to all agency staff members.[51] It is unclear to what extent the extension of the merit system would have changed the salaries of the existing employees at the FDIC, the SEC, and the Federal Reserve following the reorganization.

Funding the Reorganization: The Brownlow Committee did not indicate where the funding to cover the costs of the reorganization of the federal agencies would come from or how much the reorganization would cost.

[51] *Id*. at 7.

B. Arguments for and Against the Proposal

The Brownlow Committee articulated four main benefits to be derived from its recommendations but none of these narrowly focused on the consolidation of financial regulation into a single department.

First, the consolidation of agencies would enhance the effectiveness of the President by reducing the number of agencies that report directly to him.[52] This benefit mainly derives from the reduction of 100 separate agencies and departments reporting directly to the President to only 12 departments reporting to the President.

Second, the consolidation of agencies would reduce or eliminate duplication of supervision and contradictory policies. Certainly, consolidating the supervision of the banks into the Treasury Department would more likely result in a harmonization of the examination standards employed by the OCC and the FDIC.

Third, the consolidation of agencies would enhance democracy by making the independent agencies and government corporations more directly accountable to the President and the public. The heads of the independent agencies and the government corporations are appointed, not elected, and once in place cannot be easily removed by elected officials. The Brownlow Committee consider this to be particularly problematic as the Constitution envisioned the President as the head of the Executive Branch but he lacked the power to control the plethora of independent agencies and government corporations.

Fourth, the reorganization of the agencies could accelerate the speed of agency decision-making because a single individual would act as the head for the administrative functions of the former independent agencies, replacing the boards or commissions. With a single individual in charge, the agencies could operate more decisively than before the reorganization.

The opponents of Brownlow proposal identified several major disadvantages. First and most importantly, it concentrated too much power in the hands of the President, particularly if the President would be allowed to continuously reorganize the internal structures of the twelve departments and their internal units. The opponents fanned fears that this would lead to the President acting as a dictator rather than an elected public official.

Second, the opponents charged that the benefits to be gained by reducing or eliminating duplicative efforts by the FDIC, the OCC, and the Federal Reserve were overblown. In fact, they argued that there was less duplication of efforts than suggested. For example, the Federal Reserve in its Annual Report in 1938 took issue with the amount of overlap alleged to exist among the Federal Reserve, the OCC, and the FDIC by noting that there was, in fact, no overlap in terms of the banks each agency examined.[53]

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[52] *Id.* at 3.
[53] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, TWENTY-FIFTH ANNUAL REPORT 14-15 (1938).

Third, many of the independent agencies questioned the wisdom of the reorganization and any reallocation of authority or functions among the units within the twelve departments. The Federal Reserve argued that it needed to maintain its supervisory functions in order to competently perform its monetary policy duties. In its 1938 Annual Report, the Federal Reserve commented that each of the bank supervisory agencies put a different emphasis on the policies that they sought to advance. Because the Federal Reserve was responsible for monetary and credit policy (unlike the OCC or the FDIC), it was concerned about advancing policies that not only maintained the safety and soundness of individual institutions but that maintained "sound credit conditions in the aggregate and a sound banking system."[54] These obligations to maintain "sound credit conditions in the aggregate and a sound banking system" are what most financial commentators today would refer to as maintaining financial stability and managing systemic risks.

C. What Happened to the Proposal?

President Roosevelt announced his support for the Brownlow Committee's recommendations in his message to Congress on January 12, 1937.[55] In this speech, he summarized the committee's recommendations. He noted that the fourth recommendation of the committee was to "[o]verhaul the 100 independent agencies, administrations, authorities, boards, and commissions, and place them by Executive Order within one or the other of the following twelve major Executive departments: State, Treasury, War, Justice, Post Office, Navy, Conservation, Agriculture, Commerce, Labor, Social Welfare, and Public Works; and place upon the Executive continuing responsibility for the maintenance of effective organization."[56] He urged Congress to enact the necessary legislation to allow a reorganization of the administrative agencies based upon the committee's recommendations.

The President sent to the 75th Congress a bill that would have allowed for the entire range of the Brownlow Committee's recommendations regarding how to reorganize the federal administrative agencies. It faced strong opposition because it would have allowed the President a free hand in how the administrative agencies were reorganized without any significant congressional input.[57] Republicans denounced it as authoritarian.[58] In addition, almost every special interest took exception to some part of the bill.[59] Further undermining the chances of the recommendations being enacted into law was the fact that the Brownlow Committee itself seems to have considered its mandate to be to produce an impartial, academic analysis, even if they considered themselves to be the "President's committee."[60] As a result, the committee members made little attempt to manage the political process to enhance the chance that their recommendations would be successfully enacted.

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[54] *Id*. at 16.
[55] President Franklin Delano Roosevelt, Message to Congress Recommending Reorganization of the Executive Branch (Jan. 12, 1937), http://www.presidency.ucsb.edu/ws/?pid=15343.
[56] *Id.*
[57] John W. Jeffries, *Executive Reorganization Act* in John W. Jeffries and Gary B. Nash, eds. ENCYCLOPEDIA OF AMERICAN HISTORY: THE GREAT DEPRESSION AND WORLD WAR II, 1929 TO 1945, v. VIII (Rev. Ed., 2010).
[58] Roberts, *supra* note 30, at 4.
[59] *Id.*
[60] *Id.* at 5-6.

The fact that the broader proposals for reorganizing the federal agencies would be contentious was known at the time. Roosevelt even told Brownlow that he doubted if the plan would succeed because similar proposals had been put forth since President McKinley had failed but that "we've all got to keep trying and maybe someone will succeed."[61]

A version of the reorganization bill that was far more limited than what the President requested passed the Senate.[62] The Senate-passed measure was considered and amended by the House.[63] Ultimately, it failed to pass before the end of the congressional term.[64]

The 76th Congress took up a revised version of the reorganization bill, H.R. 4425, that was considerably more limited the version considered by the 75th Congress.[65] The new bill prohibited the President from transferring, consolidating, or abolishing 21 agencies, including the SEC, the FDIC, and the Federal Reserve.[66] It also required the President to submit any reorganization plans to Congress prior to January 21, 1941, and allow Congress to veto such plans if two-thirds of both houses voted against the plan.[67] This version of the bill ultimately became the Reorganization Act of 1939.

In addition to the broader reorganization bill, the Senate considered a bill proposed by Senator William H. Smathers (D-NJ) to transfer all of the banking supervisory authority of the OCC, the Federal Reserve and the FDIC to a new entity within the Treasury Department called the Bureau of Examination and Supervision.[68] It would have renamed the FDIC as the Federal Bureau of Insurance, which would have the same insurance authority except that it could not expel a bank from its insurance unless the Federal Reserve approved.[69] In effect, Senator Smatters' bill would have implemented the concepts underlying the Brownlow Committee's recommendations but in the limited area of banking regulation.

The bill was not well received. The Federal Reserve opposed it on the grounds that it needed greater supervision over banks in order to fulfill its monetary policy objectives.[70] This bill was not enacted prior to the expiration of the term of the 75th Congress and so died. It was not reintroduced during the term of the 76th Congress.

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[61] *Id.* at 10-11 (quoting from Louis Brownlow, Transcript of Lectures Given at the University of Minnesota, April 10-12, 1940).
[62] Henry B. Hogue, *Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress*, CONG. RESEARCH SERVICE RPT. NO. 7-5700 (December 11, 2012) at 12.
[63] *Id.*
[64] *Id.*
[65] H.R. 4425, 76th Cong. (1939).
[66] Hogue, *supra* note 62, at 13; H.R. 4425, *supra* note 65, §3.
[67] Hogue, *supra* note 62, at 13; H.R. 4425, *supra* note 65, §12.
[68] S. 3877, 75th Cong., 3d Sess. (1938); *Battle Looms Over Banking Power Setup*, MIDDLETOWN TIMES HERALD (MIDDLETOWN, NEW YORK) (Apr 22, 1938) at 8.
[69] *Battle Looms, supra* note 68.
[70] *Id.*

III. Brookings Study, 1937

A. The Proposed Consolidation

In 1937 the Brookings Institute submitted a report to the Senate Select Committee on Investigation of Executive Agencies of the Government recommending, among other things, the abolition of the Office of the Comptroller of the Currency (OCC) and the transfer of its supervisory powers to other two federal banking regulators, the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve.[71] The Brookings' recommendations aimed to make the regulation of banks more "efficient and economical."[72]

1. Structural Reorganization

Before getting to the heart of its analysis, Brookings noted that the United States has a dual banking system, under which both the states and the federal government regulated the banks that they respectively chartered.[73] It also commented that consolidating the federal banking regulators would be a useful step towards ending the dual banking system and moving towards a unified, national banking system. Brookings, however, stated that it was "beyond the assigned function of this report to weigh the advantages and disadvantages" of ending the dual banking system and replacing it with a unified banking regime.[74]

Even with the dual banking system remaining in place, Brookings believed the federal government only needed two banking agencies – one to handle monetary and credit policy and the other to supervise national banks and manage the federal government's relations with the state banks.[75] It recommended that the Federal Reserve continue to handle monetary and credit policy, while the FDIC should become be the sole federal supervisor for all banks except for the 12 Federal Reserve Banks.[76]

The FDIC in its capacity as the banking supervisor would be responsible for conducting bank examinations, supervising bank holding company affiliates, and controlling the interlocking directorates of member banks of the Federal Reserve System.[77] At the time of the study, the Federal Reserve held the latter two powers but Brookings consider that those powers had more to do with the safety and soundness of the banks than with monetary or credit policy and thus, should be conducted by the FDIC. The FDIC would also have the power to authorize branches for national banks, state member banks, and insured state nonmember banks, although the Federal Reserve would be allowed to veto branches by any member bank (national or state).[78] At the time of the study, the OCC was responsible for approving branches of national banks, the

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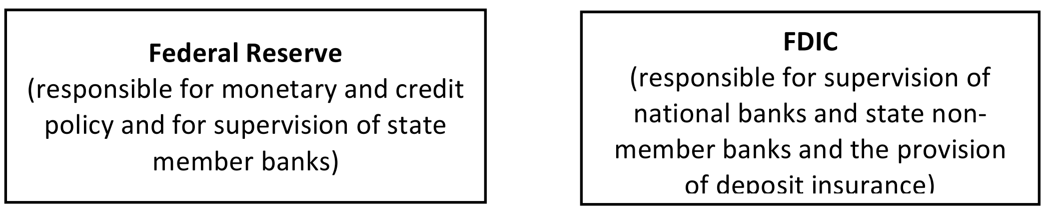
[71] Report on Government Financial Agencies Prepared by the Brookings Institution, 75th Cong., Investigation of Executive Agencies of the Government 37 (1937).
[72] *Id.*
[73] *Id.* at 38.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 39.
[77] *Id.* at 39, 43-44.
[78] *Id.* at 43.

Federal Reserve was responsible for approving branches of state member banks, and the FDIC was responsible for approving branches of state nonmember banks.[79]

After the reorganization, the Federal Reserve and the FDIC would have joint control over certain issues. The FDIC would not be able to charter a national bank without the approval of the Federal Reserve and the Federal Reserve would not be able to admit a state bank as a member of the Federal Reserve System without the approval of the FDIC.[80] The reason that Brookings felt such joint control was justified was because the FDIC was required by law to insure every state bank that became a member of the Federal Reserve System and the Federal Reserve was required by law to automatically admit every nationally chartered bank as a member of the Federal Reserve System.[81] Thus, Brookings believed that the agencies should have a say regarding the entities entitled to participate in their programs.

Figure 4
Reorganization of Federal Banking Regulators After the Implementation of the Brookings Proposal



In addition, Brookings considered the setting of maximum interest rates on time deposits to be both a credit policy issue that should fall within the remit of the Federal Reserve and a safety and soundness issue that should fall within the remit of the FDIC.[82] It recommended that a five-member committee be established to set interest rate ceilings with two members from the FDIC, two members from the Federal Reserve, with the Treasury Secretary or his representative serving as the fifth member.[83]

2. Proposed Implementation

Reorganization of Regulatory Powers: Brookings stated that it was "impracticable" to consolidate the federal supervision of banks into any agency other than the FDIC because the FDIC was the only agency that had the appropriate incentives to examine the 7,000 state banks that it insured but which were not members of the Federal Reserve System.[84] Since those banks were neither national banks nor members of the Federal Reserve System, neither the OCC nor the Federal Reserve had a stake in properly supervising those state banks.

[79] *Id.*
[80] *Id.* at 39.
[81] *Id.*
[82] *Id.* at 44.
[83] *Id.* at 45.
[84] *Id.* at 39-40.

Brookings recommended the abolition of the Office of the Comptroller of Currency.[85] It stressed that the OCC was the most feasible agency to abolish because their responsibilities could easily be transferred to the Federal Reserve and the FDIC but the reverse was not true.[86]

Brookings did not provide any specific suggestions regarding how the powers of the OCC should be transferred to the FDIC and the Federal Reserve or how the bank supervisory powers of the Federal Reserve should be transferred to the FDIC. It did not suggest whether this should be done in phases or all at once, how long the transition period should be, or whether all of the OCC staff should be transferred to the other agencies.

Personnel Issues: Brookings did not specify whether the any of the staff members in the OCC or the Federal Reserve would be transferred to the FDIC when the functions that they were fulfilling, such as conducting examinations or managing banks in receivership, were transferred to the FDIC. It seems likely that at least some of them would have become employees of the FDIC because the FDIC could have fulfilled all of the responsibilities being transferred to it with its existing staff.

Funding the Reorganization: Brookings made no attempt to estimate how much the proposed reorganization would cost. Brookings did recommend that, following the reorganization, the FDIC should be housed within the Federal Reserve building in Washington, probably in order to facilitate the working relationship between the FDIC and Federal Reserve.[87]

B. Arguments for and Against the Proposal

Brookings ascribed at least five benefits to centralizing bank examinations in the FDIC. First, it would reduce costs because of economies of scale. While no banks were subject to multiple examinations by different federal banking regulators, the overhead costs of each agency maintaining its own cadre of examiners were not negligible.[88] In addition, it would reduce travel costs to have one set of examiners review all of the banks in a particular geographic area at once rather than having three sets of examiners sent out to examine only small subsets of these banks.[89]

Second, centralizing bank examinations in the FDIC would promote the "uniformity of standards of examination" which should allow for more effective oversight.[90] At the time of the Brookings' study, the Federal Reserve, the OCC, and the FDIC did not always agree on the standards to which banks should be held, even in the areas of lending and investment standards. As a result, banks had some flexibility to engage in regulatory arbitrage by changing their charters or whether they were members of the Federal Reserve System. These changes would allow them to choose which federal regulator would supervise them and usually they opted for the one whose policies they felt were better for the banks' business. Regulatory arbitrage is problematic because

[85] *Id.* at 39.
[86] *Id.*
[87] *Id.* at 45.
[88] *Id.* at 39.
[89] *Id.*
[90] *Id.*

it usually leads to a race to the bottom as banks seek the regulator with the weakest standards in order to increase the banks' profits.

Banks would not only engage in regulatory arbitrage but certain jointly owned national and state banks would seek to hide financial problems from their examiners by moving assets among themselves.[91] The Brookings proposal would have reduced the ability of banks to engage in such schemes because the FDIC examiners would be looking at the books for all of the members of a banking group and would have been more likely to have uncovered such activities.

Third, centralizing bank examinations with the FDIC would give supervision authority to the federal agency with the strongest incentives to see that the banks are well managed from a safety and soundness perspective. According to Brookings, the "examination [of banks] is more important to the FDIC than the Federal Reserve System" because the FDIC insures the banks' deposits and, thus, has a direct interest in whether a particular bank becomes insolvent.

Nevertheless, Brookings did acknowledged that the Federal Reserve had strong interests in maintaining the health of its member banks because of the role that the Federal Reserve Banks played as a lender to banks and holding the reserves of their member banks.[92] Therefore, Brookings recommended that the Federal Reserve should have access to the FDIC's examination reports and the ability to make follow up examinations when the Federal Reserve needs additional information.[93] At the time of the Brookings study, the Federal Reserve relied upon examinations of national banks conducted by the OCC and relied on state examinations for the 1,051 state chartered member banks.[94]

Fourth, centralizing bank examinations with the FDIC would lower the costs of such examinations for national banks.[95] At the time of the study, national banks paid fees to the OCC to cover the costs of the examinations. The FDIC, however, conducted examinations of the state banks that it insured for free. Brookings believed that the FDIC could examine all of the banks assigned to it without charging the banks fees by covering the costs for the examinations out of its investment income.[96]

Finally, Brookings predicted that the recommendations made in the report would allow the Federal Reserve Board more time to devote to credit policy by greatly reducing the amount of administrative tasks.[97] Brookings felt that it was more important for the Federal Reserve's focus to be unimpeded by administrative tasks that the FDIC could easily handle given the importance of monetary and credit policy for addressing business ills.

Critics raised several disadvantages of this scheme. First, critics were concerned consolidating the bank examination functions into one agency would destroy regulatory competition, which

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[91] *Id.* at 39.
[92] *Id.* at 40.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 41.
[96] *Id.*
[97] *Id.* at 46.

they believed helped check excessive regulation and fostered more efficient regulations. Not everyone agreed that regulatory competition was desirable or whether the then-existing structure actually resulted in competition among the banking agencies.[98] In addition, critics of the proposal argued that the existing structure worked well enough so that there was no need to "fix" it by consolidating the bank examination functions into a single agency.[99]

C. What Happened to the Proposal?

On April 3, 1939, Senator Fred Brown (D-NH) introduced a bill, S. 2045, to the Senate that would have consolidated all bank examining functions into the FDIC.[100] While the bill did not mention the Bookings Study, it did reflect the Brookings's proposal to consolidate bank examination powers into the FDIC. After being introduced, S. 2045 was referred to the Senate Committee on Banking and Currency. It never left that committee and died when the term of the 76th Congress expired.

On March 1, 1939, Rep. Jerry Voorhis (D-CA12) introduced a similar bill, H.R. 4931, in the House of Representatives that also would have made the FDIC the sole examiner of insured banks.[101] After being introduced to the House, H.R. 4931 was referred to the House Committee on Banking and Currency. It never left that committee and died when the term of the 76th Congress expired.

The Reorganization Act of 1939 was enacted on April 3, 1939. On September 5, 1939, World War II began in Europe, although the United States did not enter the war until December of 1941. Those two events, however, caused Congress's interest in reorganizing the banking regulators to wane. Congress did not again seriously consider this issue until 1949 when the Hoover Commission released its recommendations.

IV. Hoover Commission Proposals 1949

A. The Proposal

The Hoover Commission was created in 1947 by the Lodge-Brown Act.[102] The commission had twelve members with former President Herbert Hoover serving as chairman.[103] To create its report, the Commission took the most valuable information from the reports of the twenty-four

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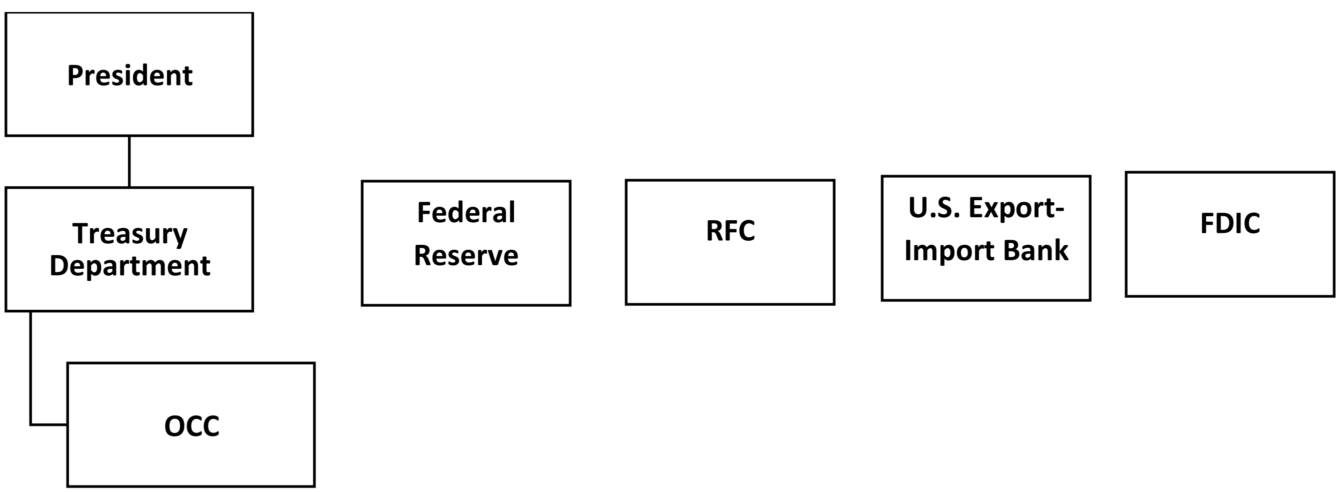
[98] Andrew S. Carron, *Banking on Change: The Reorganization of Financial Regulation*, 2 BROOKINGS REV. 12, 17 (1984).
[99] *Id.* at 16.
[100] S. 2045, 76th Cong. (1st Sess. 1939). Senator Fred H. Brown (D-NH) would later serve as the Comptroller General of the United States. *Brown, Fred Herbert*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS (July 8, 2014), http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000916.
[101] H.R. 4931, 76th Cong. §5 (1st Sess. 1939).
[102] US COMM'N, ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, REPORT vi (1949) [hereinafter Hoover Comm'n Rep.]. The act was named after the senators who sponsored it, Senator Henry Cabot Lodge (R-MA) and Senator Fred H. Brown (D-NH). Senator Lodge would later claim that the implementation of some of the Hoover Commission recommendations resulted in saving the federal government $3 billion. Eric Pace, *Henry Cabot Lodge, 82, is Dead*, N.Y. TIMES, Feb. 28, 1985.
[103] Hoover Comm'n Rep., *supra* note 102, at vi.

task forces that it had formed to provide in-depth research and analysis on the principal problems with government and management.[104] The purpose of the report was to increase efficiency through reorganization of the executive branch.[105] The Hoover Commission designed their report as a guideline for how to run the government effectively.[106] The Hoover Commission believed that if all of their recommendations had been implemented, not just those dealing with the banking regulators, the executive branch of the government would have saved about $3 billion a year in operating costs.[107]

1. Structural Reorganization

Figure 5 illustrates the federal bank regulatory structure at the time that the Hoover Commission was developing its recommendations. The OCC, the FDIC and the Federal Reserve were the federal banking regulators. Figure 5 also shows a number of lending agencies that the Hoover Commission decided to deal with when it made its recommendations regarding the banking regulators. The lending agencies were the Reconstruction Finance Corporation (RFC) and the Export-Import Bank.

Figure 5
Existing Federal Banking and Lending Agencies in 1949



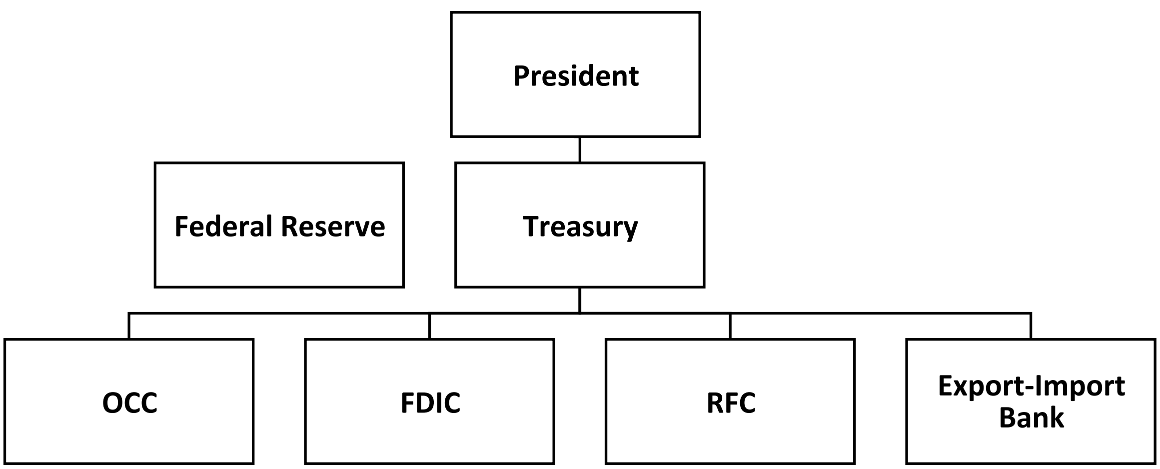
The Hoover Commission and several of the task forces that it created acknowledged the need to consolidate the federal bank regulatory agencies but they had differing opinions on how the consolidation should occur. The Hoover Commission itself recommended that the Treasury absorb the responsibilities of the FDIC.[108] In addition, the Treasury would also gain control over

[104] *Id.* at *vi-vii*. The Lodge-Brown Act had not specified that these task forces be created. The Hoover Commission decided to create them after identifying 24 principal problems that it felt needed to be addressed. *Id.* at vi.
[105] *Id.* at *xiv*.
[106] *Id.* at *vii*.
[107] *Id.*
[108] *Id.* at 208.

the RFC as well as the U.S. Export-Import Bank.[109] The Hoover Commission believed the consolidation should occur in the Treasury because it felt that the Treasury should be responsible for, among other things, the supervision of credit institutions and the inspection of lending agencies.[110] In addition, like the Brownlow Commission in the 1930s, the Hoover Commission wanted to reduce the number of agencies reporting directly to the president. Thus, it felt that it was better to only have the Treasury Secretary report to the president because the president could not consistently give enough attention to the supervision of the Treasury and three independent agencies – the FDIC, RFC, and Export-Import Bank.[111]

The Secretary of the Treasury would supervise the FDIC unless he delegated the duty to someone else and the "reorganization of the [Treasury] Department should be made without regard for the retention of existing offices and units except as they conform to the new structure."[112] Thus, the new offices were to be overhauled and not merely a combination of the old agencies' offices and employees.[113]

Figure 6
Hoover Commission Reorganization Structure



The Hoover Commission's recommendation was at odds with the recommendations put forth by three of its task forces. The Task Force on Regulatory Commissions and the Task Force on Fiscal Budgeting and Accounting Activities agreed that banking supervision should be consolidated within the Federal Reserve, not the Treasury, and that the FDIC should remain as a separate entity providing deposit insurance.[114] The Task Force on Lending Agencies did not opine on banking supervision but did recommend that the FDIC be placed under the supervision

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[109] *Id.*
[110] *Id.* at 201.
[111] *Id.* at 207.
[112] *Id.* at 210-211.
[113] *Id.* at 211.
[114] Bray Hammond, *Hoover Commission Recommendations and Federal Reserve Board* 2, 11-12, 116-117 (Fed. Res. Board of St. Louis, 1949).

of the Federal Reserve.[115] The level of analysis in support of these recommendation varied greatly among the task forces with the Task Force on Regulatory Commissions providing the most comprehensive analysis regarding why banking supervision should be consolidated within the Federal Reserve.

The Task Force on Regulatory Commissions studied nine agencies: Interstate Commerce Commission, Federal Reserve Board, Federal Trade Commission, Federal Power Commission, Securities and Exchange Commission, Federal Communications Commission, National Labor Relations Board, US Maritime Commission, and Civil Aeronautics Board. They recommended "that all the bank supervisory activities be combined in one, preferably the Federal Reserve Board; the Federal Deposit Insurance Corporation, however, to be continued as a separate insuring body."[116] The Task Force on Regulatory Commissions argued the most important reason for the consolidation was to prevent banks from capitalizing on the different requirements between the Federal Reserve and the Federal Deposit Insurance Corporation.[117] According to this task force, the Federal Reserve was the best positioned to ensure examination policies do not affect the stability of monetary policy.[118]

The Task Force on the Regulatory Commissions wanted the Chairman or Vice Chairman of the Federal Reserve Board to become a director of the FDIC.[119] In addition, the Task Force on Regulatory Commissions recommended that all insured banks should be held accountable to the reserve requirements of the Federal Reserve member banks.[120]

The Task Force on Fiscal Budgeting and Accounting Activities, which included a study on the Treasury, basically concurred with recommendations of the Task Force on Regulatory Commissions that the OCC's bank supervisory functions should be moved to the Federal Reserve.[121] It believed that the responsibilities of the OCC better align with the Federal Reserve than the Treasury.[122] In addition, the Task Force stated that if the OCC was not moved it should be placed under the control of the Banking and International Finance Assistant Secretary.[123]

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[115] TASK FORCE ON LENDING AGENCIES, REPORT ON LENDING AGENCIES FOR US COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T ix (1949) [hereinafter Task Force on Lending Agencies Rep.].
[116] Hammond, *supra* note 114, at 2.
[117] TASK FORCE ON REG. AGENCIES, REPORT ON REG. AGENCIES FOR US COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T 116 (1949) [hereinafter Task Force on Reg. Agencies Rep.].
[118] *Id.* at 117
[119] *Id.* at 11-12.
[120] *Id.* at 118.
[121] TASK FORCE ON FISCAL BUDGETING & ACCT. ACTIVITIES, REP. ON FISCAL BUDGETING & ACCT. ACTIVITIES FOR US COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T 12 (1949) [hereinafter Task Force on Fiscal Budgeting & Acct. Activities Rep.].
[122] *Id.*
[123] *Id.* at 19.

Figure 7
Reorganization Structure Proposed by the Task Force on Regulatory Commissions and the Task Force on Fiscal Budgeting and Accounting

Federal Reserve (responsible for monetary and credit policy and for supervision of national and state banks)	**FDIC** (responsible for the provision of deposit insurance)

The Task Force on Lending Agencies surveyed the six major lending agencies of the government: Farm Credit Administration, Farmers' Home Administration, Reconstruction Finance Corporation, Housing and Home Finance Agency, Export-Import Bank of Washington, and the Federal Deposit Insurance Corporation.[124] It did not express an opinion about consolidating federal banking regulation into a single agency. Instead, the Task Force on Lending Agencies suggested the FDIC should be under the supervision of the Federal Reserve Board rather than as an independent agency.[125] The Task Force on Lending Agencies believed the Federal Reserve Board would be the best place for the FDIC because their examining functions were so similar.[126] In addition, the Federal Reserve already examined insured banks that were members of the Federal Reserve System and the FDIC was only responsible for non-member insured banks.[127] The Task Force on Lending Agencies stated that if their recommendation in regards to the FDIC was not accepted then the FDIC should at least be allowed to review the assessment base when insufficient evidence was provided by other examining agencies to show the assessment has been paid.[128]

2. Proposed Implementation

Reorganization of Regulatory Powers: Neither the Hoover Commission nor its task forces provided a timetable for completing the reorganizations of the banking agencies. They did not indicate whether they thought the reorganizations should be done all at once or in phases.

Personnel Issues: The Hoover Commission had recommended that the FDIC be placed within the Treasury Department. While it did not expressly say what would happen to the FDIC's staff, the implication from the Hoover Commission's report was that the FDIC would continue to employ all of its staff members that were part of the agency prior to the reorganization after it became part of the Treasury.

The Task Force on Regulatory Commissions recommended that the personnel from the existing agencies be transferred to whatever agency ultimately took control of the bank supervisory

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[124] Task Force on Lending Agencies Rep., *supra* note 115, at *ix*.
[125] *Id.* at 52.
[126] *Id.* at 53.
[127] *Id.*
[128] *Id.* at 108.

functions. The Task Force on Regulatory Commissions had recommended that the supervisory functions be consolidated in the Federal Reserve. Thus, it would have transferred the personnel of the OCC and the FDIC to the Federal Reserve as part of the reorganization.

Funding of the Reorganization: Neither the Hoover Commission nor its task forces discussed how the reorganization of the banking regulators should be financed.

B. Arguments for and Against the Proposal

Like the recommendations of the Brownlow Committee, the Hoover Commission's recommendations attempted to centralize power in the hands of the president in order to increase accountability.[129] Having too many independent agencies covering many of the same problems made it difficult to determine who to hold responsible if things went wrong.[130] Thus, the Hoover Commission attempted to consolidate agencies into Executive Branch departments or agencies to reduce the number of independent agencies over which the president had little control.[131]

In addition, by concentrating power in the Executive Branch agencies like the Treasury, the Hoover Commission's recommendations would have improved administrative efficiency.[132] Thus, the Hoover Commission attempted to consolidate agencies into Executive Branch departments or agencies in order to reduce the number of agencies that reported to the president.[133]

Another advantage of the Hoover Commission's recommendation was that there would be a complete elimination of overlap of authority by the regulators.[134] This would have saved both the banks and the agencies time and money. In addition, the Treasury would save money because the consolidation would be part of an internal reorganization of the Treasury that would streamline its operations around major functions.[135]

One major objection to the Hoover Commission's recommendations was that they would undermine effective banking supervision by giving the powers to an Executive Branch official who may be more prone to political influences than the existing independent agencies were. Many different parties objected to the Hoover Commission's recommendation to give the powers of the OCC to the Treasury Secretary on the grounds that the agency's independence was essential for effective banking supervision.[136] John Snyder, then Secretary of the Treasury, and

[129] John Lederle, *The Hoover Commission Reports on Federal Reorganization*, 33 MARQUETTE L. REV. 89, 95 (Fall 1949).
[130] *Id*. Lederle quoted Woodrow Wilson who stated: "If it be divided, dealt out in shares to many, it is obscured; and if it be obscured, it is made irresponsible. But if it be centered in heads of the service and in heads of branches of the service, it is easily watched and brought to book." *Id*.
[131] *Id*. at 97.
[132] *Id*. at 96.
[133] *Id*. at 97.
[134] *Bankers Wonder About Transfer of Comptroller*, TUCSON DAILY CITIZEN, Apr. 5, 1950 at 25.
[135] *Hoover Commission Proposes Transfer*, THE HERALD (JASPER, INDIANA), Mar. 10, 1949 at 4.
[136] S. Rep. No. 81-1774, 4 (1950).

the American Bankers Association were among those who objected to giving the OCC's powers to the Treasury Secretary.[137]

Another major objection to the Hoover Commission's recommendations was that the Treasury Secretary lacked experience supervising banks and would not be well equipped to handle the examination and supervision responsibilities of agencies like the FDIC. A New York Times article noted that "bankers asserted that placing the FDIC in the Treasury is not logical. The examination and supervision of banks, they explained, is not one of the Treasury's functions."[138]

Opponents of the Hoover Commission's recommendations also disputed the contention that the consolidation would save the federal government money. The American Bankers Association noted that the OCC was funded by the fees that it collected from the banking industry, not appropriations.[139] In addition, the OCC already shared its reports with the FDIC and the Federal Reserve.[140] As a result, the American Bankers Association contended that very little duplication existed.[141]

The American Bankers Association also alleged that the Hoover Commission's proposal to consolidate banking supervisory powers in the hands of the Treasury Secretary might create a slippery slope towards nationalization of the banking industry.[142] This fear stemmed from the political nature of the position of the Treasury Secretary and from concerns that it would concentrate too much power in the Treasury.[143] The American Bankers Association felt that the Treasury already had significant power over the banking industry through its power to set interest rates on government securities.[144]

The recommendation of the Task Force on Regulatory Commissions to consolidate all supervisory functions in the Federal Reserve has faced four main criticisms. First, the Federal Reserve's focus on credit policy could be placed above supervisory standards.[145] Second, the Reserve's time should be spent on credit policy and not examination.[146] Third, there was a concern that the decentralized nature of the Federal Reserve banks would lead to a less effective bank examinations.[147] This concern arose from the perception that the Federal Reserve had an issue communicating with their field staff because of the decentralized nature of the Federal Reserve.[148] Finally, the proposal of the Task Force on Regulatory Commissions to require the non-member insured banks to be governed by the same requirements as those imposed on the

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137 *Reorganization Plan No. 1 of 1950: Hearings before the Committee on Expenditures in the Executive Departments*, 81st Cong. 5 (1950).
138 George A. Mooney, *Bankers are Cool to Hoover Report: Proposal to Transfer Federal Reserve Functions Meets Strong Opposition*, N.Y. TIMES, Mar. 13, 1949, at F1.
139 *Bankers Wonder, supra* note 134, at 25.
140 *Id*.
141 *Id*.
142 *Id*.
143 *Id*.
144 *Id*.
145 G. L. Bach, *Bank Supervision, Monetary Policy, and Government Reorganization*, 4 J. FIN. 269, 281 (1949).
146 *Id.*
147 *Id.*
148 *Id.*

Federal Reserve members faced the strongest criticism.[149] James Forrestal and Clarence J. Brown, two members of the Hoover Commission, disagreed with the majority opinion and believed authority over the FDIC should not be changed unless Congress decided to transfer all banking activities to the Treasury.[150]

C. What Happened to the Proposal?

Although many of the recommendations of Hoover Commission had widespread support, the recommendations related to banking supervision faced opposition and criticism.[151] The existing agencies and the industry groups that supported them opposed the reorganization because they did not want their powers diminished or altered.[152] In addition, those in the Senate and House who had a vested interest in the existing administrative structure also opposed the reorganization.[153]

Rep. Norris Cotton (R-NH2) also claimed that the Truman Administration and the Democrats in Congress were reluctant to act upon the Hoover Commission's recommendations because it would result in a reduction in the federal payrolls that would cost them votes.[154] After presenting the commission's proposal, Hoover realized that he had not won over the full support of President Truman. In an effort to gain congressional support for the commission's proposals, Hoover helped to start the Citizens' Committee for the Hoover Commission.[155]

In 1950, President Truman submitted to Congress thirty-five plans, most of which followed the recommendations of the Hoover Commission, to reorganize government agencies.[156] Among those thirty-five plans was Reorganization Plan Number 1, which included a plan to transfer the powers of the OCC to the Secretary of Treasury as the Hoover Commission had recommended.[157] On March 31, 1950, Rep. Absalom Willis Robertson (D-VA7) introduced S. Res. 246. It was a resolution stating that the Senate was not in favor of the President's Reorganization Plan No. 1.[158] The Senate passed this resolution on May 11, 1950.

Reorganization Plan No. 1 faced severe criticism from many parties including some members of the Hoover Commission. Much of the opposition was due to the concern that the functions of the Comptroller of Currency would not be performed effectively if its structure was not kept

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149 *Id.*
150 Godfrey N. Nelson, *Plan to Elaborate Treasury Scanned: Hoover Group's Conclusions as to Financial Agencies Not Unanimous*, N.Y. TIMES, Mar. 20 1949, at F1.
151 *Bankers Wonder, supra* note 134, at 25.
152 Lederle, *supra* note 129, at 98; *Bankers Wonder, supra* note 134, at 25.
153 Lederle, *supra* note 129, at 98; *Hoover Commission – Naming Names*, THE TERRE HAUTE STAR, May 18, 1950 at 4 (reprint of Christian Science Monitor piece noting that the OCC reported to Congress and congressional leaders wanted to keep the OCC from Executive Branch control).
154 Norris Cotton, *Cotton Reports: Action Taken by Congress on Hoover Recommendations*, NASHUA TELEGRAPH, Jan. 5, 1950 at 3.
155 GARY DEAN BEST, HERBERT HOOVER, THE POSTPRESIDENTIAL YEARS, 1933-1964, V. 2: 1946-1964, 330 (1983).
156 *Record of the 81st Congress (Second Session)*, CQ PRESS, http://library.cqpress.com/cqresearcher.
157 *Reorganization Plan No. 1, supra* note 137, at 3.
158 S. Res. 246, 81st Cong. (2nd Sess. 1950).

intact.[159] The Secretary of Treasury at the time, John Snyder, expressed his plan to keep the Comptroller of Currency as a separate office within the Treasury, but the majority expressed concerns about what potential actions a future Secretary of Treasury might take, which could include eliminating the OCC.[160]

An amended plan without the provision to consolidate supervision of banks under the Secretary of the Treasury was later passed.[161]

V. Commission on Money and Credit, 1961

A. The Proposal

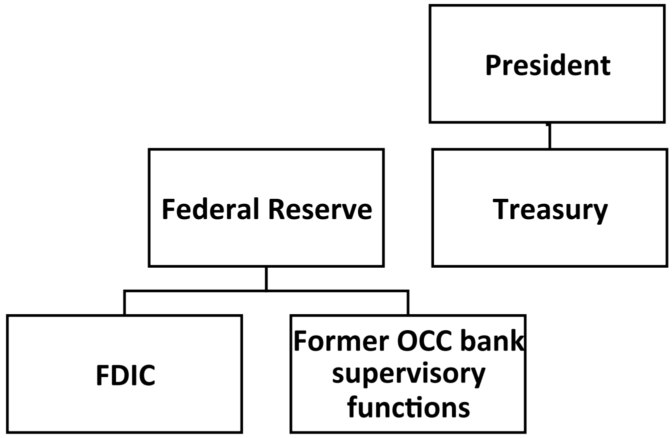
The Committee for Economic Development, a private, nonprofit organization devoted to researching issues related to economic stability and providing suggestions for reform, established the Commission on Money and Credit in 1958 to study the "adequacy of the nation's monetary and financial structure and its regulation and control."[162] The recommendations were "designed to contribute to the more effective functioning of the economy or propose broad guides for specific policy discussions."[163] The Commission was comprised of twenty-five members, including bankers, business leaders, economists, labor representatives, farmers, and other interest group representatives.[164]

1. Structural Reorganization

The Commission recommended all examining and supervisory functions to be consolidated in the Federal Reserve System.[165] The Comptroller of the Currency and the FDIC would be transferred to the Federal Reserve to create a single commercial banking examiner.[166] For saving and loan associations and mutual savings banks, the Commission recommended that an examination authority at the federal level be created and its activities should be coordinated with those of the Federal Reserve and the state thrift commissions.[167] The Commission also encouraged Congress and regulating authorities to review their regulations to ensure protection against "unwarranted personal benefits accruing to individuals responsible for handling institutional funds."[168]

[159] *Reorganization Plan No. 1, supra* note 137, at 19.
[160] *Id.* at 5.
[161] *Id.*
[162] COMMISSION ON MONEY AND CREDIT, MONEY AND CREDIT: THEIR INFLUENCE ON JOBS, PRICES, AND GROWTH 1 (1961) [hereinafter CMC Rep.].
[163] *Id.* at 6.
[164] Peter Edson, *Economic Roundup Picture*, THE INDIANA GAZETTE, June 22, 1961 at 8.
[165] CMC Rep., *supra* note 162, at 174.
[166] *Id.*
[167] *Id.* at 175.
[168] *Id.*

Figure 8
Commission on Money and Credit Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The Commission's report did not include any mechanics for how the recommendations should be carried out. It also lacked extensive reasoning or evidence behind their recommendations. In fact, the Commission stated that they purposefully did not go in depth in an effort to attract more readers.[169]

Personnel Issues: The Commission's report did not discuss whether the staff members of the OCC and the FDIC would be transferred to the Federal Reserve when the functions that they were fulfilling were transferred. The Commission's report recommended reducing the number of members on the Federal Reserve's Board from seven to five and reducing their terms of office from fourteen years to ten years. In addition, the Commission recommended that the president be allowed to appoint a Chairman and a Vice Chairman for the Federal Reserve whose terms would coincide with the president's term of office.

Funding of the Reorganization: The Commission's report did not discuss how the costs of the reorganization would be financed.

B. Arguments for and Against the Proposal

This proposal had three advantages. First, it would eliminate overlaps and duplications between the Federal Reserve, the OCC, and the FDIC in the areas of bank supervision and standards. Duplications, such as visits and inspections by multiple agencies, are costly and cause

[169] *Id.* at viii. It appears that their target audience was the average citizen who would likely not finish reading the recommendation if it was too long with too much statistical data.

inefficiencies.[170] It is possible to reduce the duplications without consolidating the three agencies, but that would require careful cooperation to ensure nothing is overlooked. [171]

Second, it would improve accountability for the banking sector by making only one federal regulator responsible for supervision. When there are multiple agencies responsible for supervision, there is little incentive to be transparent, because it is more difficult to pinpoint the agency responsible for a bank failure.[172]

Third, it would allow the Federal Reserve to take advantage of economies of scale to reduce the cost of supervision. Subject matter experts are better utilized, therefore saving money, when there is only one supervisory agency.[173] These experts can be applied to all sectors because institutions often offer a combination of services including banking, securities, and insurance.[174]

The first objection to the proposal, as noted by Milton Friedman, was that nothing was so "drastically wrong with our monetary and banking institutions" as to create a public consensus on the need for reform.[175] As a result, the Commission was unable to "crystallize a pre-existing informed consensus into a practical form suitable for legislative enactment."[176] The lack of public consensus on the need for reform raised questions about whether the costs of legislating the proposed changes would be worth the alleged benefits.

A second objection to this proposal was the amount of power that it would concentrate in the hands of the Federal Reserve.[177] As previously noted, the Federal Reserve already had tremendous power because it controlled monetary and credit policy. One constant theme running throughout American politics since the founding of the Republic is fear of concentrating too much power in a single entity or branch of government. This fear undermined the First and Second Banks of the United States in the early decades of the nation.

Another objection to the proposal by the Commission on Money and Credit was that it would heavily increase the administrative burden on the Federal Reserve.[178] According to James L. Robertson, a member of the Board of Governors of the Federal Reserve System, the Federal Reserve was already overworked with monetary functions and supervision of the 1,600 State member banks.[179] He also stated that bank supervision was too important for the responsibility to

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[170] Sabrina Pellerin, John Walter & Patricia Wescott, *The Consolidation of Financial Regulation: Pros, Cons, and Implication for the United States*, 95 ECONOMIC QUARTERLY 121, 139 (2009).
[171] *Id.*
[172] *Id.* at 139-140.
[173] *Id.* at 138.
[174] *Id.*
[175] Milton Friedman, *The Report of the Commission on Money and Credit: An Essay in Petitio Principii*, 52 AM. ECON. REV. 291, 293 (May 1962).
[176] *Id*. at 294.
[177] *Id*. at 301.
[178] *Conflicts of Jurisdiction Between the Comptroller of the Currency and the Federal Reserve Board*, 65 COLUM L. REV. 660, 677 (1965).
[179] *Hearings on H.R. 729 and H.R. 5874 Before the Subcomm. on Bank Supervision and Insurance of the H. Comm. on Banking and Curr*ency, 88th Cong., 1st Sess. 180 (1963) (statement by Board Governor James L. Robertson).

be combined with another responsibility.[180] In addition, the consolidation of all supervisory functions in the Federal Reserve would interfere with the independence of state regulatory agencies.[181]

C. What Happened to the Proposal?

Upon the release of the report, President John F. Kennedy issued a statement that the report "could make an important contribution to the health and strength of our economy."[182] The statement did not specifically address the report's recommendations to consolidate banking regulation in the Federal Reserve.[183] Senator A. Willis Robertson (D-VA), the then Chairman of the Senate Banking Committee, also commented that the report made "a very valuable contribution to current thinking on these subjects" but he objected to any changes that might make the Federal Reserve "subservient" to the president.[184]

Not everyone was so complementary about the Commission's report. Rep. Wright Patman (D-TX1) called the report a "boondoggle," although he conceded that it had some "moderately good recommendations."[185] Milton Friedman labeled the report as "both an irresponsible and a potentially mischievous document" because, if the report's recommendations were implemented, they would result in "the consolidation and still further expansion of arbitrary governmental power subject to no effective check."[186]

In the years since its publication, commentators, such as Robert Z. Aliber, a professor of international economics and finance at the University of Chicago, and Leonard Lapidus, a vice president of the Federal Reserve Bank of New York, have questioned the utility of the Commission because few of its recommendations were implemented.[187] Gerald Fischer, a professor of finance at Indiana University, however, observed that the report sparked an interest in "further examination of our financial system."[188]

In 1962, President Kennedy formed an interagency committee, the Committee on Financial Institutions, to evaluate the recommendations of the Commission on Money and Credit.[189]

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[180] *Id.*
[181] *Conflicts of Jurisdiction, supra* note 178, at 677.
[182] *President Pleased With New Tax Recommendations*, THE TIMES RECORD (TROY, NEW YORK), Jun 20, 1961 at 20.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] Friedman, *supra* note 175, at 301.
[187] Robert Z. Aliber, *The Commission on Money and Credit: Ten Years Later*, 4 J. MONEY CREDIT & BANKING 915, 925 (1970); Leonard Lapidus, *Discussion* in POLICIES FOR A MORE COMPETITIVE FINANCIAL SYSTEM: A REVIEW OF THE REPORT OF THE PRESIDENT'S COMMISSION ON FINANCIAL STRUCTURE AND REGULATION (Fed. Reserve Bank of Boston Conference Proceedings No. 8, June 1972).
[188] Gerald C. Fischer, *Proposed Changes in Banking Legislation – The Commission on Money and Credit, the Saxon, and the Heller Reports*, 80 BANKING L. J. 661, 662 (1963).
[189] Fischer, *supra* note 188, at 662-663; COMMITTEE ON FINANCIAL INSTITUTIONS, REPORT OF THE COMMITTEE ON FINANCIAL INSTITUTIONS TO THE PRESIDENT OF THE UNITED STATES vi (April 1963) [hereinafter Heller Com.]. The other members of the committee were the Treasury Secretary, the Attorney General, the Secretary of Agriculture, the Secretary of Health, Education, and Welfare, the Director of the Bureau of the Budget, the Chairman of the

Walter W. Heller, then Chairman of the Council of Economic Advisers, was appointed Chairman of the Committee and as a result, the committee is sometimes referred to as the Heller Committee.[190] The Heller Committee considered not only the consolidation proposal of the Commission on Money and Credit but also the consolidation proposals of the OCC's Advisory Committee on Banking, of James L. Robertson, a Governor of the Federal Reserve Board, and Egbert Erle Cocke, Jr., Chairman of the Board of the FDIC.[191]

Ultimately, the Heller Committee did not endorse the recommendations of the Commission on Money and Credit. Instead, the Heller Committee merely recommended that the existing agencies work to improve their cooperation and coordination efforts to achieve more uniform standards, regulations, and procedures.[192] It did suggest that consolidation of regulators should be considered in the future if these efforts failed to achieve important public goals.[193]

VI. Office of the Comptroller of Currency's Advisory Committee on Banking, 1962

A. The Proposal

James J. Saxon, the Comptroller of Currency, formed a twenty-four-member committee called the Advisory Committee on Banking to perform a complete study of the U.S. banking system.[194] The Advisory Committee on Banking was also known as the Saxon Committee.[195] The Advisory Committee on Banking recommended the unification of bank supervisory agencies to address the criticisms from banks about the substantive differences of policy between the three major banking regulators.[196] The committee noted: "Greater simplicity of operation, and more uniform application of policy, could be achieved through the consolidation of supervisory, examination and regulatory functions within a single agency."[197]

The committee had two important principles for any plan to consolidate examining powers.[198] The first principle was that federal control of state chartered banks and federal control of nationally chartered banks should be separated into two different agencies in order to reflect the

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Federal Reserve, the Chairman of the FDIC, the Chairman of the Federal Home Loan Bank Board, the Administrator of the Housing and Home Finance Agency, and the Comptroller of the Currency. Heller Com. at vi.

190 Fischer, *supra* note 188, at 662-663.

191 Heller Com., *supra* note 189, at 56-57. Cocke had proposed that the Federal Reserve should no longer engage in bank examination and supervision but instead, that the FDIC and the OCC should be responsible for such functions for national banks and the FDIC and state bank supervisors should be responsible for such functions for state banks. *Id*. at 56.

192 *Id*. at 62-63.

193 *Id*. at 63.

194 US Treasury Dep't Comptroller of the Currency, National Banks and the Future: Report of the Advisory Committee on Banking to the Comptroller of the Currency *iii* (1962) [hereinafter OCC Advisory Committee Report].

195 Fischer, *supra* note 188, at 662.

196 OCC Advisory Committee Report, *supra* note 194, at 137.

197 *Id.* at 138.

198 *Id.*

dual banking structure that exists within the United States.[199] In connection with this principle, the committee felt that the supervisory responsibilities for state chartered banks should rest mainly with state regulators, if they were prepared to adequately fulfill those obligations.[200] The second principle was the need to clearly separate the exercise of monetary policy from the exercise of bank supervisory functions.[201]

1. Structural Reorganization

To implement the first principle, the Advisory Committee on Banking recommended that supervision of national banks be consolidated into the OCC and supervision of the state banks should be consolidated in the FDIC. The committee also recommended that the OCC and the FDIC should become units within the Treasury Department.[202] It thought it was important to have banking regulation under the Treasury Secretary because he was the "chief financial officer" for the U.S. government.[203]

The committee suggested three main steps to consolidate the regulators. First, the committee recommended that the Comptroller of the Currency take over the supervisory and regulatory authority for all nationally chartered banks.[204] This required that some functions of the Federal Reserve and the FDIC would be transferred to the OCC.

Second, the FDIC, reorganized under the Treasury, would have authority over state chartered banks, including the power to approve mergers.[205] The FDIC would have the power to regulate all state chartered banks whether or not they were members of the Federal Reserve System.[206] At the time of this proposal, the Federal Reserve was responsible for supervising and examining state chartered banks who were members of the Federal Reserve System.

Finally, the Federal Reserve Board would no longer play a supervisory function for national banks or for bank holding companies but instead, it would focus on its responsibility for monetary policy.[207] It would continue to oversee the twelve Federal Reserve Banks.

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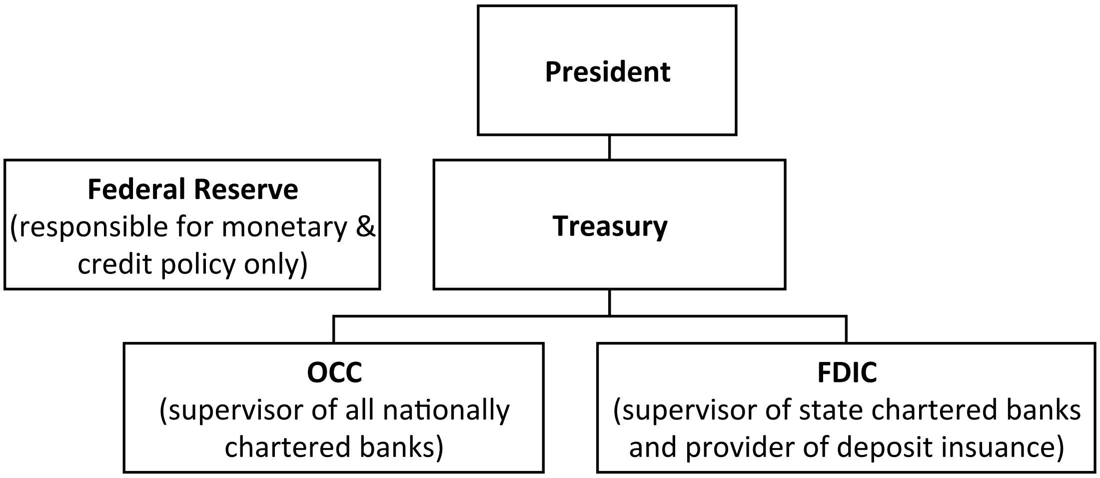
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*; Howard H. Hackley, *Our Baffling Banking System – Part II*, 52 VA. L. REV. 771, 810 (1966).
204 OCC Advisory Committee Report, *supra* note 194, at 138.
205 *Id.*
206 *Id.* at 138-139.
207 *Id.* at 139.

Figure 10
OCC Advisory Committee Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The committee's recommendations and analysis regarding reorganizing the federal financial regulators were very brief and they provided no details regarding a timetable for the reorganization or whether it should be done all at once or in phases.

Personnel Issues: Because of the brevity of its recommendations and analysis, the committee did not discuss what would happen to the personnel of the existing agencies during or after the reorganization.

Funding of the Reorganization: The committee did not discuss how its reorganization would be financed.

B. Arguments For and Against the Proposal

One benefit of this proposal is that it would have concentrated supervision of national banks into one agency and supervision of state banks in another. This would have eliminated overlaps and duplications between the Federal Reserve, the OCC, and the FDIC. It also would improve accountability for the national and state banking sectors by making only a federal regulator responsible for supervision of each sector.

One disadvantage of this proposal is that it might have weakened the dual banking structure by making the Treasury Department ultimately responsible for federal regulation of both national and state banks. The Treasury Department might be inclined to favor policies that give a competitive edge to national banks at the expense of state banks, particularly regional and community banks.

Another disadvantage of the Advisory Committee's proposal was that it did not include a recommendation for general standards applicable to all banks. This left the door open to a continuation of the conflict between state regulatory agencies, on one side, and the FDIC and the OCC, on the other.[208]

C. What Happened to the Proposal?

Legislation did not result from the Advisory Committee's report. This is likely due to the disagreement on which agency should hold the supervisory functions.[209]

[208] *Id.* at 676.
[209] Richard E. Mooney, *Changes Weighed in Banking Setup*, N.Y. TIMES, October 7, 1962, at 35.

VII. The Patman Bill and the Multer Bill, 1965

A. The Proposal

On March 29, 1965, Rep. Wright Patman (D-TX1) introduced the H.R. 6885, also known as the Banking Act of 1965. Because the bill became so identified with its sponsor, it became commonly known as the Patman Bill. The purpose of the bill was to consolidate the bank supervisory powers of the OCC, the FDIC, and the Federal Reserve into the Treasury Department.[210]

Rep. Abraham J. Multer (D-NY13), the second-ranking majority member on the House Banking and Currency Committee, introduced H.R. 107 earlier in 1965.[211] Unlike H.R. 6885, H.R. 107 called for the creation of a Federal Banking Commission, into which the bank examination and supervision functions of the OCC, FDIC, and the Federal Reserve would be transferred.[212] Rep. Multer had introduced a similar bill, H.R. 5874, in 1963.[213]

Part of the motivation for these bills were four bank failures in 1964-65: the First National Bank of Marlin in Texas, which closed on March 10, 1964, the Crown Savings Bank in Virginia, which closed on September 4, 1964, the San Francisco National Bank in California, which closed on January 22, 1965, and the Brighton National Bank in Colorado, which also closed on January 22, 1965.[214] Investigations into the bank failures revealed that they were caused by the "infiltration by criminal elements and irregularities that might have been checked had the Comptroller, the Federal Reserve and the FDIC been in closer cooperation."[215]

In addition, James J. Saxon, the Comptroller of the Currency, had run afoul of Congress because he was accused of employing weak standards when determining which banks to charter as national banks.[216] Between 1961 and 1965, Saxon had chartered 434 banks, almost double the 227 banks that had been chartered in the ten years prior to his appointment.[217] Both bills would have eliminated the OCC and were seen as ways to remove Saxon from office.[218]

1. Structural Reorganization

The Patman Bill, H.R. 6885, would transfer the supervisory powers of the Office of the Comptroller, the Federal Deposit Insurance Corporation, and the Federal Reserve to the

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[210] *Consolidation of Bank Examining and Supervisory Functions: Hearings Before the Subcomm. on Bank Supervision and Ins.*, 89th Cong. 59 (1965) [hereinafter House Banking Consolidation Hearings] (Reorganization of Federal Bank Supervision: A Staff Analysis and Comparison of H.R. 107 and H.R. 6885).

[211] *Senate and House Units Probe Bank Failures* in CQ ALMANAC 1965 1533-34 (21st ed., 1966), http://library.cqpress.com/cqalmanac/cqal65-875-26759-1261087; *Abraham Multer Ex-Congressman*, N.Y. TIMES, November 7, 1986.

[212] House Banking Consolidation Hearings, *supra* note 210, at 59.

[213] Fischer, *supra* note 188, at 668.

[214] *Senate and House Units Probe Bank Failures, supra* note 211, at 1533-1534.

[215] *Id.*

[216] *Id.*

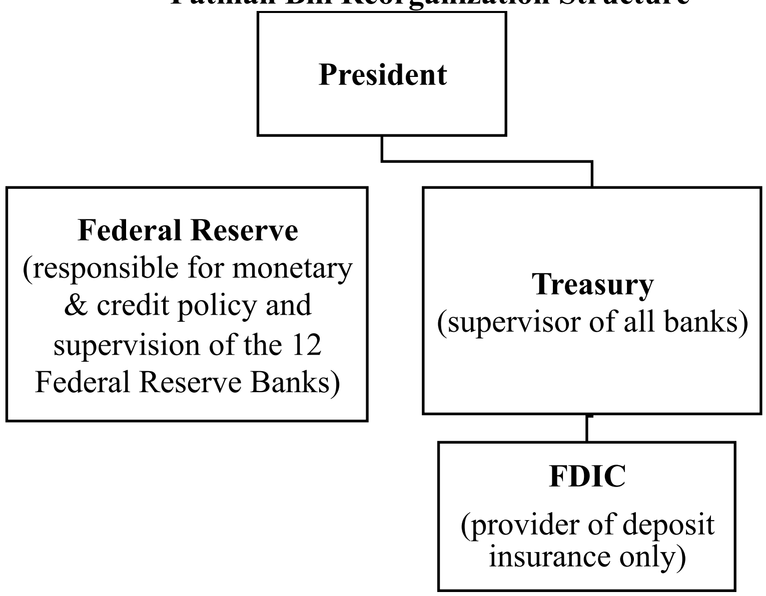
[217] *Id.*

[218] Jack Steele, *Overall Bank Czar Urged*, EL PASO HERALD-POST (EL PASO, TEXAS), Apr 1, 1965 at 14.

Secretary of the Treasury.[219] The Federal Reserve's power to adjust banks' required reserves would not have been affected by this bill.[220]

Under the Patman Bill, the Office of the Comptroller would cease to exist after its duties had been transferred to the Treasury Secretary.[221] Following the transfer of its supervisory powers, the FDIC would only exist to provide depository insurance.[222] The Treasury Secretary would be able to continue to levy the same fees and assessments on banks as had been imposed prior to the reorganization, except that those connected with the Deposit Insurance Fund would go to the FDIC.[223]

Figure 11
Patman Bill Reorganization Structure



In contrast, the Multer Bill, H.R. 107, would transfer the supervisory powers of the Office of the Comptroller, the Federal Deposit Insurance Corporation, and the Federal Reserve to a new agency, the Federal Banking Commission (FBC).[224] The FBC would be run by a five member commission with members serving for staggered ten-year terms.[225] The members would be appointed by the president with the advice and consent of the Senate.[226] The functions of the OCC related to currency issuance and redemption would be transferred to the Treasury Secretary.[227]

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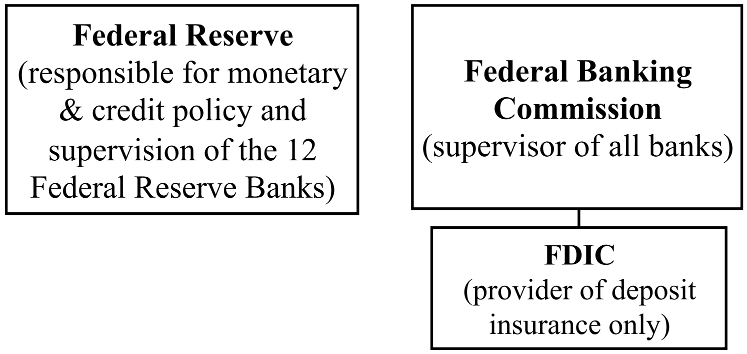
219 House Banking Consolidation Hearings, *supra* note 210, at 59.
220 *Id.* at 59-60.
221 *Id.* at 61.
222 *Id.*
223 *Id.* at 64.
224 H.R. 107, 89th Cong., §§4, 7 (1965).
225 *Id.*, §§4-5.
226 *Id.*, §4.
227 *Id.*, §7.

Figure 12
Multer Bill Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: Under the Patman Bill, the consolidation was to occur by January 1 of the year after the date of enactment.[228] Under the Multer Bill, the reorganization would phase the provisions of the statute in over a two-year period.[229]

Personnel Issues: Under the Patman Bill, the Federal Reserve would be required to submit a list of Federal Reserve employees to the Treasury Secretary indicating which Federal Reserve employees would be transferred to the Treasury and which would remain at the Federal Reserve after the consolidation.[230] Once the Treasury Secretary received this list, he must make a written offer of full time employment for those named employees who are named on the list to be transferred to the Treasury.[231]

In addition, the Patman Bill would have transferred all of the existing FDIC officers and employees to the Treasury.[232] The Patman Bill would also have transferred all of the existing OCC employees to the Treasury, which means that they no longer would have been employed by an independent bureau within the Treasury Department but would have been regular civil service employees of the Treasury Department.[233]

Under the Multer Bill, the personnel of the OCC's Division of Issue and Redemption would be transferred to the Treasury Secretary and all other OCC personnel would be transferred to the FBC.[234] All of the officers and personnel of the FDIC, except its Board of Directors, would be transferred to the FBC.[235] The Federal Reserve would provide to the FBC a list of the names of

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228 H.R. 6885, 89th Cong. §21(b) (1st Sess. 1965).
229 H.R. 107, *supra* note 224, §21.
230 H.R. 6885, *supra* note 228, §51.
231 *Id.,* §52(a).
232 *Id.,* §4.
233 *Id.*, §2.
234 H.R. 107, *supra* note 224, §43.
235 *Id*. §44.

its personnel that performed the functions that would be transferred to the FBC and the FBC would make offers of full-time employment to each person on that list.[236] The employment offer would include a salary equal to the lesser of the salary that the employee earned at the Federal Reserve or the salary that the FBC paid to members of its commission.[237] Federal Reserve employees to whom such FBC offers are made, would have 61 days to accept the offer before it would expire.[238]

Funding of the Reorganization: The Patman Bill stated that the costs of the reorganization would be paid for out of funds appropriated by Congress.[239] It did not, however, provide any estimate of what those costs might be. The Patman Bill also stated that all of the costs and expenses of the functions transferred to the Treasury Secretary, except those associated with the payment or liquidation of insurance losses or those supplied on a reimbursable basis, would be paid for from funds appropriated by Congress.[240]

Under the Multer Bill, the FDIC would pay the FBC $200,000 to cover the costs for the FBC during the interim period after the initial commission members are appointed and while the FBC is being organized.[241] Under the Multer Bill, the FBC would pay to the FDIC any funds that the FBC collects from fees and assessments from the banking industry.[242] The FDIC would cover all of the costs and expenses of the FBC, including the salaries for the FBC's officers and employees.[243]

In 1963, the operating expenses for the OCC were $15.9 million, of which the bulk of these were for bank supervision.[244] The operating expenses of the FDIC in 1963 were $14.3 million, of which two-thirds, or about $9.5 million, were for bank supervision.[245] The operating expenses of the Federal Reserve associated with bank supervision could not be precisely measured but were estimated at about $8 million in 1963 for purposes of the Multer Bill.[246] Thus, the total expenses associated with bank supervision at the federal level equaled roughly $33.4 million in 1963.

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[236] *Id*. §§51-52.
[237] *Id*. §52.
[238] *Id*.
[239] H.R. 6885, *supra* note 228, §6.
[240] *Id*. §6.
[241] H.R. 107, *supra* note 224, §61.
[242] *Id*. §10.
[243] *Id*.
[244] House Banking Consolidation Hearings, *supra* note 210, at 62.
[245] *Id*. at 63, 66.
[246] *Id*. at 62.

B. Arguments For and Against the Proposal

Both bills would consolidate the bank supervisory functions into a single agency. Proponents of this consolidated structure, such as the Washington Post's editorial board, believed that it would have been more likely to have caught the banking anomalies that resulted in the four bank failures.[247]

In addition, the consolidated structures in the Patman and Multer Bills would eliminate the duplication and overlap that the then existing federal bank regulatory structure exhibited. The existing structure was complicated, inefficient, and expensive.[248] If either bill was implemented, the banks would have benefited because they would no longer have to conform to the regulations and standards of multiple regulators according to James L. Robertson, a member of the Board of Governors of the Federal Reserve.[249] In addition, having a single set of standards applied to all banks would level the playing field and create a fair environment in which banks could compete with one another.[250] K. A. Randall, the Chairman of the FDIC, however, argued that there was no duplication of activities among the three banking regulators because each dealt with only certain types of bank.[251]

For some commentators, such as James L. Robertson, both the Patman and Multer Bills would be preferable to the status quo because the status quo encouraged a race to the bottom.[252] The firms in the banking industry played regulators off against each other in order to minimize the regulations with which they had to comply.[253] This sort of regulatory competition can undermine the goals that banking regulation should seek to foster, such as safety and soundness.

Both bills also offered the advantage of focusing the Federal Reserve on monetary and credit policy without the distraction of engaging in bank examination and supervision. James L. Robertson argued that the Federal Reserve had difficulty providing adequate supervision for the 1,500 state member banks and that it lacked the resources to take over the supervision of all of the national and state banks.[254] In addition, Robertson rejected the notion that the Federal Reserve needed to engage in bank supervision in order to fulfill its monetary policy obligations because only a small portion of the data used for monetary policy came from banks and it could get the data it needed from the FBC.[255]

One major difference between the Patman and Multer Bills is the degree to which politics might influence bank supervision. The Multer Bill tried to divorce bank supervision from political

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[247] House Banking Consolidation Hearings, *supra* note 210, at 77 (reprint of an editorial from the Washington Post published on Apr. 11, 1965).
[248] House Banking Consolidation Hearings, *supra* note 210, at 77 (reprint of an editorial from the Washington Post published on Apr. 11, 1965); House Banking Consolidation Hearings, *supra* note 210, at 79-80 (statement of Rep. William S. Moorhead).
[249] House Banking Consolidation Hearings, *supra* note 210, at 93 (statement of James L. Robertson).
[250] *Id.*
[251] House Banking Consolidation Hearings, *supra* note 210, at 215 (statement of K.A. Randall).
[252] House Banking Consolidation Hearings, *supra* note 210, at 81-82 (statement of James L. Robertson).
[253] *Id.*
[254] *Id.* at 86.
[255] *Id.*

influences as much as possible by creating an independent agency run by a commission, whose members would be selected without reference to their political affiliations.[256] The Patman Bill, however, gave the Treasury Secretary, who is a cabinet officer appointed by the president, control over the banking supervision. As a result, the Treasury Secretary is more likely to be subject to political influences and considerations than the FBC commission members.[257]

Many opponents of the Patman Bill were concerned that it concentrated too much power in the Treasury. While the Treasury Secretary would have the ability to delegate any task, the Patman bill would make the Treasury Secretary solely responsible for the national banking system.[258] In a hearing before the Subcommittee on Banking Supervision and Insurance, James L. Robertson favored the Multer Bill over the Patman Bill because he believed that placing so much power in the hands of single individual was dangerous and that the deliberations of a five-member commission were more likely to produce rules that would foster the beneficial economic growth of the financial sector than the decisions made by a single individual.[259] The American Bankers Association, the Independent Bankers Association, the National Association of Supervisors of state Banks, the Chairman of the FDIC and the Comptroller of the Currency all opposed the Patman bill because they felt it would give the Treasury too much power.[260]

Conversely, the Washington Post editorial board objected to the Multer Bill because they believed that a commission would lack the flexibility and accountability that the Treasury Secretary would exhibit.[261] Getting five commission members, like those on the proposed FBC, to make a decision frequently takes longer than having a single individual, the Treasury Secretary, make a decision.

Another disadvantage of both bills, which was raised by Rep. Burt L. Talcott (R-CA12), was the loss of the system of checks and balances.[262] Having a single agency supervise banks might lead to overly repressive regulations. In addition, if there was only one agency in charge of bank examination, it might fail to spot certain issues, which could lead to bank failure.[263] James L. Robertson disputed this contention on the grounds that the number of examinations would not change if either bill was enacted because, under the existing system, national banks were subject

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[256] H.R. 107, supra note 224, §§4-5; House Banking Consolidation Hearings, *supra* note 210, at 67 (Reorganization of Federal Bank Supervision: A Staff Analysis and Comparison of H.R. 107 and H.R. 6885).

[257] House Banking Consolidation Hearings, *supra* note 210, at 117 (statement of Benjamin J. Klebaner, an economics professor at City College of the City University of New York).

[258] House Banking Consolidation Hearings, *supra* note 210, at 85 (statement of James L. Robertson, member of the Board of Governors, Federal Reserve System).

[259] *Id.* Robertson stated: "It cannot be questioned that one-man administration is usually swifter and more immediately effective than administration by a board or commission. Under Mussolini, the railroads in Italy ran on time, and unemployment disappeared in Hitler's Germany. In many areas of government, the vesting of authority in one individual is even appropriate in principle. But this is *not* true, to a peculiar degree, with Federal bank supervision." *Id*.

[260] Howard H. Hackley, *Our Baffling Banking System – Part II*, 52 VA. L. REV. 771, 809 (1966).

[261] House Banking Consolidation Hearings, *supra* note 210, at 77 (reprint of an editorial from the Washington Post published on Apr. 11, 1965).

[262] House Banking Consolidation Hearings, *supra* note 210, at 105-106 (questions from Burt L. Talcott to James L. Robertson).

[263] *Id.*

to examinations by a single regulator while state banks might be subject to examinations by both a federal regulator and a state regulators and that this situation would still be true if Congress enacted either bill.[264]

Finally, another concern raised against both bills was that they would harm the dual banking system in the United States.[265] Shelby Cullom, the Commissioner of Banking of North Carolina, argued that the dual banking system was important to maintain the competitive environment for state and national banks.[266] He voiced concern that, by concentrating power in a single federal agency, the new federal regulator would seek to give national banks a competitive edge over state banks.[267] Cullom noted that the federal regulators, such as the OCC, already had the power to give such competitive advantages to national banks because national banks only needed the approval of a single agency to gain a new charter or open a new branch, while state banks need the approval of both a state regulator and a federal regulator.[268] In addition, the OCC already could use its position as a member of the Board of the FDIC to reject applications for insurance from state nonmember banks.[269] If Congress enacted either bill, the new federal bank regulator could also use its control over the FDIC to reject applications for insurance from state nonmember banks. James L. Robertson argued that neither bill was likely to cause the demise of the dual banking system because neither bill gave the federal government any more powers over state banks or state banking regulation than it already possessed.[270]

C. What Happened to the Proposal?

Neither the Patman Bill nor the Multer Bill were ever enacted. The Johnson Administration signaled its opposition to any drastic structural reforms when it announced that it was forming a coordinating committee on bank regulation on July 6, 1965.[271] The coordinating committee was comprised of the OCC, the FDIC, the Federal Reserve, and the Federal Home Loan Bank Board.[272] The creation of the committee blunted the need for a reorganization as it addressed one of the rationales for consolidation, the failure of prior informal efforts to get the federal banking regulators to cooperate with one another. In addition, at least some members of Congress wanted to see how the committee worked before proceeding with a more fundamental change to how the federal government supervised banks.[273]

[264] House Banking Consolidation Hearings, *supra* note 210, at 90 (statement of James L. Robertson, member of the Board of Governors, Federal Reserve System).
[265] *Id*. at 90.
[266] House Banking Consolidation Hearings, *supra* note 210, at 120-124 (statement of Shelby Cullom).
[267] *Id.* at 123.
[268] *Id.* at 123-124.
[269] *Id.*
[270] House Banking Consolidation Hearings, *supra* note 210, at 90 (statement of James L. Robertson, member of the Board of Governors, Federal Reserve System).
[271] *Changes in Bank Rules Rejected*, TUCSON DAILY CITIZEN (TUCSON, ARIZONA), July 7, 1965 at 8.
[272] *Id*.
[273] *Id*.

VIII. Hunt Commission, 1971

A. The Proposal

In 1970 President Richard Nixon created the President's Commission on Financial Structure and Regulation to "review and study the structure, operation, and regulation of the private financial institutions in the United States, for the purpose of formulating recommendations that would improve the functioning of the private financial system."[274] It became known as the Hunt Commission after its chairman Reed O. Hunt, who was the Chairman of Crown Zellerbach Corporation, a diversified paper and lumber manufacturer. The commission focused on financial intermediaries, including commercial banks, thrifts, savings and loans, credit unions, insurers, and pension funds.[275] Nevertheless, the Hunt Commission did make three major recommendations regarding the federal banking regulators.

1. Structural Reorganization

First, the Hunt Commission recommended that the OCC be transformed into an independent agency and renamed the Administrator of National Banks.[276] The Administrator of National Banks would supervise national banks, thrifts, and savings banks.

Second, another new independent agency should be created to take over the Federal Reserve's and the FDIC's supervisory powers over state banks.[277] This new agency would be named the Administrator of State Banks.[278]

Finally, the remaining insurance powers of the FDIC should be placed in a third new agency called the Federal Deposit Guarantee Administration (FDGA).[279] The FDGA would also assume the insurance functions of the FSLIC and the National Credit Union Administration.[280] The FDGA would be run by a Director.[281] In addition, it would be governed by five trustees, who would consist of the FDGA Director, the Administrator of National Banks, the Administrator of State Banks, the Federal Home Loan Bank Board Chairman, and the Administrator of the National Credit Union Administration.[282]

Figure 13 illustrates what the federal banking regulatory structure would look like if the Hunt Commission's recommendations had been fully implemented.

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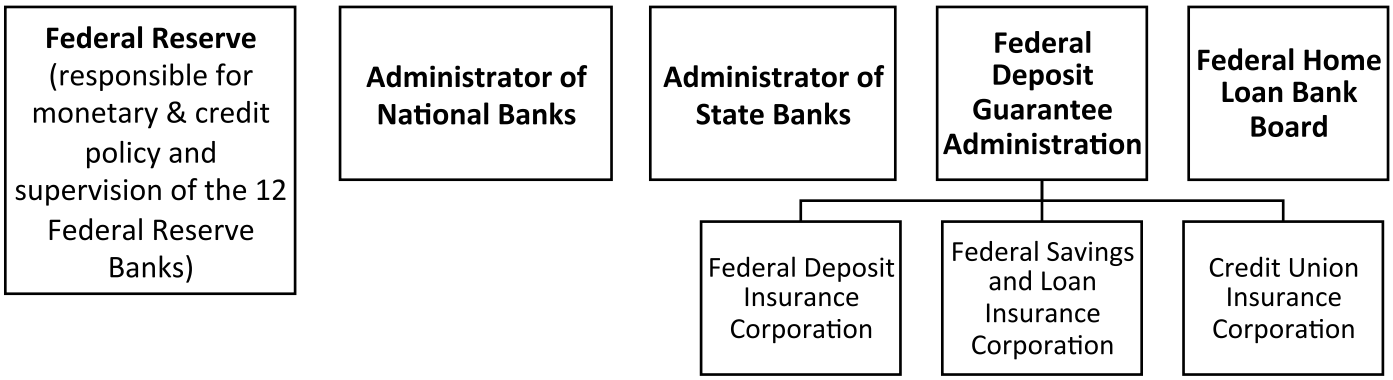
[274] The Report of the President's Commission on Financial Structure & Regulation 1 (1971) [hereinafter Hunt Commission Report].
[275] JERRY MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES V. III 7 (2002) [hereinafter Markham v. III].
[276] Hunt Commission Report, supra note 274, at 87.
[277] *Id.*
[278] *Id.*
[279] *Id.* at 87-88.
[280] *Id.*
[281] *Id.* at 88.
[282] *Id.*

Figure 13
Hunt Commission Reorganization Structure[283]



2. **Proposed Implementation**:

Reorganization of Regulatory Powers: The Hunt Commission's recommendations on reorganizing the federal financial regulators were only eight pages long and did not address any of the logistical details for how the reorganization would be done.[284]

Personnel Issues: The Hunt Commission did not discuss what would happen to the employees of the existing agencies during and after the reorganization. For some employees, like those at the OCC, their entire agency would be moved out of the Treasury and so they would move with it. For others, their functions would be moved out of the Federal Reserve and the FDIC to the new Administrator of State Banks. Presumably they would move to that new agency when their functions moved. The Hunt Commission, however, never indicated that would be the case.

Funding of the Reorganization: The Hunt Commission did not discuss how the reorganization would be financed.

B. Arguments For and Against the Proposal

Like almost all of the other proposals, this one would reduce the duplication and overlap of responsibilities that existed among the OCC, the FDIC, and the Federal Reserve. It did not go as far as other proposals that centralized banking regulation into a single agency. Thus, it was not criticized for creating an agency with too much power.

The Hunt Commission report led to two reports – one from the Treasury Department and one from the staff of the House Subcommittee on Domestic Finance of the House Committee on

[283] *Id*. at 87-93.
[284] *Id*.

Banking and Currency.[285] Only the House staff report, however, commented upon the Hunt Commission's proposed reorganization of the federal banking regulators.

The staff report criticized the Hunt Commission's recommendation on structural reform because it "simply perpetuates the confusion and conflict in federal bank regulation in a slightly different form."[286] The report noted that the Hunt Commission's proposal merely changed the names of the existing federal regulators while leaving decisions about chartering, branching, and holding company policies divided among the three agencies.[287]

The staff report instead concluded that the creation of a Federal Banking Commission that would be responsible for bank supervision and examination, would be a better solution to the structural problems inherent in the then existing regulatory structure.[288] The staff felt that the FDIC should solely deal with insuring deposits while the Federal Reserve would focus on monetary policy.[289]

First, it would reduce regulatory arbitrage that had led the OCC to be more lenient in its regulation of national banks to encourage state chartered banks to convert to national charters.[290] The Hunt Commission would have allowed that problem to persist by maintaining a separate regulator for national banks and state banks. By having only one federal regulator for banks, that regulator could not expand its jurisdiction by promulgating different rules for national banks than it imposed for state banks as it would already be responsible for supervising both.[291]

Second, the creation of a Federal Banking Commission would reduce costs and promote efficiency in ways that the Hunt proposal would not.[292] It would consolidate the examination staffs and achieve economies of scale that would not occur with the Hunt proposal as the Administrator for National Banks and the Administrator for State Banks would need to maintain separate staffs to full their functions in all 50 states.[293]

By creating an agency for national banks and another for state banks, this proposal would have reinforced the dual banking structure and possibly encouraged banks to play state and federal regulators against each other in order to foster deregulation. Whether that should be considered an advantage or a disadvantage depends on however one views the dual banking system. If one views the dual banking system as promoting regulatory competition, which checks an agency from imposing overly burdensome regulations on the banks, then efforts to support the system

[285] STAFF OF H. SUBCOMM. ON DOMESTIC FIN. OF H. COMM. ON BANKING AND CURRENCY, REPORT ON FINANCIAL INSTITUTIONS: REFORM AND THE PUBLIC INTEREST 62 (Comm. Print 1973) [hereinafter H. SUBCOMM. ON DOMESTIC FIN. REPORT]; US DEPT. OF THE TREASURY, RECOMMENDATIONS FOR CHANGE IN THE US FINANCIAL SYSTEM (1973).
[286] H. SUBCOMM. ON DOMESTIC FIN. REPORT, *supra* note 285, at 61.
[287] *Id*. at 61-62.
[288] *Id*. at 62-63. The Federal Banking Commission would be governed by a five member commission with four members appointed by the President and a Governor of the Federal Reserve Board serving as an *ex officio* fifth member. *Id.* at 63. The members would serve staggered five-year terms. *Id.*
[289] *Id*. at 62.
[290] *Id*. at 63-64.
[291] *Id*.
[292] *Id*. at 64.
[293] *Id*.

are an advantage. If one views it as promoting regulatory arbitrage and a race to the bottom as agencies loosen standards and requirements in order to attract more banks and thus increase their power, then efforts to support the dual banking system would seem to be a disadvantage of the proposal.

C. What Happened to the Proposal?

Although S. 2591 and H.R. 10990, both referred to as the "Financial Institutions Act," included the Hunt Commission's recommendations on other issues, such as removing interest rate caps, they did not include the commission's recommendations regarding reorganizing the federal financial regulators.[294] Many of the proposals in S. 2591 and H.R. 10990 would ultimately be enacted as part of the Depository Institutions Deregulation and Monetary Control Act of 1980.[295]

None of the Hunt Commission's structural recommendations were ever enacted. They did, however, provoke an ongoing debate about reorganizing the federal banking regulators that led to three proposals in 1975: the Compendium of Major Issues in Banking Regulation, the Wille Proposal, and the Financial Institutions and the Nation's Economy (FINE) proposal.

IX. Compendium of Major Issues in Banking Regulation, 1975

A. The Proposal

In 1975, the Senate Committee on Banking, Housing, and Urban Affairs chaired by Senator William Proxmire (D-WI) commissioned non-governmental banking experts to produce a series of papers concerning, among other things, reforms to the bank regulatory structure.[296] These papers were published in a report entitled "Compendium of Major Issues in Bank Regulation."

1. Structural Reorganization

Part IX of this report contained five papers commenting upon the bank regulatory structure.[297] The first two papers are by Former Federal Reserve Vice Chairman James L. Robertson and Federal Reserve Governor Jeffrey M. Bucher.[298] They supported creating a single agency, the Federal Bank Commission (FBC), to supervise banks and that the supervisory powers of the OCC, the FDIC, and the Federal Reserve should be transferred to this new agency.[299]

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[294] Congress.gov, Legislation, 93rd Congress, H.R. 10990 – The Financial Institutions Act, https://beta.congress.gov/bill/93rd-congress/house-bill/10990 [hereinafter H.R. 10990 Summary]; Congress.gov, Legislation, 93rd Congress, H.R. 10990 – The Financial Institutions Act, https://beta.congress.gov/bill/93rd-congress/senate-bill/2591?q=%7B%22search%22%3A%5B%22S.+2591%22%5D%7D [hereinafter S. 2591 Summary]. Rep. Wright Patman (D-TX1) introduced H.R. 10990. H.R. 10990 Summary. Senator John Sparkman (D-AL) introduced S. 2591. S. 2591 Summary.

[295] John T. Woolley, *Persistent Leadership: Presidents and the Evolution of US Financial Reform, 1970-2007*, 42 PRES. STUDIES Q. 60, 66-67 (2012).

[296] S. Comm. On Banking, Housing, and Urban Affairs, Compendium of Major Issues in Banking Regulation, 94th Cong. (1975)[hereinafter Compendium of Major Issues]

[297] *Id*. at 865-957.(report by James L. Robertson, Former Federal Reserve Vice Chairman)

[298] *Id*. at 865-889.

[299] *Id*. at 868, 875.

Robertson thought that a FBC would be more likely to attract the type of highly qualified analysts that were needed to properly supervise the banks than the fragmentary structure had been able to do.[300] He felt that it would produce a single set of uniform standards that would be preferable to the diverse sets of standards applied by the existing bank regulators.[301] In addition, Robertson strongly opposed consolidating the bank supervisory functions in the Federal Reserve because he thought that bank supervision would create conflicts with the Federal Reserve's monetary policy functions and vice-versa.[302] Robertson concluded his paper by noting:

> The function of formulating and implementing monetary policy and the equally important and coordinate function of supervising banks and bank holding companies cannot be performed by one agency without seriously compromising the effectiveness of each function. Furthermore there should never be a possibility of utilizing the supervisory function to enforce a given monetary policy today and an opposite one tomorrow, to look at bank loan portfolios through rose-colored glasses today and black ones tomorrow.[303]

Bucher shared Robertson's concern about consolidating regulation in the Federal Reserve. He too thought that the two functions, monetary policy and bank supervision, created conflicts that potentially undermined the ability of a single agency to fulfill its responsibilities in both areas.[304] Bucher also was concerned that the existing system of multiple regulators resulted in a race to the bottom in terms of the standards applied to banks and that this competition in laxity was bad for the economy.[305] Bucher thought that the FBC would address these problems.

Bucher and Robertson both provided some details regarding the internal structure of the FBC. Robertson wanted the FBC run by a five-member commission appointed by the president with the advice and consent of the Senate. [306] He wanted the commissioners to serve two-year terms. He wanted at least three divisions within the FBC: one for examinations, one for deposit insurance and one for bank holding companies.[307] Bucher supported Robertson's internal organizational structure for the FBC.[308]

Figure 14 illustrates what the federal banking regulatory structure would have looked like if the recommendations of Robertson and Bucher had been implemented.

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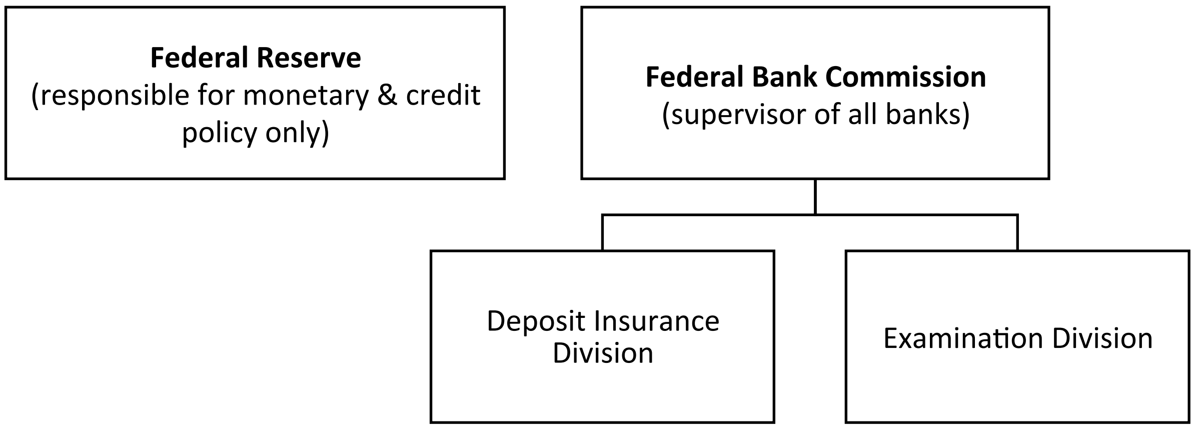
[300] *Id*. at 868.
[301] *Id*. at 870.
[302] *Id*. at 870-871.
[303] *Id*. at 871.
[304] *Id*. at 879. *Id*. at 871 (report by Jeffrey M. Bucher, Federal Reserve Governor).
[305] *Id*. at 880.
[306] *Id*. at 868-869 (report by James L. Robertson, Former Federal Reserve Vice Chairman).
[307] *Id*. at 869
[308] *Id*. at 875-876, 882-883 (report by Jeffrey M. Bucher, Federal Reserve Governor).

Figure 14
Robertson & Bucher Reorganization Structure



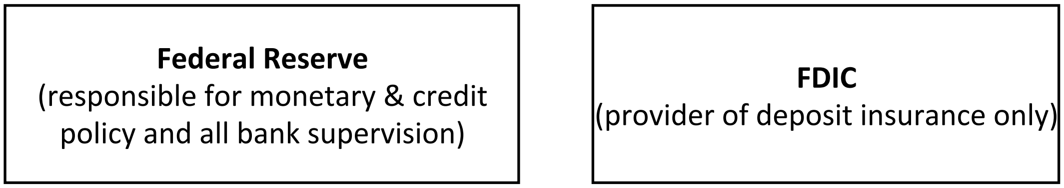
The third paper was by Federal Reserve Governor John E. Sheehan. While he agreed with Robertson and Bucher regarding most of the problems that could be solved by consolidating banking regulation into a single agency, he strongly disagreed with them regarding where consolidation should occur. He wanted banking supervision consolidated within the Federal Reserve. He argued that that the Federal Reserve needed such authority if it was to act as the lender of last resort.[309] Sheehan commented,

> The function of lending to commercial banks which are faced with either temporary liquidity difficulties or longer-term problems necessarily lies with the monetary authorities, serving, as discount lending does, as one of the vehicles of reserve creation. And the lending activity with its attendant reserve creation must be taken into account in determining the magnitude of other operations implementing monetary policy such as open market operations.[310]

Governor Sheehan's remarks were brief and did not attempt to address any of the logistical details of merging the bank supervisory powers of the OCC and the FDIC into the Federal Reserve. Figure 15 illustrates what the federal banking regulatory structure probably would have looked like if Sheehan's recommendations had been implemented.

[309] *Id*. at 897-898 (report by John E. Sheehan, Federal Reserve Governor).
[310] *Id.*

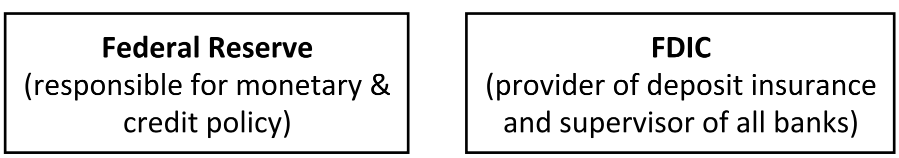
Figure 15:
Sheehan Reorganization Structure



The fourth paper and fifth papers by the Carter H. Golembe Associates, Inc. and Raymond J. Saulnier, a professor of economics at Columbia University, respectively, both endorsed the Hunt Commission's recommendation that banking supervision should be consolidated in the FDIC.[311] The paper by the Carter H. Golembe Associates, Inc. was primarily aimed at refuting point-by-point the argument that Governor Sheehan had advanced for consolidating bank regulation in the Federal Reserve.[312] The fifth paper by Raymond J. Saulnier focused mainly on specific bank regulations, although it also called for implementing the Hunt Commission's recommendations.[313]

Beyond saying that they agreed with the Hunt Commission's recommendations, neither paper elaborated on how the reorganization of the bank supervisory functions into the FDIC should be done. Figure 16 illustrates what the federal banking regulatory structure would have looked like if their recommendations had been implemented.

Figure 16
Golembe & Saulnier Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: While a few of the papers discussed the internal structure of the agency into which all of the bank supervisory functions would be consolidated, none of the five papers attempted to address the logistical issues raised by the reorganizations that they proposed. They did not discuss whether the reorganization should be done all at once or in phase.

[311] *Id*. at 909-929 (report by Carter H. Golembe Associates, Inc.); *Id*. at 930-942 (report by Raymond J. Saulnier).
[312] *Id*. at 909-929 (report by Carter H. Golembe Associates, Inc.).
[313] *Id*. at 941-942 (report by Raymond J. Saulnier).

Personnel Issues: Only one of the five papers dealt with what would happen to the employees of the existing agencies when the functions connected with their jobs were transferred to another agency. Robertson in his report expressly stated that the employees of the existing federal banking regulators should be transferred to the FBC.[314]

Funding the Reorganization: None of the five papers discussed how their proposed reorganizations would be financed. Robertson, however, did state that he thought that the FBC should be funded from the deposit insurance assessment fees because he thought that the banking industry should shoulder the burden of the cost of its supervision.[315]

B. Arguments For and Against the Proposal

The proposals to consolidate banking regulation found in this report relied upon arguments previously advanced for consolidating regulators. It would promote efficiency, end overlap, and abolish duplication. These proposals also favored consolidation as a means of ending regulatory competition that possibly had encouraged lax supervision by some banking regulators. The specter of inadequate supervision was raised by the failure of the Franklin National Bank in 1974 and U.S. National Bank of San Diego in 1973. These banks had been two of the largest banks in the United States at the time.

The opponents of the proposals by Robertson, Bucher, and Sheehan, such as Carter H. Golembe Associates, Inc., raised concerns about consolidating banking regulation into a single agency such as the FBC or the Federal Reserve because it would concentrate too much power in that agency.[316] This concern was particularly acute with regard to Sheehan's proposal, which would have made the Federal Reserve responsible not only for banking regulation but for monetary policy as well. Carter H. Golembe Associates, Inc. noted that it was unlikely that Congress would allow the Federal Reserve to maintain the type of independence that it had if it controlled so much of the U.S. economy.[317]

Another concern raised about concentrating all of the banking regulation into a single agency was that it increased the possibility of the industry capturing that agency. The Justice Department opposed creating a single agency because "a single agency with responsibility for everything . . . will frequently become highly protective of the firms that it is responsible for and will tend to prevent any one of them from taking advantages of its various efficiencies."[318]

C. What Happened to the Proposals?

Of these three proposals, the Robertson and Bucher proposal came the closest to being enacted. Senator William Proxmire (D-WI) introduced a bill in the Senate, S. 2298 – Federal Bank Commission Act, that would have combined the examination and supervisory functions of the

[314] *Id*. at 869 (report by James L. Robertson, Former Federal Reserve Vice Chairman).
[315] *Id*. at 869 (report by James L. Robertson, Former Federal Reserve Vice Chairman).
[316] *Id*. at 921 (report by Carter H. Golembe Associates, Inc.).
[317] *Id*. at 926.
[318] *Id*. at 816 (report by Gerald T. Dunne, professor of law, St. Louis University).

Federal Reserve, the FDIC, and the OCC in a new agency called the Federal Bank Commission.[319] No one cosponsored the bill. Senator Proxmire's Federal Bank Commission contained many of the same features as Federal Bank Commission proposed by Robertson and Bucher. It was referred to the Senate Banking, Housing and Urban Affairs Committee but was never voted upon.[320] Senator Proxmire re-introduced the bill as S. 684 in the next session of Congress. Senator Donald Riegle (D-MI) and Senator Spark Matsunaga (D-HI) cosponsored that bill.[321] It again was referred to the Senate Banking, Housing and Urban Affairs Committee where it died when the session for the 95th Congress expired.[322]

A companion bill, H.R. 4346, was introduced in the House of Representatives by Fr. Robert Drinan (D-MA4).[323] The House bill was referred to the House Financial Services Committee where it died when the session for the 95th Congress expired.[324]

X. Wille Proposal, 1975

A. The Proposal

As noted in Part IX, Senator William Proxmire (D-WI) introduced on September 5, 1975 a bill in the Senate, S. 2298 – Federal Bank Commission Act, that would have combined the examination and supervisory functions of the Federal Reserve, the FDIC, and the OCC in a new agency called the Federal Bank Commission.[325] The Senate Banking, Housing and Urban Affairs Committee held hearings on the bill in March of 1975.[326] Then FDIC Chairman Frank Wille was one of the people who testified before the committee on S. 2298.

1. Structural Reorganization

While testifying before Congress, Chairman Wille proposed keeping the OCC with only two modifications – one would make the OCC responsible for the supervision of national banks and the other would create a new agency, the Federal Supervisor of State Banks, to be the sole federal regulator for state banks. [327] The Federal Supervisor of State Banks would assume control

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319 GovTracks.us, Congress, Bills, S. 2298 (94th): Federal Bank Commission Act, https://www.govtrack.us/congress/bills/94/s2298 [hereinafter GovTracks S. 2298].
320 *Id*.
321 GovTracks.us, Congress, Bills, S. 684 (95th): Federal Bank Commission Act, https://www.govtrack.us/congress/bills/95/s684 [hereinafter GovTracks S. 684].
322 *Id*.
323 GovTracks.us, Congress, Bills, H.R. 4346 (95th): Federal Bank Commission Act, https://www.govtrack.us/congress/bills/95/hr4346 [hereinafter GovTracks H.R. 4346].
324 *Id*.
325 GovTracks S. 2298, *supra* note 319.
326 *Id*.
327 *Hearings on S. 2298 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 94th Cong.267-68 (1975) (statement of FDIC Chairman Frank Wille). The two modifications to the OCC were to remove the decision on approving a bank merger in which the surviving entity would be a national bank to a new board and to allow the OCC to approve or deny nonbank acquisitions by one bank holding companies. *Id.*

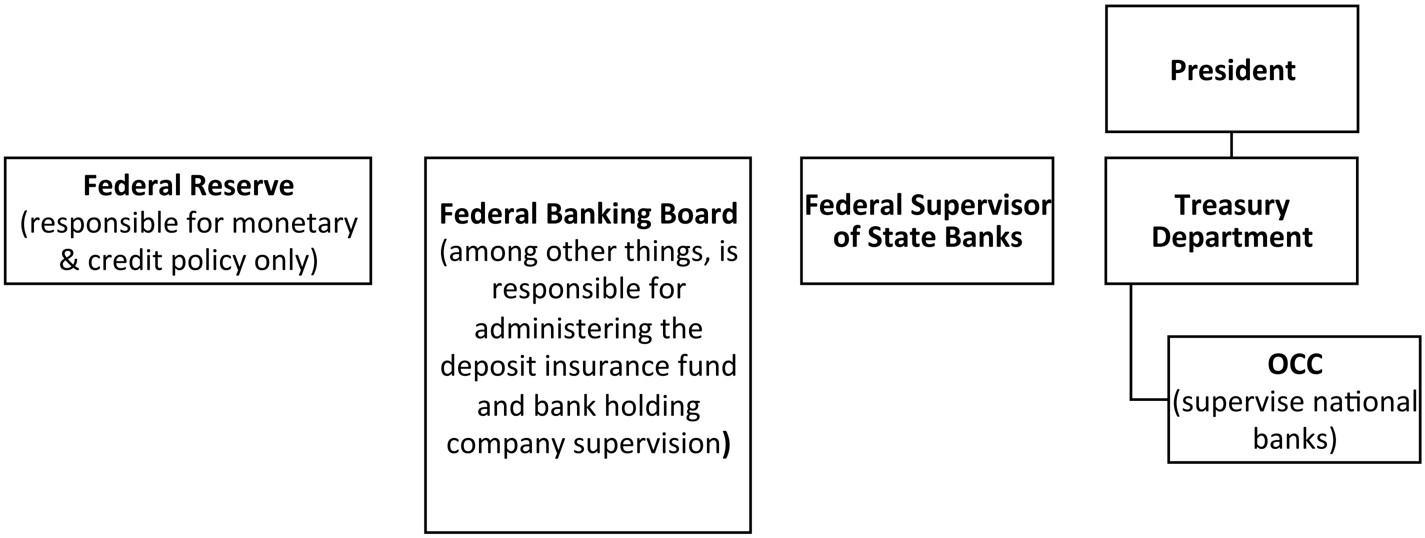
of the supervisory functions of the FDIC and the Federal Reserve for state banks.[328] Wille did not expressly indicate whether the Federal Supervisor of State Banks would be an independent agency on its own or would be housed within the Treasury Department. He did indicate that the inspiration for this new agency was the Hunt Commission's recommendations, which would have created a new independent agency for supervising state banks that was not within the Treasury. As a result, it is likely that Wille did not intend for the new Federal Supervisors of State Banks to be part of the Treasury Department.

In addition, he proposed creating a Federal Banking Board to implement a "uniform national policy" for bank regulation.[329] The Federal Banking Board would be run by a five member board comprised of the Comptroller of the Currency, the Federal Supervisor of State Banks, a Governor from the Federal Reserve, and two members appointed by the president with the advice and consent of the Senate.[330] In order to fulfill its mandate to create a uniform national policy for bank regulation, the Federal Banking Board would administer the following matters: (1) the deposit insurance program, including the FDIC's liquidation and receivership powers, (2) bank holding company supervision powers that the Federal Reserve was exercising at the time that Wille made his proposal, (3) approvals for bank mergers and acquisitions, and (4) the formulation and promulgation of uniform banking rules and regulations.[331] The Federal Banking Board would have the authority to conduct bank examinations as part of its administration of the deposit insurance fund.[332] Although Wille never said that the FDIC would cease to exist, he implied as much by talking about transferring the FDIC's state bank supervisory powers to the Federal Supervisor of State Banks and having the Federal Banking Board administer the deposit insurance fund.

Figure 17 below illustrates what the federal financial regulatory structure might have looked like if the Wille proposal had been implemented.

[328] *Id*.
[329] *Id*.
[330] *Id*. at 276.
[331] *Id*.
[332] *Id*. at 277.

Figure 17
Wille Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: Wille did not discuss the logistical details of how his reorganization would be implemented.

Personnel Issues: Wille did not discuss what would happen to the personnel of the existing regulators if his proposal was implemented. Presumably, the staff at the FDIC and the Federal Reserve whose functions had been transferred to the Federal Supervisors of State Banks would have been transferred there as well. In addition, if the Federal Banking Board would be administering the deposit insurance fund, then the FDIC employees who had been responsible for the deposit insurance fund would be working for the Federal Banking Board in some capacity.

Funding the Reorganization: Wille never discussed how his reorganization should be financed.

B. Arguments For and Against the Proposal

Wille thought that this proposal had at least nine advantages. First, it would simplify the regulatory structure. It would make it clearer which agencies regulated national banks and which regulated state banks.

Second, it would allow the Federal Reserve to focus on monetary policy without having to also deal with the conflicting goal of bank supervision. He reiterated a comment made by Governor Bucher: “Supervision was too important a function in itself to be the Federal Reserve’s part-time job."[333] Wille thought that the Federal Reserve could obtain the information it needed to fulfill its monetary policy duties by working closely with the banking supervisors and did not need to be directly engaged in supervision.[334]

Third, it would increase the efficiency of federal regulation and achieve cost savings. It would reduce the regulatory overlap and the potential for multiple examinations. Both of these can increase costs, not only for the government but for the regulated firms.

Fourth, it would eliminate actual or potential policy conflicts. It would allow agencies, like the Federal Reserve, to focus on a narrower range of objectives that would be less likely to conflict with one another. Policies that might be beneficial for monetary policy reasons might not be desirable for bank safety and soundness reasons.

Fifth, it would provide a better structure for dealing with failing banks. It would allow the Federal Banking Board to focus on its insurance and resolution functions.

Sixth, it would improve the regulation of bank holding companies and their affiliates. It would concentrate regulation of bank holding companies within a single agency rather than have it divided between the OCC and the Federal Reserve. This might have resulted in a more uniform application of the bank holding company rules.

Seventh, consumers would benefit from only having to deal with one federal banking agency. By making it clear which federal agency was responsible for national banks and which was responsible for state banks, it would have made it easier for customers to know which agency to contact if they experienced problems with their bank.

Eighth, the streamlined structure would better handle the changing environment for financial services than the then existing structure. It would reduce the need for interagency cooperation and coordination. This would enable the federal regulators to act more quickly to changes in the marketplace. It also would increase the accountability of federal regulators if problems arose.

Finally, FDIC Chairman Wille also believed that his proposal would maintain the dual banking structure, which he argued would allow for beneficial regulatory competition. He opposed consolidating banking supervision into a single agency because he thought it would undermine the dual banking system, which had worked well, and it would allow too much power to be concentrated in one agency.

At least four arguments were advanced against the Wille Proposal. First, the then existing structure while complicated did work reasonably well.

Second, the consolidation would not guarantee that supervisory functions would be performed more uniformly than before. The supervisory functions would still have been divided among multiple regulators but just along different criteria than in the existing structure. There is no

[333] *Id*. at 279.
[334] *Id*.

reason to think that Wille's new agencies would act more cooperatively than the existing banking regulators.

Third, consolidation would concentrate power into a few agencies and would decrease regulatory choice for the banks being supervised. Banks would have fewer options about how they structure themselves in order to pick the most favorable regulator. They still would be able to choose between having a national charter versus a state charter but they would no longer be able to choose their federal regulator.

Fourth, the United States would lose the benefits of diversity. Having multiple regulators examine the same problem can result in a wider range of possible solutions than if only one or two are wrestling with the problem.

C. What Happened to the Proposal?

While the proposal generated a great deal of discussion at the time, it does not appear to have ever been the basis for any legislative proposal in Congress.

XI. Financial Institutions and the Nation's Economy (FINE) Study, 1975

In the 1970s and early 1980s, commercial banks began to face competition from investment banks for consumers' deposits. Investment banks began to offer consumers the option of placing their funds in money market accounts, except that these accounts were not subject to the interest rate ceilings imposed on bank demand deposits.[335] Consumers began moving their funds out of checking and savings accounts at banks and thrifts and into money market accounts in investment firms, even though the funds in money market accounts were not eligible for deposit insurance from the FDIC.[336] In response, Congress and some states began to deregulate the rules on banks.[337]

In the midst of these changes and the growing competition between commercial and investment banks, the House Committee on Banking, Currency and Housing authorized the Financial Institutions and the Nation's Economy (FINE) study.[338] The purpose of the FINE study was to determine how to reorganize banking and thrift regulations to provide relief from the harm being done to banks and thrifts by the existing interest rate regulations.[339]

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[335] Markham v. III, *supra* note 275, at 6-7. Money market accounts are a type of mutual fund that invested the funds in short-term instruments like commercial paper, Treasury bills, and negotiable certificates of deposits.
[336] *Id.* at 8-9.
[337] *Id.* at 8.
[338] *Id.*
[339] *Id.*

A. The Proposal

1. Structural Reorganization

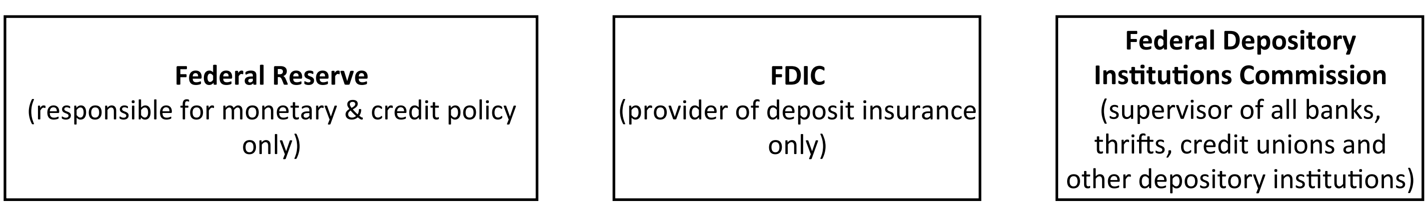
In 1975, the FINE study resulted in a four-volume report entitled "Financial Institutions and the Nation's Economy Discussion Principles" (FINE).[340] The report recommended the establishment of a Federal Depository Institutions Commission to administer all supervisory functions of the FDIC, the Federal Reserve, the OCC, the FHLBB, and the NCUA. Insurance functions would be handled by a subsidiary agency within the commission.[341] The FINE study seemed to view the Federal Depository Institutions Commission as an independent agency, although it never uses that the term independent agency. Its structure, however, is closer to independent agencies like the SEC rather than the structures used for units within a cabinet-level department. Thus, it probable that the FINE study did not intend for the Federal Depository Institutions Commission would be part of the Treasury like the OCC.

The FINE proposal was the broadest consolidation of federal financial regulators to date. No prior proposal had ever suggested that the thrift and credit union regulators should be consolidated with the banking regulators.

The FINE study recommended that the new agency be run by a five member commission comprised of the "Deputy Attorney General, a commissioner of the Securities and Exchange Commission (selected by the Chairman of the SEC), the Vice Chairman of the Federal Reserve Board, and two representatives of the public interest, one of whom would be Chairman."[342] The commission would have two mandates: "to encourage the soundness of depository institutions, and to encourage competition among them."[343] To fulfill these mandates, it would have two divisions, one for examinations and one for promoting competition.[344]

Figure 18 illustrates what the U.S. banking regulatory structure would have looked like if the FINE proposal had been implemented.

Figure 18
FINE Reorganization Structure



[340] Financial Institutions and the Nation's Economy, Compendium of Papers Prepared for the FINE Study, H. Comm. on Banking, Housing and Urban Affairs, 94th Cong., (1976).[hereinafter FINE Study].
[341] *Id.* at 16.
[342] *Id.*
[343] *Id.* at 17.
[344] *Id.*

2. Proposed Implementation

Reorganization of Regulatory Powers: Like many of the other reorganization proposals, the FINE study did not concern itself with addressing the logistical problems of implementing the reorganization. It did not indicate whether the reorganization should be done all at once or phased in over time.

Personnel Issues: The FINE study did not discuss what would have happened to the existing employees when their functions were transferred to the new Federal Depository Institutions Commission. Presumably, the employees would be transferred as well but the FINE study never expressly stated that.

Funding the Reorganization: The FINE study did not indicate how its reorganization would be financed.

B. Arguments For and Against the Proposal

The drafters of the FINE proposal saw the elimination of the existing overlapping and sometimes conflicting regulators and regulatory processes as the proposal's chief virtue.[345] In the opinion of the drafters of the FINE proposal, the existing fragmentary structure encouraged federal regulators to engage in a "competition in laxity" that was not beneficial to the economy because it encouraged banks to take excessive risks.[346] Support for the FINE proposal reportedly was limited to academic economists, a few consumer groups, and some member of Congress.[347]

Opponents of the FINE proposal included banks, savings and loans, mutual savings banks, the regulators for banks and thrifts, home builders, labor unions, and the Ford administration.[348] Some opponents, like Tracy Kelley, the President of the Oklahoma Bankers Association, felt that the proposed reforms were unnecessary as the system was working adequately.[349] Concerns were also raised that creating a single depository institution regulator would increase the influence of politics in bank and thrift regulation.[350]

Opponents of the FINE proposal saw regulatory competition as a virtue and not something to be stifled. Regulatory competition was what prevented an agency from imposing excessive regulatory burdens on the banks and curtailing innovation. From their perspective, ending

[345] *Id.* at 15.
[346] *Id.*
[347] James L. Pierce, *The FINE Study*, 4 J. OF MONEY, CREDIT & BANKING 605, 616 (November 1977); Richard L. Florida, *The Political Economy of Financial Deregulation and the Reorganization of Housing Finance in the United States*, 10 INT'L J. OF URBAN AND REGIONAL RESEARCH 207, 212 n. 7. (June 1986).
[348] Pierce, *supra* note 347, at 616.
[349] *The Financial Reform Act of 1976 Hearings Before the H. Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the H. Comm. on Banking, Currency and Housing*, 94th Cong. 216-217 (1976) [hereinafter Financial Reform Act Hearings] (statement of Tracy Kelley).
[350] *Id.* at 217.

regulatory competition by creating a single depository institution supervisory agency would harm the economy, not help it.

B. David Goble, President of the National Association of Federal Credit Unions, opposed creating the Federal Depository Institutions Commission because the new agency would be "bank-dominated" which might fail to appreciate the unique public service that credit unions fulfilled.[351] Goble argued that credit unions were formed to "provide services that commercial banks failed to perform."[352] He contended that the National Credit Union Administration (NCUA) had never engaged in a "competition in laxity" as the banking regulators had and thus, it was unnecessary and potentially harmful to merge the NCUA's functions into the new Federal Depository Institutions Commission.[353]

C. What Happened to the Proposal?

The bill that was perhaps most directly inspired by the FINE proposal was the Financial Reform Act of 1976, H.R. 15690, which was introduced into the House on September 23, 1976.[354] This bill did not include the FINE proposal's recommendations on regulatory restructuring.[355] The bill that tracked the FINE proposal's recommendations regarding regulatory restructuring actually was introduced while the FINE study members were working on finalizing their report.

In the mid-1970s, the bill that most closely resembled the Federal Depository Institutions Commission called for by the FINE study was one introduced on September 5, 1975, by Senator William Proxmire (D-WI). He introduced a bill in the Senate, S. 2298 – Federal Bank Commission Act, that would have combined the examination and supervisory functions of the Federal Reserve, the FDIC, and the OCC in a new agency called the Federal Bank Commission.[356] No one cosponsored the bill. It was referred to the Senate Banking, Housing and Urban Affairs Committee but was never voted upon.[357] On February 10, 1977, Senator Proxmire re-introduced the bill as S. 684 in the next session of Congress. Senator Donald Riegle (D-MI) and Senator Spark Matsunaga (D-HI) cosponsored that bill.[358] It again was referred to the Senate Banking, Housing and Urban Affairs Committee where it died when the session for the 95th Congress expired.[359]

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[351] Financial Reform Act Hearings, *supra* note 349, at 189 (statement of B. David Goble).
[352] *Id*.
[353] *Id*. at 188-189.
[354] Pierce, *supra* note 348, at 616; GovTracks.us, Congress, Bills, S. 15690 (94th): Financial Reform Act, https://www.govtrack.us/congress/bills/94/hr15690#overview.
[355] GovTracks.us, Congress, Bills, S. 15690 (94th): Financial Reform Act, Summary, https://www.govtrack.us/congress/bills/94/hr15690#summary.
[356] GovTracks.us, Congress, Bills, S. 2298 (94th): Federal Bank Commission Act, https://www.govtrack.us/congress/bills/94/s2298 [hereinafter GovTracks S. 2298].
[357] *Id.*
[358] GovTracks.us, Congress, Bills, S. 684 (95th): Federal Bank Commission Act, https://www.govtrack.us/congress/bills/95/s684 [hereinafter GovTracks S. 684].
[359] *Id.*

A companion bill, H.R. 4346, was introduced in the House of Representatives by Fr. Robert Drinan (D-MA4).[360] The House bill was referred to the House Financial Services Committee where it died when the session for the 95th Congress expired.[361]

James L. Pierce, an economics professor at the University of California at Berkeley, argued that the efforts to implement the FINE recommendations failed because the public failed to recognize the potential benefits that they might garner while special interests fought against the recommendations because of the potential downsides that they might suffer if Congress enacted the recommendations.[362] The public had difficulty understanding the benefits because of the complexity of the issues and the diffuse way in which the benefits would have been spread among the public.[363]

Pierce commented that banks and thrifts resisted efforts to change the regulatory structure because they had "learned to deal with the existing regulatory structure" and were "made uncomfortable by the prospect of a new and unknown regulatory apparatus."[364] He noted that bankers believed that they would more likely lose if the regulatory agencies undertook greater regulation and supervision of their institutions.[365] In addition, homebuilders and building trade unions opposed implementing the FINE proposal's restructuring recommendations because they feared that those recommendations might foster increased competition that "might reduce production and employment in the housing industry."[366]

In addition, the existing regulators opposed the implementation of the FINE proposal's recommendations regarding regulatory restructuring. Pierce observed that the regulators felt aggrieved by the criticism that they received in the FINE report and had "no intention of giving up their bureaucratic preserves without an intense fight."[367] He felt that the Federal Reserve was particularly aggressive in fighting to maintain its supervisory prerogatives.[368]

In the end, Congress never enacted the FINE recommendations regarding regulatory reorganization.

XII. Senate Governmental Affairs Committee Proposal, 1977

A. The Proposal

The Senate Governmental Affairs Committee proposal was the result of a two-year process that began in 1975 when the Senate passed a resolution, S. Res. 71, instructing the Senate

[360] GovTracks.us, Congress, Bills, H.R. 4346 (95th): Federal Bank Commission Act, https://www.govtrack.us/congress/bills/95/hr4346 [hereinafter GovTracks H.R. 4346].
[361] *Id.*
[362] Pierce, *supra* note 348, at 617.
[363] *Id.*
[364] *Id.* at 616.
[365] *Id.*
[366] *Id.* at 616-617.
[367] *Id.* at 616.
[368] *Id.*

Governmental Affairs Committee to conduct a comprehensive study of federal regulations.[369] In 1977, the committee released a six-volume report on the regulatory process.[370]

While the Senate Governmental Affairs Committee was conducting its review of the federal regulations, Senator William Proxmire, the Chairman of the Senate Committee on Banking, Housing and Urban Affairs, introduced a series of bills that also proposed creating a Federal Bank Commission. The last of these bills before the committee released its report was S. 684, also known as the Federal Bank Commission Act of 1977, which Senator Proxmire introduced to the Senate on February 10, 1977.[371] Fr. Robert Drinan had introduced a companion bill, H.R. 4346 on March 2, 1977.[372] The Senate Governmental Affairs Committee was influenced by these bills and in fact, specifically referred to them in its report.[373]

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369 S. Rep. No. 104-89, at 4 (1995).
370 S. Rep. No. 104-89, *supra* note 369, at 4; S. COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., STUDY ON FEDERAL REGULATION v. 6 (1977) [hereinafter S. Comm. on Governmental Affairs].
371 GovTracks S. 684, *supra* note 358.
372 GovTracks H.R. 4346, *supra* note 360.
373 S. Comm. on Governmental Affairs, *supra* note 370, at XXXV.

1. Structural Reorganization

The Senate Governmental Affairs Committee reached the conclusion that a Federal Bank Commission along the lines suggested by S. 684 and H.R. 4346 should be created.[374] Both S. 689 and H.R. 4346 called for the called for the creation of a Federal Bank Commission, which would be run by a five member commission appointed by the President with the advice and consent of the Senate.[375] The FBC would be an independent agency, not part of the Treasury Department. Under both bills, all of the bank supervisory and examination powers of the OCC, the Federal Reserve, and the FDIC would be transferred to the FBC.[376] In addition, the bills transferred to the FBC all of the Federal Reserve's functions related to the Bank Holding Company Act, the Banking Act of 1933, the Securities Act of 1933, the Securities and Exchange Act of 1934, the Consumer Credit Protection Act, the Bank Merger Act, and the Edge Act.[377] The only exception to the transfer of powers from the Federal Reserve to the FBC was that the Federal Reserve would retain its power to set margin requirements for securities.[378] The bills also transferred to the FBC all of the powers of the OCC, except its powers concerning currency and redemption.[379] The OCC powers related to currency and redemption would have been transferred to the Treasury Secretary.[380] Finally, all of the functions of the FDIC would have been transferred to the FBC.[381]

Under S. 684 and H.R. 4346, the FBC would be run by a five member commission appointed by the President with the advice and consent of the Senate.[382] The FBC would be an independent agency, not part of the Treasury Department.[383]

The Senate Governmental Affairs Committee felt that the FDIC should continue as a corporate entity within the FBC that offered deposit insurance.[384] It also felt that the Federal Reserve needed to keep its discount window operations, its setting of interest rate ceilings, its buying and selling of government bonds, and its other activities that relate to monetary policy.[385] The committee felt that those should be kept separate from the regulatory functions to avoid regulatory considerations influencing monetary policy.

Figure 19 illustrates the regulatory structure that the Senate Governmental Affairs Committee recommended.

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374 Id. at VIII.

375 GovTracks.us, Congress, Bills, H.R. 4346 (95th): Federal Bank Commission Act, Summaries, https://www.govtrack.us/congress/bills/95/hr4346#summary [hereinafter GovTracks H.R. 4346 Summary]; GovTracks.us, Congress, Bills, S. 684 (95th): Federal Bank Commission Act, Summaries, https://www.govtrack.us/congress/bills/95/s684#summary [hereinafter GovTracks S. 684 Summary].

376 S. Comm. on Governmental Affairs, *supra* note 370, at XXXV.

377 *Id*. at XXXVI.

378 *Id*.

379 *Id*.

380 *Id*.

381 *Id*.

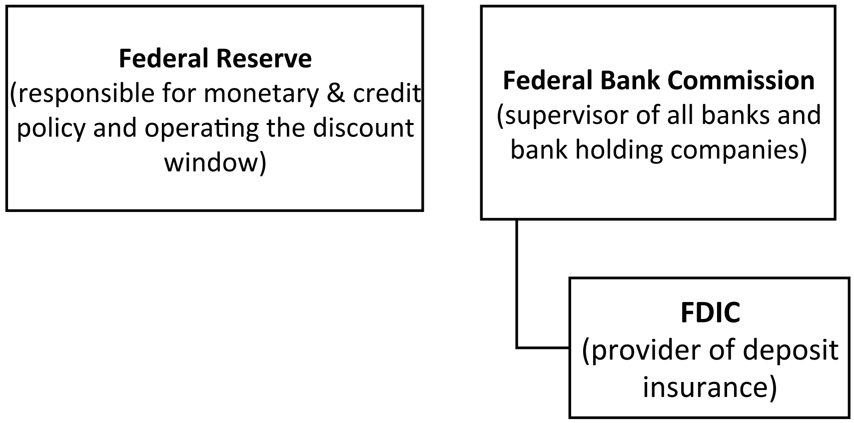
382 GovTracks H.R. 4346 Summary, *supra* note 375; GovTracks S. 684 Summary, *supra* note 375.

383 GovTracks H.R. 4346 Summary, *supra* note 375; GovTracks S. 684 Summary, *supra* note 375.

384 S. Comm. on Governmental Affairs, *supra* note 370, at XXXVIII.

385 *Id*.

Figure 19
Senate Governmental Affairs Committee Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The Senate Governmental Affairs Committee did not address how its proposed reorganization would be implemented.

Personnel Issues: The Senate Governmental Affairs Committee also did not address what would happen to the employees in the existing regulatory agencies if its proposed reorganization was implemented. Both H.R. 4346 and S. 689 would have authorized the transfer of the personnel responsible for the functions transferred to the FBC from the Federal Reserve, the OCC, and the FDIC to have been transferred to the FBC.[386]

Funding the Reorganization: The Senate Governmental Affairs Committee did not address how its proposed reorganization would be financed. Both S. 684 and H.R. 4346 would have authorized the appropriation of $5,000,000 for the costs and expenses of the FBC if it had been enacted.[387]

B. Arguments For and Against the Proposal

Senate Governmental Affairs Committee identified five advantages of creating a Federal Bank Commission. First, it would eliminate the overlap and duplication of responsibilities that existed among the OCC, the Federal Reserve and the FDIC at the time.[388]

Second, it could improve supervision by having one agency responsible for supervising both the bank and its holding company.[389] At the time, a national bank would be supervised by the OCC and its holding company supervised by the Federal Reserve. Similarly, a state nonmember bank

[386] GovTracks H.R. 4346 Summary, *supra* note 375; GovTracks S. 684 Summary, *supra* note 375.
[387] GovTracks H.R. 4346 Summary, *supra* note 375; GovTracks S. 684 Summary, *supra* note 375.
[388] S. Comm. on Governmental Affairs, *supra* note 370, at XXXVI.
[389] *Id.*

would be supervised by the FDIC but its holding company would be supervised by the Federal Reserve. It would also improve supervision by having the same standards applied to all banks. At the time, the OCC, the FDIC, and the Federal Reserve were employing somewhat different standards when conducting examinations of banks.

Third, it would enhance the dual banking system.[390] One of the major reasons some opposed consolidating federal banking regulators into a single agency was that the agency would be too powerful and would use that power to run the state banking regulators out of business. The committee challenged that notion by pointing out the federal thrift supervision had been in a single agency, the Federal Home Loan Bank Board (FHLBB), for over thirty years and the FHLBB had not undermined the dual thrift system.[391]

Fourth, creating the FBC would foster a competitive climate.[392] Again the committee pointed to the experience of the FHLBB, which had made it easier for smaller thrifts to merge with one another.[393] In addition, the committee felt that inconsistent regulations warped the competitive playing field that banks competed upon as the differences gave some banks a competitive advantage over those subjected to different standards.[394]

Finally, the committee believed that the FBC would encourage financial innovations.[395] It would do this by eliminating the inconsistent and duplicative regulations that banks had to deal with when seeking to offer a new product or service.

Opponents of the Senate Governmental Affairs Committee proposals, such as the Treasury, the Conference of State Bank Supervisors, and the American Bankers Association, generally argued that they did not think that the steps the committee proposed to protect the dual banking structure would succeed and that the FBC would use its power to weaken state banking regulators.[396]

Second, they argued that the regulatory system seemed to be working just fine and did not need to be fixed.[397]

Third, they also claimed that the proposal was unnecessary because one of the ills that it was seeking to address, namely bank regulators engaging in a race to the bottom in terms of regulatory laxity, had been replaced by increasing efforts among regulators to cooperate with one another.[398]

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[390] *Id.*
[391] *Id.*
[392] *Id.*
[393] *Id.* at XXXVII-XXXVIII.
[394] *Id.* at XL.
[395] *Id.* at XXXVI.
[396] *Federal Bank Commission of 1977 and Report by the Senate Governmental Affairs Committee on Bank Regulatory Agency Consolidation: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs*, 95th Cong. 4-5 (1978) [hereinafter S. Comm. On Banking Hearings 1978] (statement by Deputy Treasury Secretary Robert Carswell).
[397] *Id.* at 5-6.
[398] *Id.* at 6-7.

Fourth, the opponents also argued that consolidating the regulators would not lead to significant cost savings.[399] The reason for this was that most the expenses of the OCC, the FDIC, and the Federal Reserve were associated with the bank examination process and these agencies did not examine the same institutions.[400] Thus, there was no overlap among the agencies in the area of examinations that could have produced cost savings if it had been eliminated. Not only would consolidation fail to produce significant cost savings but it would lead to larger expenditures, at least in the short term, as the agencies' functions and their staffs are moved to the FBC.[401]

C. What Happened to the Proposal?

S. 684 did not become law even with the endorsement of the Senate Governmental Affairs Committee. Senator Proxmire continued to introduce bills that would have created a Federal Bank Commission if any of them had been enacted. These bills included S. 2750, known as the Consolidated Banking Regulation Act, which was introduced to the Senate on March 15, 1978, and S. 332, known as the Consolidated Banking Regulation Act of 1979, which was introduced to the Senate on February 5, 1979.[402] Neither bill was ever enacted.

XIII. FDIC's Deposit Insurance in a Changing Environment Report, 1983

The problems caused by the double-digit inflation in the 1970s and early 1980s, which were discussed in Part XII above, continued to lead consumers to move their funds out of traditional demand deposit accounts with the commercial banking and thrift industries and into money market funds offered by investment banks.[403] Congress attempted to provide some relief to banks and thrifts by enacting the Depository Institutions Deregulation and Monetary Control Act of 1980 that allowed national banks to offer NOW accounts and thrifts to offer credit cards and consumer loans.[404] In addition, Congress enacted the Garn-St. Germain Depository Institutions Act of 1982 that allowed banks and thrifts to offer money market deposit accounts.[405] In addition, §712 of the Garn-St. Germain Act required the FDIC, the Federal Savings and Loan Insurance Corporation, and the NCUA to each produce a study that discussed the status of the system of deposit insurance in the United States, including "the feasibility of consolidating the three separate insurance funds" operated by the FDIC, the FSLIC, and the NCUA.[406]

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[399] *Id.* at 7.
[400] *Id.*
[401] *Id.*
[402] GovTracks.us, Congress, Bills, S. 2750 (95th): Consolidated Banking Regulation Act, https://www.govtrack.us/congress/bills/95/s2750; GovTracks.us, Congress, Bills, S. 332 (97th): Consolidated Banking Regulation Act of 1979, https://www.govtrack.us/congress/bills/96/s332.
[403] Markham v. III, *supra* note 275, at 8-9.
[404] *Id.* at 9.
[405] *Id.*
[406] Garn-St. Germain Depository Institution Act of 1982 (Pub. L. No. 97--320; 96 Stat. 1544), §712.

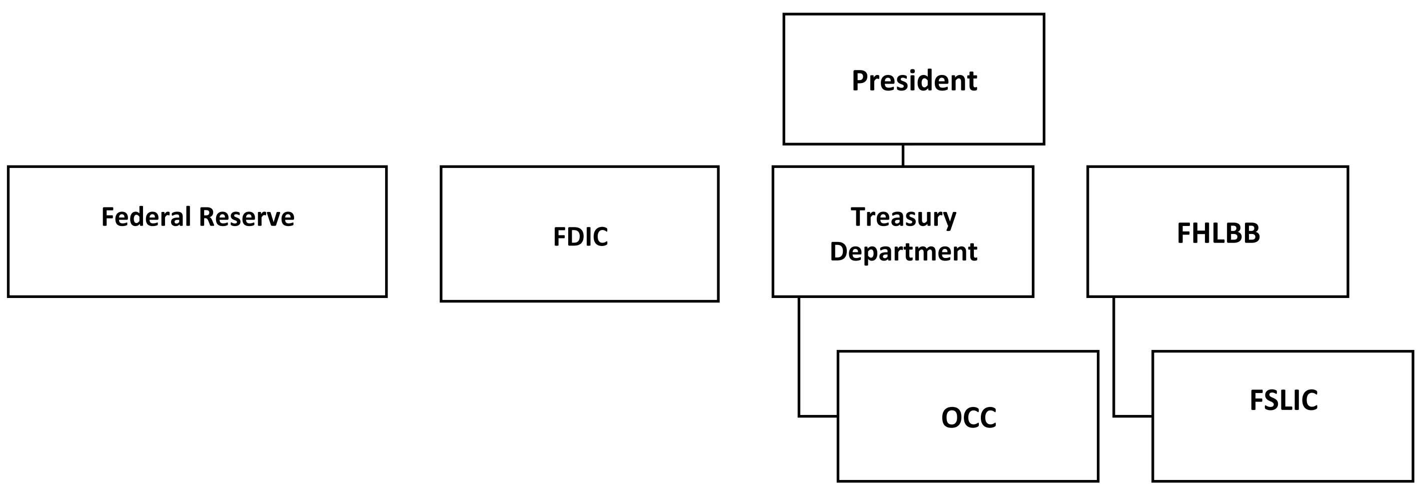
A. The Proposal

In 1983 the FDIC published a report entitled "Deposit Insurance in a Changing Environment," which contained the findings of the study that it had been required to produce under §712 of the Garn-St. Germain Act. [407]

1. Structural Reorganization

The report by the FDIC recommended two different consolidations of federal agencies. The first recommendation was that the FSLIC be rolled into the FDIC and that the insurance of deposits be undertaken jointly by the resultant entity.[408] The second recommendation was the transfer of the bank and thrift supervisory functions of the Federal Home Loan Bank Board (FHLBB), the OCC, the Federal Reserve, and the FDIC into a new separate regulatory agency that would not part of the Treasury or any other department or agency.[409] The report did not provide a name for this new agency. For purposes of this report, it will be referred to as the Federal Banking Agency or FBA. Figure 20 illustrates the existing federal bank and thrift regulators in 1983 while Figure 21 illustrates the proposed new structure.

Figure 20
Federal Bank and Thrift Regulators in 1983



Following the transfer of its supervisory functions to the new agency and the merger of the FSLIC into the FDIC, the FDIC would only be responsible for managing the deposit insurance funds for banks and thrifts. It would not retain any supervisory powers of the banks and thrifts whose deposits it insures.

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[407] Federal Deposit Insurance Corporation, Deposit Insurance in a Changing Environment: a Study of the Current System of Deposit Insurance Pursuant to Section 712 of the Garn-St. Germain Depository Institution Act of 1982 v, (1983)[hereinafter *Deposit Insurance in a Changing Environment*].
[408] Id. at VI – 1.
[409] *Deposit Insurance in a Changing Environment, supra* note 407, at VI – 12; Rose Marie Kushmeider, *The US Federal Financial Regulatory System: Restructuring Federal Bank Regulation*, 17 FDIC BANKING REV. 26 (2005).

Figure 21
FDIC's Deposit Insurance in a Changing Environment Reorganization Structure

Federal Reserve (responsible for monetary and credit policy only)	**FDIC** (provider of deposit insurance for banks and thrifts only)	**Federal Banking Agency** (supervisor for banks and thrifts)

In the case of the merger of the FDIC and FSLIC, the report suggested that the FDIC and the FSLIC be combined under the FDIC.[410] The report did consider briefly combining the two into a new entity, but dismissed the idea as inefficient because it would be disruptive and unnecessary given the support for merging the funds into the FDIC.[411]

The report stated that this was the best idea for many reasons. The first was because of brand recognition that the FDIC enjoyed but that the FSLIC did not.[412] This brand recognition would enhance the public's perception of stability of the resulting entity that the merger would create. The second reason for subsuming the FSLIC into the FDIC was that the FDIC had a bigger insurance fund to work with than the FSLIC had.[413] The third reason was that the FDIC had some experience dealing with mutual savings banks, which are a type of thrift, but the FSLIC lacked any similar experience dealing with banks.[414]

Another reason along those lines was that the FDIC already insured a large percentage of existing banks as well as some thrifts in the form of mutual savings banks.[415] The FDIC also already maintained an experienced liquidation division that the merged entity could use.[416] Finally, the FSLIC was a subsidiary of the FHLBB and as such had almost no administrative apparatus in place, which would mean that such apparatus would have to be created or would have to be transplanted in its entirety from the FDIC into the FSLIC if the FDIC merged into the FSLIC.[417]

In the merger of the supervisory powers of the FDIC, the FHLBB, the Federal Reserve and the OCC into a new agency, the purpose of the new agency would be to regulate all federally chartered depository institutions.[418] This new single agency would be run by either a board or a panel and would be independent of any other federal agency in order to minimize possible

[410] *Deposit Insurance in a Changing Environment*, *supra* note 407, at VI–10.
[411] *Id.*
[412] *Id.* at VI–10.
[413] *Id.*
[414] *Id.* at VI–11.
[415] *Id.*
[416] *Id.*
[417] *Id.*
[418] *Id.* at VI–12.

conflicts of interest.[419] The new agency would be in charge of supervising all federally chartered banks and thrifts and their holding companies.[420] The individual states, however, would continue to regulate state chartered institutions.[421]

As previously mentioned, the FDIC would also no longer have any regulatory authority, but would instead only deal with problem or near problem banks.[422] The FDIC would be required to investigate those problem banks yearly and would investigate well rated institutions by use of a sampling program where they evaluate approximately 10 percent of those institutions per year.[423] The report argued that the Federal Reserve did not need to be present for these evaluations. Instead, the Federal Reserve only needed access to the information from those examinations in order to fulfill its monetary policy duties.[424]

Following the spin-off of its supervisory functions to the new agency and the merger of the FSLIC into the FDIC, the FDIC would be headed by a three member board, two appointed and one as the ex officio member of the Federal Reserve.[425]

The report concluded broadly that all other regulation should be reorganized along functional lines.[426] The examples given of the types of functional regulation, which would be imposed, included giving the SEC exclusive supervisory powers over all securities relating to financial institutions, giving the Department of Justice jurisdiction over all anti-trust actions, or making the Federal Trade Commission the only enforcer of consumer protection laws, such as the Truth-in-Lending laws.[427]

2. Proposed Implementation

Reorganization of Regulatory Powers: The FDIC did not give a timetable for when the consolidation would occur. However, it did discuss the possibility of phasing the changes in, rather than having the changes to happen overnight.[428]

Personnel Issues: In the report, the FDIC assumed that personnel levels would stay about the same after the reorganization in order to support the new regulatory structure.[429] The FDIC expected that that would have been necessary in the short-term.[430]

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419 *Id.*
420 *Id.*
421 *Id.*
422 *Id.* Problem banks are defined as those who are rated as a 3 or higher on the CAMEL system used by all of the federal banking regulators. *Id.* "CAMELS" stands for: Capital adequacy, Asset quality, Management administration, Earnings, Liquidity, and Sensitivity to market risk. COMPTROLLER'S CORPORATE MANUAL, A GUIDE TO THE NATIONAL BANKING SYSTEM 18 (April 2008).
423 *Deposit Insurance in a Changing Environment, supra* note 407, at VI-12.
424 *Id.* at VI–13.
425 *Id.*
426 *Id.*
427 *Id.*
428 *Id.* at VI–12.
429 *Id.* at VI–13.
430 *Id.*

Funding the Reorganization: The report did not discuss how the reorganization would be funded.

B. Arguments For and Against the Proposal

In the case of the merger of the FSLIC into the FDIC, the report gave at least five reasons for supporting it. The first two reasons were interrelated. The first reason the report gave for merging the FSLIC into the FDIC was the need to eliminate duplication of work by the regulators, which would lead to an increase in efficiency and equity.[431] The report pointed out that the Garn-St. Germain Act seemed to set the stage for this consolidation by already allowing institutions chartered by the FHLBB and insured by the FDIC.[432]

The second reason flowed out of the first reason. It was that merging the FSLIC and the FDIC would lead to cost-savings by unifying the assessment costs of the two institutions as well.[433] The merger of the FDIC and FSLIC was also expected to result in some cost savings through reduced overhead, reduced assessment costs, and reduced personnel costs.[434]

The third reason for merging the two insurance corporations was to increase the public confidence in the deposit insurance system.[435] The FDIC believed that as the financial services market moves towards one in which banks and thrifts essentially offer the same products and services, the public would perceive a single entity in charge of all deposit insurance as more secure than two distinct corporations each with their own rules, regulations and practices.[436] Some private sector attorneys also believed that the merger of the FDIC and the FSLIC would allow customers to avail themselves of a strong, federally backed insurance fund regardless of the nature of the depository institution.[437] The merger could also do away with imbalances that the public perceives in the relative strengths of the insurance funds.[438]

The fourth reason to merge the FDIC and FSLIC into a single entity was to diversify risks in both funds.[439] Both the FDIC and the FSLIC were subject to certain risks inherent in deposit insurance, but by merging together they would be able to better withstand the fallout from materialized risks.[440]

The final stated reason for the merger of the FDIC and FSLIC was because banks and thrifts had begun to directly compete with one another in a variety of areas, including attracting deposits

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431 *Deposit Insurance in a Changing Environment, supra* note 407, at VI–2, VI-10.
432 *Id.* at VI–7.
433 *Id.* at VI–2-3.
434 *Id.* at VI–2, 13.
435 *Deposit Insurance in a Changing Environment, supra* note 407, at VI–5.
436 *Id.*
437 C. Thomas Long, William J. Schilling and Carol R. Van Cleef, *Enhancing the Value of the Thrift Franchise: A Possible Solution for the Dilemma of the FSLIC*, 37 Cath. U. L. Rev. 385, 437 (1987-1988) (three Jones Day attorneys discussing the benefits of a merger of the FDIC and FSLIC).
438 *Id.*
439 *Deposit Insurance in a Changing Environment, supra* note 407, at VI–6.
440 *Id.*

and providing commercial loans.[441] The *Deposit Insurance in a Changing Environment* report concluded that, as the financial climate changes and more institutions affiliate with banks and thrifts, deposit insurance should not be left behind.[442] According to the report, the system at the time was already outdated and in need of an overhaul.[443]

Regarding the merger of the supervisory functions of the FDIC, the FHLBB, the Federal Reserve and the OCC into a new single regulator, the FDIC report gave four reasons for supporting it. The first reason given for the merger of the depository institution supervisory functions of the FHLBB, Federal Reserve and OCC was that the merger would be part of the greater comprehensive plan to reorganize regulatory processes, of which the combined deposit insurance system is also a step.[444] The report went on to say that the compartmentalized system, which imposed different regulations for banks and thrifts, was inefficient, ineffective and inequitable, and that it had outlived its usefulness.[445]

The second reason that the report gave for the homogenization of the federal regulators into a single agency was that the new agency would benefit from cost-savings by being able to reduce the legal, research and support staff of each individual institution, while also consolidating regional offices for that same purpose.[446]

The third reason for the removal of regulatory duties from the FDIC was due to the inherent conflict of interest between its roles as a regulator and as an insurer. The FDIC argued that it could not always support both functions equally but would subordinate one function to advance the other.[447] As a regulator, the FDIC often felt compelled to promote the banking industry, which would conflict with its duties as an insurer that is concerned with the safety and soundness of the firms within the industry.[448] The report found that there should be a tension between insurance and regulation and that having both responsibilities under the same umbrella (as it is under the FDIC) removed the necessary checks and balances of the financial system.[449]

Finally, the *Deposit Insurance in a Changing Environment* report viewed the uniform reporting requirements of the combined organizations as a significant benefit.[450] The information that every agency would need, would be centralized.[451] The report found that the FDIC has already had some success in this area, and that such success would only be expanded by the consolidation.[452]

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441 *Id.* at VI–8.
442 *Id.*
443 *Id.*
444 *Id.* at VI–12.
445 *Id.* at VI–13. For example, until interest rate ceilings on bank demand deposits were completely phased out in 1987, thrifts were allowed to pay higher interest rates on time and savings deposits than banks. Markham v. III, *supra* note 275, at 74. This gave thrifts a competitive advantage over banks in attracting deposits.
446 *Deposit Insurance in a Changing Environment*, *supra* note 407, at VI-13.
447 *Id.*
448 *Id.* at VI–8.
449 *Id.* at VI–8-9.
450 *Deposit Insurance in a Changing Environment, supra* note 407*,* at VI–8.
451 *Id.*
452 *Id.*

One other potential benefit of the reorganization is worth noting. Separating the supervisory functions of the FDIC from its insurance functions would result in more effective implementation of both. Robert S. Pasley, who was the Assistant Director of the OCC's Enforcement and Compliance Division, contended that having the examination functions and insurance functions in a single agency created conflicts of interests within the agency.[453]

Pasley noted that the FDIC tended to be overly cautious because of its role as the insurer.[454] Although safety and soundness is the goal of both the insurer and regulator, there are differences between the ways that those roles are completed.[455] Insurers are generally concerned with the risks of a given change, while regulators are focused on delivering the services that a customer wants in a competitive manner without compromising the integrity of the financial services industry.[456] Finally, the FDIC did its job as an insurer without supervisory authority for national banks, which implied that such oversight was not absolutely necessary for the FDIC to fulfill its insurance functions.[457]

In addition, Sarkis Joseph Khoury, a professor of finance at University of California at Riverside, did not believe that the existing system should be viewed as beneficial. He argued that the existing structure was not created in the interest of rationality, but rather was based on the outcome of a political struggle between financial institutions.[458] The American taxpayers paid for the economic externalities created this political struggle in the form of higher costs for financial services and in invisible regulatory taxes.[459] Reforming the existing system could reduce these costs and taxes.

Not everyone agreed that consolidation would be beneficial. Robert S. Pasley, who was the Assistant Director of the OCC's Enforcement and Compliance Division, outlined several arguments against consolidating federal banking regulation into a single agency. [460] First, consolidation would result in one agency having too much power over the financial sector, one of the most important sectors in the U.S. economy. [461] In addition, a single federal regulator might use its powers to stifle the state banking system and undermine the dual banking structure that had proved beneficial for the United States.[462] Regulatory competition should be preserved to provide checks and balances to avoid excessive regulation.[463]

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453 *Id.* at 284-285.
454 *Id.*
455 *Id.*
456 *Id.*
457 *Id.* at 304.
458 SARKIS JOSEPH KHOURY, US BANKING AND ITS REGULATION IN THE POLITICAL CONTEXT 246 (1997).
459 *Id.* at 246-247.
460 Robert S. Pasley, Consolidation of the Federal Banking Regulatory Agencies, 9 ANN. REV. BANKING L. 255, 258-278 (1990).
461 *Id*. at 258-260.
462 *Id*. at 260-261.
463 *Id*. at 261-263.

Second, consolidation would reduce the responsiveness and creativity of the banking regulators.[464] Agencies that must compete with one another are more likely to be responsive to the banking industry and the marketplace than those that know that a firm has no alternative but to deal with the sole banking regulator.[465] In addition, competition might force agencies to devise more creative regulatory solutions than they would if left to their own devices.[466]

Third, a single agency supervising an industry tends to become inefficient, which can lead the industry that it supervises to stagnate.[467] Pasley cites the experiences of the nuclear, the airline, the railroad, and trucking industries as evidence of this problem.[468]

Fourth, consolidation might result in the loss of important differences between the banking and thrift industries that should be preserved.[469] Pasley, however, noted that the differences between banks and thrifts were already blurred, and that the two institutions were in direct competition with one another.[470] As a result, he was not sure that there was a need for a distinct thrift industry.[471]

Fifth, consolidation that removed the bank supervisory powers from the Federal Reserve might undermine the Federal Reserve's ability to effectively formulate monetary and credit policy.[472] The Federal Reserve has usually advanced this argument against any consolidation proposal that would strip it of its bank supervisory powers. Pasley, however, argued that the Federal Reserve reviewed a wider range of information than that provided by its bank supervisory functions when making monetary policy decisions.[473] In addition, much of the information that the Federal Reserve had on banking institutions came from the other banking regulators.[474] As a result, it is not clear that the Federal Reserve could not perform its monetary and credit policy functions if it lost its ability to directly supervise a portion of the banking industry.

Finally, the problems with the existing system might be solved by a less radical solution, such as enhanced coordination and cooperation among the existing banking regulators.[475] Unfortunately, getting the existing federal banking regulators to work with each other had not proven to be an easy objective to accomplish.[476]

The American Bankers Association Banking Journal also objected to the proposed merger of the FDIC and the FSLIC on the grounds that the merger would strain already thin resources.[477] The

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[464] *Id*. at 265-266.
[465] *Id*. at 265.
[466] *Id*.
[467] *Id*. at 267.
[468] *Id*. at 267-270.
[469] *Id*. at 271-276.
[470] *Id*. at 274.
[471] *Id.* at 275.
[472] *Id.* at 292-293.
[473] *Id.* at 298.
[474] *Id.* at 293-294.
[475] *Id.* at 276-278.
[476] *Id.* at 277.
[477] William M. Isaac, *Meet the New FDIC*, AM. BANKERS ASSOC. BANKING J. 79, 79 (1989).

FDIC only had limited resources and could have encountered problems if mandated to absorb a troubled FSLIC.[478] Not only would such a merger have resulted in the destruction of the thrift industry as a stand-alone entity,[479] but it was also considered unlikely that the merged insurance funds would be able to cover the commitments of both industries without raising extra capital.[480]

C. What Happened to the Proposal?

The recommendations drafted by the FDIC in the report got a mixed reception and failed to materialize due to political conditions and maneuvers.[481] Thrifts generally opposed any change that removed existing powers from them.[482] The only way that thrifts would support the proposal was if the thrifts maintained the advantageous powers associated with thrift charters after the merger.[483] Banks also opposed the merger because they felt like they were bailing out the failing thrift industry.[484]

In 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) in response to the growing thrift crisis.[485] This legislation eliminated the FHLBB and the FSLIC, and created the Office of Thrift Supervision (OTS) to replace the FHLBB as the supervisors for nationally chartered thrifts.[486] In addition, FIRREA created the Resolution Trust Corporation to deal with the fallout from failing thrifts.[487]

FIRREA effectively implemented one of the two consolidation proposals discussed in the FDIC's *Deposit Insurance in a Changing Environment* study. It merged the FSLIC into the FDIC but, unlike the FDIC's proposal, FIRREA kept the insurance funds for thrifts and banks separate. Following the enactment of FIRREA, the FDIC administered the Bank Insurance Fund (BIF) to insure deposits in banks and the Savings Association Insurance Fund (SAIF) to insure deposits in thrifts. The other regulatory consolidation elements of the FDIC proposal were not enacted.

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[478] Long, *supra* note 338 at 387-388.
[479] *Id.* at 464
[480] *Id.*at 440-441
[481] Isaac, *supra* note 477, at 135.
[482] John D. Hawke, Jr., *Reflections on the Ongoing Effort to Modernize Financial Services Regulation*, 49 Mercer L. Rev. 777, 781-82 (1997-1998) (discussing thrift responses to regulatory change).
[483] *Id.*
[484] Thomas A. Brooks, A Necessary Precursor to Reform, 8 Ann Rev. Banking L. 483, 489 (1989) (discussing regulatory proposals broadly).
[485] Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L No. 101-73, 103 Stat. 183 (1989) (codified at various sections of 12 and 15 USC.) [hereinafter FIRREA]. The thrift crisis arose in part because the Garn-St. Germain Act allowed thrifts to invest in riskier businesses than before, and thus many thrifts began to invest heavily in speculative investments, knowing that they were insured by the FSLIC. DEPARTMENT OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE, 36 (Department of the Treasury, 2008) [hereinafter Treasury Blueprint].
[486] FIRREA, *supra* note 485, §401(a)(1)-(2), 703.
[487] *Id*. §501(b).

XIV. The Bush Task Group's Blueprint for Reform, 1984

President Ronald Reagan created the Task Group on Regulation of Financial Services to investigate whether the financial services industry needed to be deregulated.[488] President Reagan appointed Vice President George W. H. Bush to serve as its chairman and as a result, the group became more commonly known as the "Bush Task Group."[489] In addition to Vice President Bush, the Task Group was comprised of twelve members, who included the heads of all of the federal financial regulators in existence at the time.[490]

A. The Proposal

The Bush Task Group's Blueprint for Reform was an attempt to consolidate the nation's financial regulators. The Task Group leadership argued that every agency except the OCC was in some way independent of the Executive Branch, which meant that there was no effective way to coordinate the agencies and asserted that the current system of regulation was structured around institutions (banks, insurance companies, securities firms) and not on function.[491] As a result, multiple federal agencies shared responsibility for regulating financial firms, which impaired the safety and soundness of the financial system.[492] The Task Group spent a year sifting through prior consolidation proposals they believed would give the nation's financial service industry "workable proposals for action."[493]

The Task Group leadership proposed that regulation should be organized based on functional regulation, not institutional regulation.[494] At the time of the proposal, the Federal Reserve was in charge of regulating all bank holding companies, while the regulation of the banks themselves was assigned to the OCC (for nationally chartered banks), the Federal Reserve (for state member banks), and the FDIC (for state non-member banks).[495]

1. Structural Reorganization

Under the Bush Task Group's proposal, every banking institution would be regulated by one of two federal agencies, either the Federal Reserve or the new Federal Banking Agency (FBA). The FBA would regulate national banks and the Federal Reserve would regulate state banks. Under the proposal, the FDIC would be relieved of all the regulatory duties that it had at the time unless

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[488] *Bush Task Group Report on Regulation of Financial Services: Blueprint for Reform: Hearings Before a Subcomm. of the Comm. On Gov't Operations*, 99th Cong. 8 (1984) [hereinafter *Hearings on Bush Task Group Blueprint for Reform*]; Markham v. III, *supra* note 275, at 96-97.
[489] *Hearings on Bush Task Group Blueprint for Reform, supra* note 488, at 8.
[490] The other members of the Task Group included the Secretary of the Treasury, the Attorney General, the Director of the Office of Management and Budget, the Assistant to the President for Policy Development, the Chairman of the Council of Economic Advisors, the Chairmen of the Federal Reserve Board, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, Securities and Exchange Commission, Commodity Futures Trading Commission and the National Credit Union Administration, and the Comptroller of the Currency, *Id.*
[491] *Id.* at 305.
[492] *Id.*
[493] *Id.* at 306.
[494] *Id.* at 335.
[495] *Id.* at 315.

such regulation pertained directly to deposit insurance.[496] The FDIC's supervisory duties for 9,000 state non-member banks would be transferred to the Federal Reserve.[497] In addition, a new program would be established to transfer some federal supervisory powers to the "better" state bank and thrift supervisors to give the states a stronger incentive to engage in strong supervision.[498] Under this program, state regulators would be certified to act as the primary banking regulator for the state banks within their jurisdiction, if they met certain requirements.

The Bush Task Group recommended renaming the Office of the Comptroller of the Currency (OCC) into the new Federal Banking Agency (FBA) that would be housed in the Treasury Department and the Comptroller of the Currency would become the Director of the FBA.[499] The Director would be appointed by the President.[500] The FBA would have exclusive authority over applications for national bank charters, the safety and soundness of mergers, and all supervisory and examination matters relating to individual institutions.[501] The FBA would regulate, supervise and examine all national banks. Nevertheless, the existing power over national banks by the Federal Reserve by virtue of a bank's membership in the Federal Reserve System would remain unchanged.[502]

In addition, the FBA would have been given the authority to regulate any bank holding companies that had a nationally chartered bank as their lead bank.[503] The OCC never had the power to supervise bank holding companies, only the Federal Reserve had that power.

If the Bush Task Group's recommendations were enacted, however, the Federal Reserve would only supervise bank holding companies with a lead bank that was a state chartered bank or bank holding companies classified as "international class holding companies." "International class" refers to a holding company that either (1) owns or controls U.S. banks with foreign branches, (2) a foreign holding company which owns a U.S. bank or has branches in the United States, or (3) "whose size is sufficiently large that supervisory problems affecting any such institution could have a national or international impact."[504] The Task Group created a bright line rule for when a bank holding company would likely be large enough to have a national or international impact if it got into trouble. Any bank that possessed assets totaling ½ of 1 percent of the aggregate bank holding company assets of all of the bank holding companies in the United States would be deemed to be an "international class" holding company.[505] In 1984, any bank holding company with approximately $12.5 billion in assets would be deemed an international class holding company.[506]

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[496] *Id.* at 345.
[497] *Id.* at 345, 381.
[498] *Id.* at 308.
[499] *Id.* at 365.
[500] *Id.*
[501] *Id.*
[502] *Id.*
[503] *Id.* at 368. The Bush Task Group defined the "lead bank" as the largest subsidiary bank in a holding company that had multiple banking subsidiaries. *Id*. at 368 n.23.
[504] *Id.* at 53.
[505] *Id.*
[506] *Id.*

The Task Group recommended that a federal certification process for state agencies be implemented in order for the state agencies to undertake certain federal supervisory functions (e.g., examinations, enforcement) for state chartered banks.[507] This certification would be performed by the either the Federal Reserve for state banking regulators or by the FHLBB for state thrift regulators.[508] If a state banking agency was not certified to regulate state chartered banks, then, under certain conditions, the FBA would also oversee those state banks as well.[509] If the Federal Reserve certified a state as capable of regulating state chartered banks, then the examination and supervision responsibilities for certain federal purposes would be transferred to that agency.[510] Meanwhile, FDIC's existing regulatory power over foreign banks would be transferred to the FRB.[511]

The FBA would also assume the Federal Reserve's responsibility for promulgating the list of "permissible activities" that a bank holding company may engage in under the Bank Holding Company Act (BHCA).[512] The FBA would be required to work with the Federal Reserve in several ways to produce this list. The FBA would be required to give the Federal Reserve a copy of a list of permissible activities no later than 30 days prior to publication for public comments.[513] The FBA would also be required to give the Federal Reserve a copy of the final list no later than 30 days before it would be published in the Federal Register.[514] If the Federal Reserve disapproved of the list, it would have veto power.[515] Private parties would be allowed to bring a lawsuit to contest the Federal Reserve's veto but the FBA would not be allowed to bring a lawsuit seeking to overrule the Federal Reserve's veto.[516]

Another major change would have been the coordination between agencies, because under the Task Group's recommendations responsibility would be divided between FBA, Federal Reserve, and certified state banking agencies.[517] As mentioned above, the FBA would have been authorized to review and comment on applications or notices by international class holding companies and state chartered bank holding companies that have been filed with the Federal Reserve.[518] If the Federal Reserve decided to continue to grant the application or notice regardless of adverse comments from the FBA, the Federal Reserve would be required to submit a written report as to its reasoning.[519] Conversely the Federal Reserve would have been authorized to submit comments on applications or notices filed with the FBA by national banks and their holding companies.[520] The FBA would have been required to consider these comments and provide a written report if they decide a matter despite adverse comments from the Federal

[507] *Id.* at 367.
[508] *Id.* at 382.
[509] *Id.*
[510] *Id.* at 367.
[511] *Id.*
[512] *Id.*
[513] *Id.* at 367-368.
[514] *Id.* at 368.
[515] *Id.*
[516] *Id.*
[517] *Id.*
[518] *Id.*
[519] *Id.*
[520] *Id.* at 370.

Reserve.[521] The Federal Reserve and FBA would jointly develop reporting guidelines for holding companies they mutually regulate.[522] These forms would not need to be identical, but they should have been as similar as possible.[523]

As mentioned above, the Task Group recommended a new certification program be enacted. This new certification program would enable state banking or thrift regulators to undertake certain federal supervisory functions, such as examinations and enforcement actions, for the state chartered depository institutions within their jurisdictions.[524] In order for a state banking regulator to be certified by the Federal Reserve, it would have to meet certain federal standards, such as the requirements for federal bank examinations.[525] If the certification was not granted to a state banking regulator or a state thrift regulator, the Federal Reserve in the case of banks or the FHLBB in the case of thrifts would be required to fulfill the necessary supervisory functions.[526] The Federal Reserve and the FHLBB would help state agencies meet the standards necessary to pass the proposed certification procedures.[527]

The Task Group also recommended that formal state advisory councils should be formed to inform to provide advice to the local Federal Reserve Bank for their region on issues affecting state and federal coordination of regulatory efforts.[528] It also recommended similar regional state advisory councils to be created to provide advice for the FBA and the FDIC. However, federal agencies would not be obliged to make use of deposit insurance funds available from the FDIC or the FHLBB to protect the deposits of state chartered institutions that create risks through "unsafe or unsound practices."[529] Figure 22 shows the proposed new structure.

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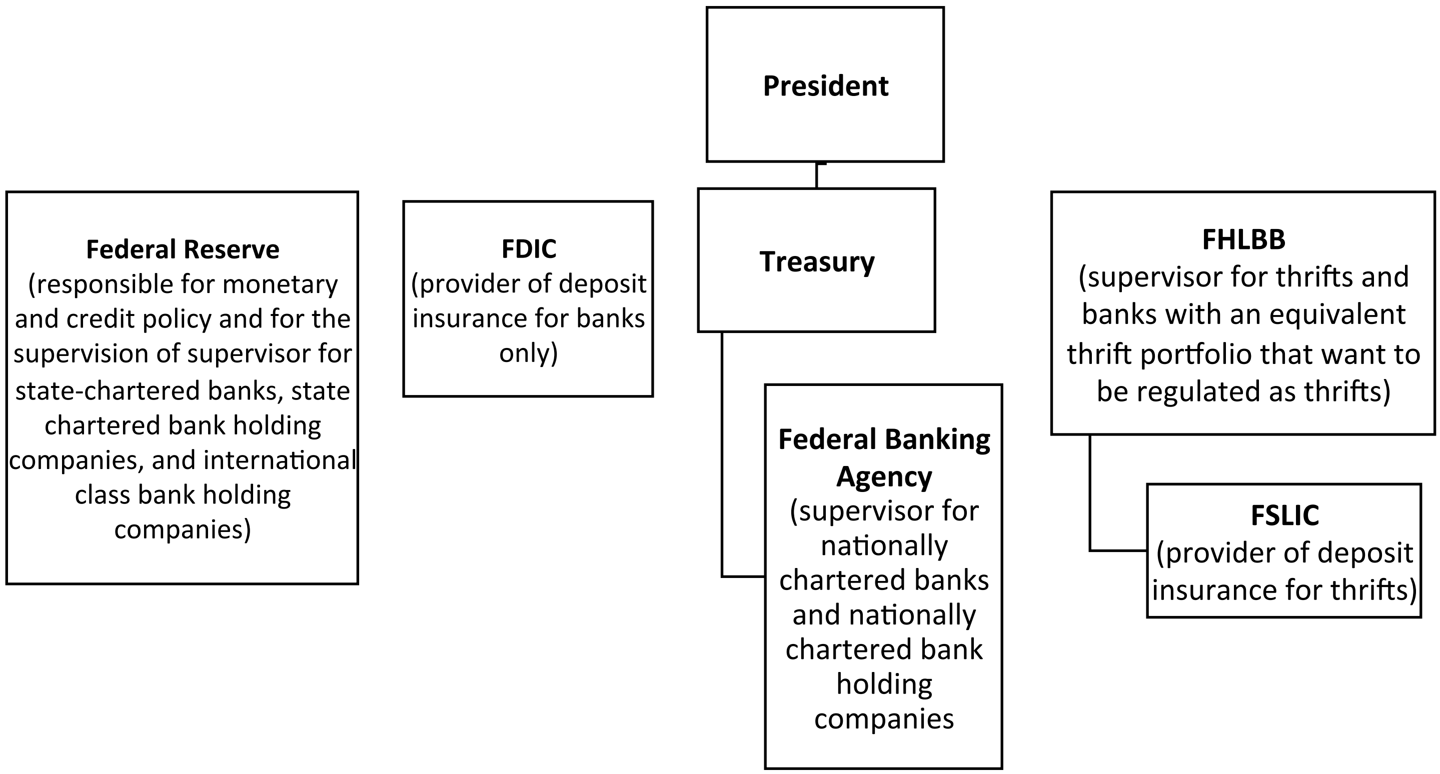
[521] *Id.*
[522] *Id.*
[523] *Id.*
[524] *Id.* at 381.
[525] Thus, the states had to meet the same standards as that existed at the time for federal examinations, including an alternating year examinations. *Id.* at 382.
[526] *Id.* at 382.
[527] *Id.*
[528] *Id.*
[529] *Id.* at 383.

Figure 22
Bush Task Group Reorganization Structure



Objectives: The Task Group listed the broad objectives of consolidation as enhancing safety and soundness, consumer protection and competition and efficiency.[530] The Task Group felt that safety and soundness of the financial system was the most important issue of those reviewed.[531] In order to be safe and sound the Task Group found the goal is not a system where firms never fail, but one where such failures do not impair the financial system as a whole.[532] The Task Group believed that no area was as necessary to a stable financial system as the banking system, and that a stable banking system requires a balance of the need for regulation with the dangers of excessive regulation.[533] Insufficient regulation could lead to disasters such as that experienced in the Great Depression, while excessive regulation could restrict competition or affect the decisions of banks artificially, adversely affecting the safety and soundness that the regulation was enacted to protect.[534]

[530] *Id.* at 307.
[531] *Id.* at 330.
[532] *Id.*
[533] *Id.* at 331.
[534] *Id.*

The second most important objective was consumer protection, especially in the more financially deregulated environment that the Task Group proposed to create.[535] The Task Group found that "truly protecting the consumer requires that each regulation be examined to make certain that its benefits exceed its direct and indirect costs."[536] The Task Group warned that consumers ultimately pay for regulation, even if that regulation was enacted for the benefit of those consumers.[537]

The final overarching objective was the promotion of efficiency by furthering fair and equal competition.[538] The Task Group stated that competition is essential to keep consumer prices low and choices high.[539] However although the promotion of efficiency and competition were important, the Task Group rejected the idea that free market forces should be allowed to operate unchecked in the financial area.[540]

2. Proposed Implementation

Reorganization of Regulatory Powers: The Task Group's proposal did not include specifics as to when its recommendations would come into effect. Due to the nature of the changes, it would appear that they intended these changes to occur as soon as feasible to ensure the stability of the nation's financial institutions into the future. The proposal also did not specify how long such sweeping changes would take to enact.

Personnel Issues: FBA employees would be granted exemptions from Office of Personnel Management regulations, while the Office of Management and Budget regulations would continue to apply to the new FBA.[541]

Funding of the Reorganization: The funding of the agencies created by the reorganization would be from assessments on the entities they supervise and not from the federal government's budget. At the time, all funding for federal banking regulators came from the banks that they regulated and not from funds appropriated from the federal budget by Congress.[542] This practice would continue if the Task Group's proposals were implemented. For example, the FBA's budget would be funded by assessments on regulated firms, rather than appropriations from Congress.[543] There was no information that would suggest these proposed new organizations would require more funding than the then existing agencies had required.

The proposal did not discuss how much the reorganization itself would cost or where the funds to cover the cost of the reorganization would come from.

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535 *Id.* at 331-332.
536 *Id.* at 332.
537 *Id.*
538 *Id.*
539 *Id.* at 333.
540 *Id.*
541 *Id.*
542 *Id.* at 392.
543 *Id*. at 365.

B. Arguments For and Against the Proposal

The Task Group had many reasons for the consolidation of the banking regulators. First, the differential treatment of the financial institutions could not be justified.[544] For example, the Task Group noted that, when a bank opened a new bank branch office, community groups or competitors were able to protest to try to block its opening, while direct bank competitors, like security firms and insurance companies, did not have to submit to such protests.[545]

Second, the excessive regulatory controls warranted consolidation.[546] The Task Group cited the necessity for certain institutions to obtain advance approval for forms of "corporate housekeeping," such as opening a new office or forming a holding company, that could be abandoned in favor of a presumption of approval subject to veto by the appropriate regulatory agency.[547] The Task Group was also concerned that the system imposed unnecessarily burdensome and detailed controls on the banks and that the banks passed the costs associated with complying with those controls on to consumers.[548]

Third, the consolidation would eliminate the overlap and duplication of regulation.[549] Some banks were subject to regulation by multiple federal regulators.[550] Complying with the demands of these regulators pushed operating costs up and the banks would pass those costs on to the customer.[551]

Fourth, the Task Group cited the lack of agency responsiveness to market changes as a reason for the consolidation.[552] Due to the scope of federal regulation, significant delays were possible even for otherwise perfunctory tasks.[553] These delays might have been caused by confusion over jurisdiction or by having to make decisions based on ambiguity in existing legislation as it relates to the action in question.[554] These delays were a "significant burden" for financial institutions attempting to stay current with technology or that wanted to take advantage of a particular opportunity for acquisitions. [555]

Fifth, the consolidation was warranted because of the difficulty regulatory agencies experienced when trying to manage their present shared responsibilities.[556] The Task Group was concerned with the inefficiencies that come with regulating the banks separately from their holding companies.[557] Having a bank and its holding company regulated by different agencies may lead

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[544] *Id.* at 323.
[545] *Id.*
[546] *Id.*
[547] *Id.*
[548] *Id.* at 324.
[549] *Id.*
[550] *Id.*
[551] *Id.*
[552] *Id.* at 325.
[553] *Id.*
[554] *Id.*
[555] *Id.* at 36.
[556] *Id.*
[557] *Id.*

the regulator responsible for the banking subsidiary to be unaware of conditions affecting the entire organization.[558] It might also lead to poor coordination when two or more regulatory agencies are required to supervise the same bank.[559] Finally, with separate regulators, the bank and its holding company could be subjected to multiple regulations that require the same things.[560]

Sixth, the overlap and conflict between state and federal requirements were another reason that the Task Group felt that the consolidation was necessary.[561] The Task Group found that federal controls over state chartered institutions were sometimes unnecessary.[562] It also found that this was an area where greater deference can be paid to the state and while federal law must be enforced, such enforcement could be enacted by the State.[563] This would follow the lead of several European nations.[564]

As mentioned previously, the funding of these changes would be gathered from assessments made on the financial institutions, rather than appropriations by Congress.[565] There were no prepared estimates of savings that this reform would engender.[566] There was originally some focus on cost savings, but the Comptroller of the Currency stated that the regulatory reform was not about those savings.[567]

The net expenses of supervision and regulation in 1983 was approximately $131.8 million, which took up approximately 29 percent of the net expenses of the Federal Reserve banks.[568] It was estimated that approximately 20 percent of the FDIC's time was spent doing things that were not related to financial work in their area of expertise. These FDIC resources could be conserved or better spent on areas in which the FDIC had expertise.[569]

The Task Force surmised that there would be great savings from the increase in efficiency and the reduction of duplication of efforts. They, however, never provided an exact dollar amount for these savings.

In addition to the reasons given by the Bush Task Group, Robert S. Pasley who was the Assistant Director of the OCC's Enforcement and Compliance Division, argued that consolidation would be beneficial because it allow agencies to focus on a narrower range of goals and reduce the

[558] *Id.*
[559] *Id.*
[560] *Id.*
[561] *Id.* at 327.
[562] *Id.*
[563] *Id.*
[564] *Id.*
[565] *Id.* at 365.
[566] ROY T. MEYERS, THE BUDGETARY STATUS OF THE FEDERAL RESERVE SYSTEM, 93-94 (1985).
[567] *Hearings on Bush Task Group Blueprint for Reform, supra* note 488, at 177 (Statement of C. T. Conover, Comptroller of the Currency).
[568] ROY T. MEYERS, CONG. BUDGET OFFICE, THE BUDGETARY STATUS OF THE FEDERAL RESERVE SYSTEM, 33 (1985).
[569] *Hearings on Bush Task Group Blueprint for Reform, supra* note 488, at 8 (Statement of Richard C. Breeden, Deputy Counsel to the Vice President and Staff Director for the Task Group).

conflicts of interest that their then existing goals created. Pasley thought that the FDIC as an insurer might not be sufficiently focused on the health of the bank as a regulator.[570] He agreed with the Task Group, that the FDIC should be removed from the regulatory framework and concentrate solely on insurance.[571] He also felt that the Federal Reserve should focus on monetary policy and that making the Federal Reserve also engage in bank supervision was possibly counterproductive.[572]

The Bush Task Group's proposal faced several major criticisms. First, Paul Volcker, then Chairman of the Board of Governors of the Federal Reserve System, argued that stripping the Federal Reserve of its bank supervisory powers would hamper the Federal Reserve's ability to properly fulfill its monetary policy obligations.[573] He stated that the Federal Reserve needed the knowledge gained from direct supervision of banking institutions and that information provided from other agencies was not an adequate substitute for direct supervision.[574]

Others have taken issue with whether the Federal Reserve really needs to be engaged in bank supervision to fulfill its monetary function. In the early 1960s, James L. Robertson, a then member of the Board of Governors of the Federal Reserve, expressed the view that the Federal Reserve could get the information that it needed to conduct monetary policy without engaging in bank supervision.[575] In fact, he argued that it would be detrimental if the Federal Reserve used bank supervisory functions to implement monetary policy. Robert Pasley also did not believe that the Federal Reserve needed to engage in bank supervision in order to conduct monetary policy. He noted that the Federal Reserve used a wide range of information sources when making monetary policy decisions, of which the information gleaned from its bank supervision was only a small part.[576]

A second problem with the Bush Task Group's proposal was that removing the Federal Reserve from having a direct role in financial regulation might threaten the safety and soundness of the financial system.[577] Chairman Volcker maintained that a strong central bank was preferable in order to take the long view of regulation, rather than regulate in reaction to ever shifting markets.[578]

A third problem with the Bush Task Group's proposal was that it increased the exposure of banking regulators to political influences.[579] Chairman Volcker noted that the existing system

[570] Pasley *supra* note 460, at 283
[571] *Id.*at 284-285
[572] *Id.* at 307.
[573] Paul A. Volcker, *The Federal Reserve Position on Restructuring of Financial Regulation Responsibilities,* 70 FED. RES. BULL. 547, 548 (1984).
[574] *Id.* at 549
[575] House Banking Consolidation Hearings, *supra* note 210, at 93 (statement of James L. Robertson).
[576] Pasley *supra* note 460, at 298
[577] Volcker, *supra* note 573, at 550.
[578] *Id.*
[579] *Id.* at 552.

with its independent agencies was relatively insulated from political pressures.[580] This might be lost under the Bush Task Group's proposal.[581]

A fourth problem with the Bush Task Group's proposal was that it might weaken the dual banking structure.[582] By consolidating bank regulation and requiring more uniformity for banking regulations, the proposal might marginalize the role that state banking regulators play.[583]

A fifth problem with the Bush Task Group's proposal was that many of the "problems" that it sought to correct through a reorganization of the banking regulators could be resolved through less radical solutions. Chairman Volcker noted that the proposed Financial Institutions Deregulation Act would "settle many of the substantive issues" that faced banking regulators at the time by expanding the powers of banking institutions and simplifying the regulatory process without reorganizing the regulatory agencies.[584]

Stephen J. Friedman, a partner at Debevoise and Plimpton, a former Deputy Assistant Director of the Department of the Treasury, and a former member of the Securities and Exchange Commission, and Connie M. Friesen, an associate at Debevoise and Plimpton, identified a sixth problem with the Bush Task Group's proposal. They criticized the Bush Task Group's proposal and several other prior proposals for reorganizing the financial regulators as being outdated in light of the blurring of lines between banking, securities, and insurance.[585] They noted:

> The problem with all of the foregoing efforts at regulatory restructuring is that they attempt to find a new congruence between financial institutions and existing regulators. That task requires a prescience about the ultimate shape of the financial industry that is simply beyond the powers of government planners and advisers, even the blue-ribbon variety. Instead, there must be a fundamental rethinking of regulatory patterns designed to match the financial functions which are to be regulated.[586]

As an alternative to using the existing regulators as the starting point for a reorganization, the United States needed to move to functional regulation, in which a regulator would be responsible for regulating a particular financial function rather than regulating particular financial institutions.[587] In Friedman and Friesen's view, functional regulation would better achieve the six major goals of financial regulation than the existing institutional regulatory structure. The six major goals of financial regulation that they identified were: (1) efficiency, (2) flexibility, (3) fairness, (4) safety and soundness, (5) avoiding concentration of power, and (6) implementation of monetary policy.[588] Friedman and Friesen also identified six functions that should serve as the

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[580] *Id.*
[581] *Id.*
[582] *Id.*
[583] *Id.*
[584] *Id.* at 551.
[585] Stephen J. Friedman and Connie M. Friesen, *A New Paradigm for Financial Regulation: Getting From Here to There,* 43 MD. L. REV. 413, 445 (1984) (discussing the necessity of creating a new regulatory framework).
[586] *Id.*
[587] *Id.*
[588] *Id.* at 446-454.

basis for a new regulatory structure: (1) sales, (2) investment management, (3) intermediation, (4) custodial services, (5) market activity, and (6) lending.[589]

Friedman and Friesen did not, however, propose a structure for implementing functional regulation. They did not indicate whether a single agency should be responsible for financial regulation with its internal structure organized to regulate the functions that they identified rather than regulate institutions. They did not discuss whether separate agencies should be created to focus on one or more of these functions.

C. What Happened to the Proposal?

The Task Group's proposal attracted a lot of attention, but nothing happened concerning it until the chairman of the Task Force, then Vice President Bush, became president of the United States.[590] Many of the proposals that the Task Group put forward were reintroduced in the Department of the Treasury study *Modernizing the Financial System: Recommendations for Safer, More Competitive Banks* in 1991.[591] However the recommendations reconsidered in the Treasury's study were not implemented subsequent to that proposal either.

XV. S. 1905 – Depository Institution Affiliation Act, 1987

During the 1980s, the performance of all banks began to decline.[592] Banks began to take increasing risks in order to make profits.[593] Also during this period, thrift institutions began to fail at an alarming rate – approximately 1,300 thrifts failed between 1980 and 1994.[594] The cost to cover the insured deposits in these floundering thrifts was approximately $152.9 billion.[595] U.S. taxpayers ended up covering most of that expense because the FSLIC became insolvent. The FSLIC simply lacked the funds needed to cover the deposits that it had insured in the hundreds of failed thrifts.

A. The Proposal

Senator Alfonse M. D'Amato (R-NY) introduced S. 1905, also known as the Depository Institution Affiliation Act (DIAA), in 1987 as an effort to reform the existing regulatory structure which was seen as inefficient.[596] The bill was co-sponsored by Senator Alan Cranston (D-CA).[597]

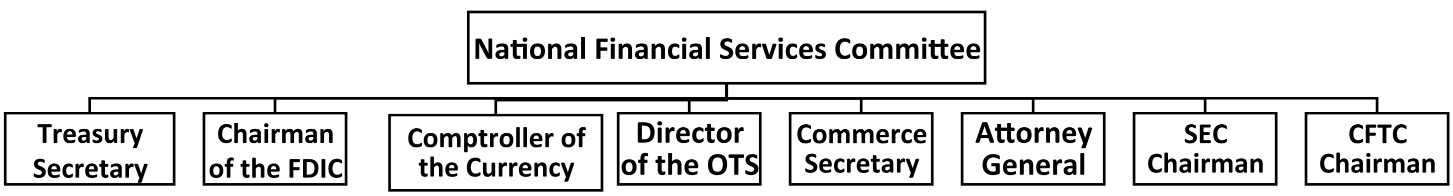
[589] *Id*. at 454-462.
[590] ANDREAS BUSCH, BANKING REGULATION AND GLOBALIZATION, 56 (Oxford University Press, 2009).
[591] *Id.*
[592] *Id.* at 8.
[593] *Id.*
[594] *Id.* at 4 n.1.
[595] TIMOTHY CURRY & LYNN SHIBUT, THE COST OF THE SAVINGS AND LOAN CRISIS: TRUTH AND CONSEQUENCES, 31 (Federal Deposit Insurance Corporation, 2000).
[596] *Legislative Proposals to Restructure our Financial System: Hearing on S. 1886, S. 1891, and S. 1905 Before the S. Comm. on Banking, Hous., and Urban Affairs*, 100th Cong. 34 (1987) [hereinafter DIAA Hearings]; GovTracks.org, Congress, Bills, S.1905 (100th), https://www.govtrack.us/congress/bills/100/s1905 [hereinafter S.1905 History].
[597] S.1905 History, *supra* note 596.

1. Structural Reorganization

The DIAA did not propose to consolidate federal regulatory agencies. However, the Act did seek to create the National Financial Services Committee (NFSC).[598] The goal of the newly created NFSC would be to "oversee the evolution and supervision of the financial services industry and to report to Congress."[599]

The DIAA proposed to establish the NFSC to oversee the financial industry and report to Congress.[600] The NFSC would consist of the Secretary of the Treasury, the Chairman of the Board of Directors of the FDIC, the Director of the OTS, the Comptroller of the Currency, the Secretary of Commerce, the Attorney General, the Chairman of the SEC, and the Chairman of the CFTC.[601] The Secretary of the Treasury would serve as the Chairman of the NFSC.[602] As noted above, the members of this committee would not receive any additional compensation for their service, but they would be allowed reimbursement for reasonable expenses.[603] The secretariat for the NFSC would be provided by the Department of the Treasury, which would also bear the costs arising from the execution of the NFSC's duties.[604] Figure 23 illustrates the organizational structure of the NFSC.

Figure 23
DIAA Reorganization Structure



The NFSC would have access to records of the federal financial regulators.[605] The NFSC would also be required to hold at least one public meeting a year.[606] Finally, the NFSC would not be allowed to take any action unless that action was agreed upon by a two-thirds majority of the members.[607]

The NFSC would establish uniform principles and standards for the examination and supervision of financial agencies. [608] The agencies who comprise the NFSC would be required to apply the

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598 DIAA Hearings, *supra* note 596, at 35.
599 *Id.*
600 *Id.* at 35.
601 *Id.* at 52.
602 *Id.* at 53.
603 *Id.*
604 *Id.*
605 *Id.*
606 *Id.*
607 *Id.*
608 *Id.*

principles and standards set by the committee. The NFSC would also be required to make other recommendations for other changes intended to promote regulatory unity.[609] The NFSC could also recommend, when necessary, that Congress take additional steps to separate the depository institutions controlled by a holding company from the activities of their affiliates.[610] The NFSC would also be required to maintain a working relationship with the appropriate state regulatory agencies and invite an agent from each to the public meetings.[611]

Finally, the NFSC would be enabled to either authorize or conduct studies.[612] The NFSC would be allowed to approach Congress with recommendations for changes to the financial system based on the results of these studies.[613] Within a year of the enactment of the DIAA, the NFSC would have been required to submit a report to Congress concerning legislative or regulatory actions designed to improve the examination process of insured depository institutions.[614] In particular, this report would have focused on both the need for increased regulatory personnel and the need for an increase in regulatory personnel compensation.[615]

2. Proposed Implementation

Reorganization of Regulatory Powers: The DIAA set forth no detailed time table for implementing its provisions. The bill would go into effect as soon as it was enacted into law.

Personnel Issues: The bill designated which regulatory agencies would have representatives on the NFSC and stated that they would not receive additional compensation for serving on the NFSC. Other than those points, the bill did not address any personnel issues.

Funding the Reorganization: To create the NFSC would not entail substantial new costs for the federal government. The bill proposed that the members of the NFSC would not receive additional compensation for serving on the committee, although they would be allowed to recover reasonable related expenses.[616] The DIAA, however, required the NFSC to conduct a study to determine if the federal financial regulators needed more employees and an increase in compensation for those employees.[617] If the federal financial regulators hired more employees and paid their employees more as a result of that NFSC study, then the creation of the NFSC would have led to increased costs.

B. Arguments For and Against the Proposal

The bill was proposed to "promote the safety and soundness of the Nation's financial system, enhance the quality of regulation and supervision of financial intermediaries and achieve a more

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[609] *Id.*
[610] *Id.*
[611] *Id.* at 53-54.
[612] *Id.* at 54.
[613] *Id.*
[614] *Id.*
[615] *Id.*
[616] *Id.* at 53.
[617] *Id.* at 54.

efficient market and effective regulatory structure."[618] Senators D'Amato and Cranston believed that the NFSC was necessary because the regulatory structure was undermining "efficiency, competition and innovation" in financial services, to the detriment of the consumer.[619] Senators D'Amato and Cranston also believed that the current structure hindered the U.S. in its attempts to compete in the global financial market.[620] Finally, Senators D'Amato and Cranston believed that the ability to monitor, supervise and coordinate actions during times of crisis were impeded by the fragmentary regulatory structure.[621]

Many of the members of the Senate Committee on Banking, Housing and Urban Affairs believed that NFSC would not create additional costs. FDIC Chairman L. William Seidman stated that the NFSC was the least costly approach of the three proposals considered that was consistent with the safety and soundness of the financial system.[622] E. Gerald Corrigan, the President of the Federal Reserve Bank of New York, stated that he believed the DIAA's blending of banking and commerce did not leave banks the required independence. [623] He also believed that the blending of banking and commerce would lead to the complete deregulation of the financial system if brought to its logical conclusions.[624]

Robert L. Clarke, the Comptroller of the Currency, believed that the DIAA contained more of the necessary financial reforms than other proposals.[625] Clarke was supportive of the more advisory role that the NFSC would play rather than the more active role that the other proposed regulatory changes would involve.[626] He especially appreciated the lack of extensive bureaucracy that would be necessary for the institution of the NFSC.[627]

The supporters of the DIAA mentioned several benefits from the creation of the NFSC and the enactment of the DIAA as a whole. The most radical of which was the statement that the U.S. consumer pays "billions" more than necessary for present financial services.[628] This kind of proposed savings comes primarily from the competitive nature of the changes to holding company regulation in Title I, which do not deal with the formation of the NFSC.[629] James Morton, Chairman and CEO of John Hancock Mutual Life Insurance, stated that the creation of the NFSC would lead to a more balanced approach to federal and state regulation, as well as improve coordination between those regulations.[630] Mr. Morton also stated that the economic inefficiencies and unnecessary costs of the current regulatory structure were "well documented." [631] Unfortunately, he did not provide any reference or documentation to support this claim.

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[618] *Id.* at 34.
[619] *Id.*
[620] *Id.*
[621] *Id.*
[622] *Id.* at 757.
[623] *Id.* at 713.
[624] *Id.*
[625] *Id.* at 884-885 (statement of Robert Clarke, Comptroller of the Currency).
[626] *Id.* at 885.
[627] *Id.*
[628] *Id.* at 80 (statement of Sen. Alan Cranston).
[629] *Id.* at 60 (statement of Sen. Alfonse D'Amato).
[630] *Id.* at 658.
[631] *Id.* at 659.

Robert R. Googins of the American Council of Life Insurance disagreed that enacting the DIAA would be beneficial.[632] He believed that the relaxed regulation, especially of holding companies, would not provide adequate safeguards to bank security and soundness[633] In addition, he argued that insurers should be present on the NFSC, otherwise the NFSC would likely become unfairly biased towards banks and against insurers.[634]

In general, the 1988 Senate Committee believed that the net benefits would outweigh the negligible costs of requiring certain regulatory personnel to form the NFSC.

C. What Happened to the Proposal?

The DIAA was first introduced in the 100th Congress in 1987.[635] However there were other proposals before Congress that year as well and the DIAA was introduced in the morning that the first hearing was scheduled. Many of the witnesses cited the quickness in which a decision would need to be rendered as a bar to the enactment of this proposal.[636] Ultimately, nothing was done with the DIAA in time and it died.

The DIAA was subsequently reintroduced in the 101st, 104th and 105th Congresses.[637] Finally, in the 105th Congress, the House adopted a different financial reform bill entitled the Financial Services Competition Act of 1997.[638] This Act incorporated several of the non-consolidation recommendations from the DIAA, but did not include the formation of the NFSC. The DIAA was not reintroduced subsequent to the House passage of the Financial Services Competition Act.

Two interagency bodies were created with the aim of enhancing interagency cooperation and coordination. These two interagency bodies were the Federal Financial Institutions Examination Council (FFIEC) and the President's Working Group on Financial Markets (President's Working Group). Title X of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 created FFIEC in 1979.[639] FFIEC is comprised of the Federal Reserve, the FDIC, the NCUA, the OCC, and the OTS.[640] At the time of its creation, FFIEC's mission was to prescribe uniform

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[632] *Id.* at 564.
[633] *Id.*
[634] *Id.* at 565.
[635] S. 1905, 100th Cong. (1987-1988).
[636] DIAA Hearings, *supra* note 596, at 743 (statement of Under Secretary of the Treasury George Gould).
[637] H.R. 1992, 101st Cong. (1989-1990); H.R. 814, 104th Cong. (1995-1996); S. 337, 104th Cong. (1995-1996); H.R. 669, 105th Cong. (1997-1998); S. 298, 105th Cong. (1997-1998); Govtrack.us, https://www.govtrack.us/congress/bills/browse?congress=__ALL__&text=%22Depository%20Institution%20Affiliation%20Act%22.
[638] Library of Cong., Committee Reports 105th Congress (1997-1998) House Report 105-164 – Part 1, THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/cpquery/?&item=&&sid=cp105Sdicm&&refer=&&r_n=hr164p1.105&&dbname=cp105&&sid=cp105Sdicm&&sel=TOC_432606&&sid=cp105Sdicm&r_n=hr164p1.105&hd_count=4&.
[639] Public L. No. 102-242, §111, 105 Stat. 2236 (1991).
[640] OFFICE OF INSPECTOR GENERAL, THE DEPARTMENT OF THE TREASURY, JOINT EVALUATION OF THE FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL 3-4 (OIG-02-099, June 21, 2002) (hereinafter OIG FFIEC REPORT)

principles and standards for the examination of banking institutions. Following the enactment of the Gramm-Leach-Bliley Act in 1999, its mission was expanded to allow it to play a greater role in coordinating federal banking regulations.[641]

The President's Working Group was created by an executive order in 1988 to analyze the 1987 stock market crash and was reactivated in 1994.[642] It is comprised of the heads of the Federal Reserve, the SEC, the CFTC, and the Treasury. Over the years, the President's Working Group has dealt with a wide range of issues, including the 1997 market decline, year 2000 preparedness issues, and the growth of the over-the-counter derivatives market.[643]

XVI. Brady Commission, 1988

A. The Proposal

On Monday, October 19, 1987, the stock markets around the world crashed.[644] Prior to this day, the stock markets had enjoyed an exceedingly strong period of growth with double digit gains for the year to date. On October 19, 1987, however, the stock markets experienced double digit losses.

The Dow Jones Industrial Average (DJIA) is illustrative of what happened in stock markets around the globe. The DJIA had gained 44 percent in value during the first seven months of 1987.[645] On October 19 the DJIA lost 508 points to close at 1738.74, which represented a 22.6 percent decline in value.[646]

President George W.H. Bush created the President's Task Force on Market Mechanisms to investigate the causes of the crash and to propose solutions. This Task Force was chaired by Treasury Secretary Nicholas F. Brady and became more commonly known as the Brady Commission.

1. Structural Reorganization

The Brady Commission considered several possible ways of restructuring the regulation of securities and futures, including, among others, merging the SEC and the CFTC, creating a joint Federal Reserve-SEC-CFTC committee to coordinate futures and securities regulation, or assigning the responsibilities for intermarket trading to the Federal Reserve.[647] Ultimately, the

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[641] *Id.* at 3.
[642] US GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, US SENATE, FINANCIAL REGULATION – INDUSTRY CHANGES PROMPT NEED TO RECONSIDER US REGULATORY STRUCTURE 107 (October 2004) [hereinafter GAO FINANCIAL REGULATION REPORT].
[643] *Id*.
[644] REPORT OF THE PRESIDENTIAL TASK FORCE ON MARKET MECHANISM 1 (1988) [hereinafter Brady Commission Report].
[645] John Dobosz, *Stock Market Haunted by Crash of 1987 as Google and Apple Hit the Skids*, FORBES, October 19, 2012, http://www.forbes.com/sites/johndobosz/2012/10/19/crash-of-1987-haunts-this-october-stock-market/.
[646] Brady Commission Report, *supra* note 644, at 1.
[647] *Id*. at 60-63.

Brady Commission recommended: "One agency should coordinate the few, but critical, regulatory issues which have an impact across the related market segments and throughout the financial system."[648] The Brady Commission felt that "weight of the evidence" suggested that the Federal Reserve should fulfill that role.[649]

Federal Reserve Chairman Alan Greenspan, however, did not want the job.[650] He did not want the Federal Reserve to become a "super-regulator."[651]

At about the same time as Chairman Greenspan was rejecting the Brady Commission's recommendations, a new controversy broke out between the SEC and the CFTC over two issues.[652] The first issue was which agency should bear the most responsibility for the 1987 crash.[653] The second issue was which agency should regulate index futures contracts and other futures contracts that involved securities.[654] This conflict raged for over two years and led Treasury Secretary Brady to suggest that the CFTC, or at least some parts of it, should be merged with the SEC.[655]

The Brady Commission, thus, began the debate that continues to this day regarding whether the SEC and the CFTC should be merged into a single agency. The Brady Commission favored doing so.

2. Proposed Implementation

Reorganization of Regulatory Powers: The Brady Commission did not go into any details regarding how any of the possible reorganizations that it considered would be implemented.

Personnel Issues: It did not consider what would happen to the personnel at the SEC or the CFTC if the agencies were merged.

Funding the Reorganization: It did not discuss how any of the reorganizations that it considered would be funded.

B. Arguments For and Against the Proposal

The potential benefits of merging the SEC and the CFTC include reducing the uncertainty about which agency has the authority to regulate certain hybrid products, reducing regulatory overlap

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[648] *Id*. at vii.
[649] *Id*.
[650] Peter T. Kilborn, *Greenspan Opposes Brady Plan*, N.Y. TIMES, Feb. 8, 1988, http://www.nytimes.com/1988/02/03/business/greenspan-opposes-brady-plan.html.
[651] *Id*.
[652] Markham v. III, *supra* note 275, at 159.
[653] *Brady Proposes Removing Some Power from CFTC*, REUTERS, March 1990, http://articles.latimes.com/1990-03-16/business/fi-275_1_cftc.
[654] *Id*.
[655] *Id*.

and duplication, and enhancing the United States' ability to negotiate international standards.[656] Many products have attributes that can allow them to be characterized as either a security or a commodity. The inability to clearly demarcate the jurisdictional boundaries for the SEC and the CFTC has led to turf disputes between the two agencies over the past four decades. In some instances, like securities futures, the issue of which agency has the authority to regulate a particular product has been answered by a finding that both agencies may regulate it.[657] This duplication and overlap is costly to the public because two agencies are spending time and money formulating what they consider the proper regulations and because the entity offering the product has to spend extra funds to comply with the regulatory requirements of two agencies, instead of one.[658] Finally, the United States has to have two representatives – one from the SEC and one from the CFTC – participating in certain international negotiations for setting standards for derivative products when most other nations are represented by only one government agency.[659]

Merging the SEC and the CFTC probably would result in some budgetary savings resulting from economies of scale that could be achieved in some support functions like human resources or information technology.[660] These savings, however, were not likely to be significant.[661]

A merger of these two agencies could entail certain disadvantages, including reducing regulatory competition and allowing one regulatory strategy to dominate the market.[662] Some commentators believe that competition between regulatory agencies deters overregulation and encourages financial innovation but may result in competition in laxity. In addition, the SEC and the CFTC traditionally have tended to employ different regulatory strategies with the SEC being more rules-based and the CFTC being more principles-based. These differences have allowed the agencies to experiment with different types of regulation to see what is most effective. This type of experimentation is less likely to occur if only one agency is responsible for the entire field.

C. What Happened to the Proposal?

While many of the other recommendations of the Brady Commission were adopted, its proposal to merge to have the Federal Reserve assume the responsibilities for intermarket trading was dead as soon as Chairman Greenspan rejected it.

One of the other possible reorganizations that the Brady Commission had considered but not endorsed was the merger of the SEC and the CFTC. That plan gained some traction in the wake of the turf disputes that the SEC and the CFTC engaged in between 1988-1990.

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[656] James Bothwell, US General Accounting Office, Financial Market Regulation: Benefits of Merging the SEC and the CFTC (May 5, 1995) at 2.
[657] *Id.*
[658] *Id.* at 3.
[659] *Id.*
[660] *Id.* at 4.
[661] *Id.*
[662] *Id.* at 5.

In April 4, 1990, Rep. Dan Glickman (D-KS4) introduced H.R. 4477, also known as the Markets and Trading Reorganization and Reform Act, which proposed merging the SEC and the CFTC to from a Markets and Trading Commission (MTC).[663] It was co-sponsored by Reps. Dennis Eckart (D-OH11), Barney Frank (D-MA4), Jim Leach (R-IA1), James Olin (D-VA6), Allan Swift (D-WA2), Ron Wyden (D-OR3) and James "Jim" Kolbe (R-AZ5).[664] It was referred to the House Committee on Energy and Commerce and the House Committee on Agriculture.[665] The Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce held hearings on the bill in May of 1990.[666] The bill did not garner enough support and it died in committee when the term of the 101st Congress adjourned.

Merging these two agencies was raised again in 1995 but failed at that time as well. Currently, there is a bill before Congress to merge these two agencies but it is unlikely to be enacted by the current Congress.

XVII. National Commission on Financial Institution Reform, Recovery & Enforcement, 1990

A. The Proposal

The National Commission on Financial Institution Reform, Recovery and Enforcement (FIRRE Commission) was formed pursuant to Subtitle F of Title XXV of the Comprehensive Crime Control Act in 1990.[667] The FIRRE Commission was comprised of co-chairs Andrew F. Brimmer and John W. Snow, and members Joseph A. Califano, Jr., Daniel Crippen, Elliott H. Levitas, Robert E. Litan, Neal S. McCoy and Michael Raoul-Duval.[668] The commission was instructed to discover the reason for the saving and loan crisis that occurred in the 1980s that culminated with the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).[669] The commission was also instructed to recommend legislative, regulatory and supervisory changes to, in part, prevent a recurrence of such events.[670] Figure 24 illustrates the federal regulatory structure in the United States for banks and savings and loans at the time that the FIRRE Commission was making its recommendations.

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663 Markets and Trading Reorganization and Reform Act, H.R. 4477, 101st Cong. §§101, 201, 202 (1990) [hereinafter H.R. 4477].

664 Library of Congress, Thomas, Bill Summary & Status, 101st Congress (1989-1990), H.R.4477, All Congressional Actions, http://thomas.loc.gov/cgi-bin/bdquery/z?d101:HR04477:@@@X.

665 *Id*.

666 *Id*.

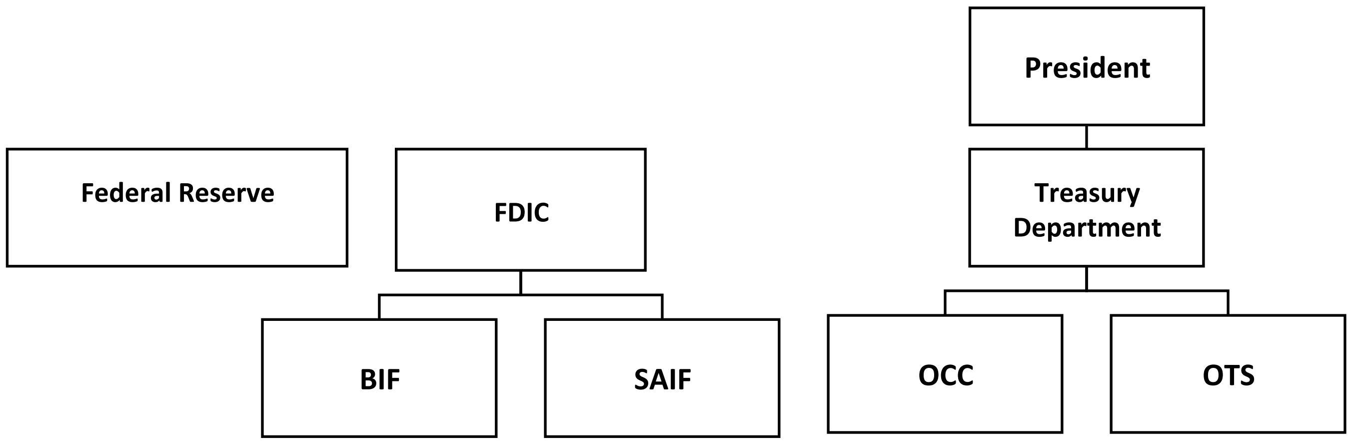
667 Nat'l Comm'n on Fin. Inst. Reform, Recovery and Enforcement, ORIGINS AND CAUSES OF THE S&L DEBACLE: A BLUEPRINT FOR REFORM ix (Library of Congress, 1993) [hereinafter FIRRE Commission Report]; Crime Control Act of 1990, PL 101–647, §2551, 104 Stat 4789 (1990).

668 FIRRE Commission Report, *supra* note 667, at v.

669 FIRRE Commission Report, *supra* note 667, at v; FIRREA, *supra* note 485.

670 FIRRE Commission Report, *supra* note 667, at v.

Figure 24
Federal Bank and Thrift Regulators in 1990



1. Structural Reorganization

The FIRRE Commission did not believe that, with integrated financial markets, there was a need for special thrift charters.[671] Accordingly, the commission recommended that thrifts no longer be nationally chartered, and that they instead be converted into commercial banks.[672] The FIRRE Commission saw thrifts as unnecessary due to the mortgage market becoming integrated with the capital market.[673] Thrifts would be converted into commercial banks, which could subsequently specialize in home lending if they desire, but would not be required to.[674]

The commission further suggested that the FDIC be made the sole federal insurer of depository institutions as well as the sole regulatory agency for insured institutions.[675] Once these changes took place, the OCC and the OTS would no longer be necessary, and should be eliminated.[676] The FIRRE Committee also felt that the consolidation of federal banking and thrift supervision into the FDIC would result in more efficient regulation of those financial institutions than the current fragmented system.[677]

The FDIC would remain an independent agency. In carrying out its supervisory duties, however, the FDIC would be required to consult regularly with the Federal Reserve.[678]

The FIRRE Commission also recommended that all federally insured institutions would be subject to federal supervision and regulation.[679] Such regulation would supersede state

[671] *Id.* at 68-69.
[672] *Id.* at 69.
[673] *Id.*
[674] *Id.*
[675] *Id.*
[676] *Id.*
[677] *Id.*
[678] *Id.* at 69.
[679] *Id.*

regulations upon a finding that the state regulations promote unsafe or unsound practices.[680] However the FDIC would not have completely halted the work of state bank regulatory agencies, only those that were deemed unsafe or unsound.[681] The FDIC would allow the state bank regulatory agencies to continue to experiment with new regulatory provisions so long as those new provisions were safe and sound.[682]

One major change that the FIRRE Commission proposed was ending insurance for deposits. Instead, the FDIC would only insure separately capitalized, money market funds that would be offered by a new type of entity called a monetary service company (MSC).[683] The money market funds would only be permitted to invest in highly rated, "short-term debt instruments for which there is an active national market."[684]

Essentially the FIRRE Commission was recommending replacing insured checking and savings accounts with insured money market accounts. Money market accounts were already allowing their accountholders to write checks, make electronic transfers and offer cash withdrawals. So in many respects, the money market accounts operated in many ways like traditional checking and savings accounts. The MSCs would be regulated solely by the FDIC. The MSCs could be affiliated with banks or other financial institutions but they did not have to be affiliated with another firm.

The FIRRE Commission believed that money market account and MSCs avoided the moral hazard problems posed by insuring deposits.[685] Bank and thrift depositors have little incentive to monitor the activities the bank or thrift where they have their account if that account is fully insured. The banks and thrifts know this and will take greater risks to potentially earn higher profit because they are not being closely monitored. To closely monitor every bank or thrift to prevent excessive risk taking would be far more intensive than then existing system of bank and thrift supervision. Money market accounts would avoid these problems because they contain highly liquid securities that the FDIC could monitor daily based on how they were performing in the markets. [686] In addition, the money market accounts would be subject to market discipline as the price of their assets rose or fell on a daily basis.[687]

Because the FDIC would be insuring the money market accounts in the MSCs, the FDIC would monitor the MSCs directly and would replace the need for other banking and thrift supervisory agencies.[688] The FIRRE Commission concluded that this monitoring burden on the FDCI would not be a greater burden than that faced by the SEC which oversees money market funds.[689]

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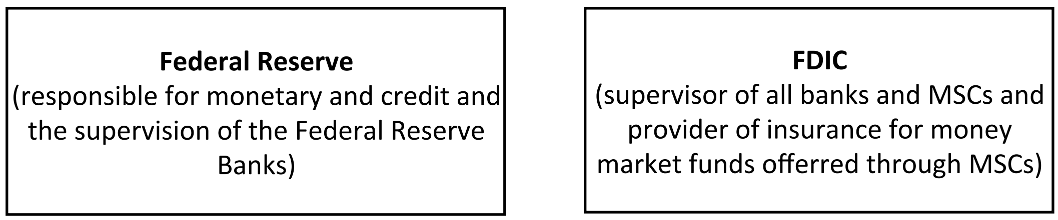
[680] *Id.*
[681] *Id.*
[682] *Id.*
[683] *Id*. at 67.
[684] *Id.*
[685] *Id.*
[686] *Id.*
[687] *Id.*
[688] *Id.* at 68.
[689] *Id.*

Figure 25
FIRRE Commission Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The commission was aware that the proposal to move insured deposits from thrifts and banks and into the new MSCs would require a "substantial transition period" to enact.[690] The commission did not address this issue in their proposal directly. The commission merely stated that it was important to address the structure of regulation during that transition period.[691]

Personnel Issues: The FIRRE Commission did not specify what would happen to federal employees in the agencies being reorganized.

Funding of the Reorganization: The FIRRE Commission did not state how they thought the reorganization should be funded.

B. Arguments For and Against the Proposal

The FIRRE Commission gave two reasons for the consolidation of all financial regulation in the FDIC. The first one was that it would reduce taxpayer vulnerability to future problems following the savings and loan debacle.[692] This requires more supervision and examination of financial institutions.[693]

The second reason given was the abolition of the FHLBB, the creation of the OTS, and the merger of the FDIC and the FSLIC as a result of FIRREA were good initial steps, but they believed that those actions did not go far enough toward solving the problem.[694] More consolidation of the financial regulators was needed to really solve the problems created by the savings and loan industry.

690 *Id.*
691 *Id.*
692 *Id.* at 68.
693 *Id.*
694 *Id.*

Another benefit from the FIRRE Commission plan was articulated by Robert E. Litan, then Deputy Assistant Attorney General in the Department of Justice.[695] He believed that the MSCs were the answer to prevent banks from failing in the same manner as thrifts because they would rely more on the market to police the institutions rather than regulators.[696] He referred to the use of MSCs as "narrow banking."[697]

Litan, however, favored MSCs that offered accounts that were not insured by the FDIC and thus, lacked the subsidy created by deposit insurance.[698] It is not clear if the benefits would be as great if the accounts in the MSCs were insured by the FDIC as the FIRRE Commission proposed. If the funds in the MSCs were not insured, however, the MSCs could face something similar to the bank runs that occurred before the creation of deposit insurance.[699] Litan argued that such a problem might be avoided if the Federal Reserve would drive down the T-bill rate.[700] This would create a gap between the interest rates offered by T-bills and by commercial paper, which would induce investors to buy up those commercial papers from well-funded institutions.[701]

The FIRRE Commission did not give a cost-benefit analysis of their proposal to move all insured deposits into MSCs and eliminate the OTS and OCC. Nevertheless, the implication was that doing so would result in cost savings because a consolidated federal regulator could provide more efficient regulation than multiple regulators.

Litan identified two problems with moving to a system that relied upon MSCs. First, it would be costly for small banks and for small businesses.[702] Litan estimated that it might add 50 basis points to the cost of funds for small businesses.[703] It is unclear how he arrived at this figure.

Second, moving to a system that relied on MSCs would require several years, perhaps a decade, to be phased in.[704] Because of that fact, he believed that the transition should be handled slowly over several years.[705]

C. What Happened to the Proposal?

The FIRRE Commission published its report in July of 1993, more than a year after the deadline set forth in the Comprehensive Crime Control Act of 1990, and well after the 1992 presidential election.[706] Co-chair Andrew Brimmer claimed that the commission had not deliberately delayed

[695] Robert E. Litan, *Discussant Comments* in 37 FED. RES. BANK OF BOSTON SYMP.: SAFEGUARDING THE BANKING SYSTEM IN AN ENVIRONMENT OF FINANCIAL CYCLES PROC. 131, 135 (1993).
[696] *Id*. at 135.
[697] *Id*.
[698] *Id*.
[699] *Id*. at 135-136.
[700] *Id*. at 136.
[701] *Id*.
[702] *Id*.
[703] *Id*.
[704] *Id*.
[705] *Id*.
[706] Comprehensive Crime Control Act, *supra* note 667, §2556 (final report due to Congress nine months after the election of the Chair for the FIRRE Commission).

issuing its report until after the election.[707] Elliott Levitas, a member of the FIRRE Commission and former congressional representative (D-GA4), said that the FIRRE Commission indicated that both the Bush Administration's Treasury Department and Congress had sought to delay the issuance of the report.[708]

William K. Black, who worked in the OTS at the time of the FIRRE Commission and was the Deputy Staff Director for the FIRRE Commission, claimed that an unnamed Republican commissioner accused him of being "a spy" for the Bush Administration.[709] Black went on to assert that this same commissioner used his position to keep the Bush Administration abreast of problems that might arise from the FIRRE Commission.[710] Another unspecified Democratic member would generally not participate in the meetings.[711] Additionally, the FIRRE Commission could only work together by compromising and ignoring their disagreements, an example being the amount that fraud played into the Debacle.[712] The result was that, according to Mr. Black, the commission's findings were "made up" and were inconsistent with other evidence reviewed by the FIRRE Commission.[713]

Mr. Black commented that the media, the Bush Administration, and Congress all ignored the FIRRE Commission's recommendations, perhaps because few really supported the commission from its inception.[714] The Bush Administration only reluctantly agreed to work with the commission.[715] Even Senator Charles Schumer and Senator Christopher J. Dodd wanted the commission's report to bolster their position that allowing banks to enter into new lines of business would result in another financial crisis.[716] No one expected the FIRRE Commission to propose regulatory consolidation. As a result, the FIRRE Commission's proposal was not acted upon by either the president or the Congress.

XVIII. U.S. Treasury Report on Modernizing the Financial System, 1991

By the late 1980s, the removal of traditional barriers allowed thrifts to invest in commercial real estate and other risky investments.[717] As a result, many thrifts began to invest heavily in highly volatile investments, like junk bonds and oil operations.[718] These investments, coupled with fraud by thrift managers, contributed to the failure of hundreds of thrifts.[719] The U.S. taxpayers ended up paying the claims on the insured deposits of these failed thrifts because the FSLIC fund

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[707] *Why Volcker Kept Quiet*, SANTA CRUZ SENTINEL (SANTA CRUZ, CALIFORNIA), Jan. 16, 1993, at 36.
[708] *Id.*
[709] William K. Black, *Flaws Inherent in the Current Commission, and How to Minimize Them*, NEXT NEW DEAL: THE BLOG OF THE ROOSEVELT INSTITUTE (Jul. 14, 2014) (copy on file with author).
[710] *Id.*
[711] *Id.*
[712] *Id.*
[713] *Id.*
[714] *Id.*
[715] David E. Rosenbaum, *And Now, a Commission on S&L's*, N.Y. TIMES, Mar. 5, 1991, at A18.
[716] *Id.*
[717] Treasury Blueprint, *supra* note 485, at 36.
[718] *Id.*
[719] *Id.*

was insufficient to cover the losses.[720] In response to the large number of thrift failures, the FIRREA was passed in 1989.[721] The FIRREA eliminated both the FHLBB and the insolvent FSLIC.[722] The FIRREA also created the Office of Thrift Supervision (OTS) within the Department of the Treasury to would oversee thrift institutions.[723]

Although FIRREA was primarily a bailout for the thrift industry, the banking industry was also in trouble.[724] Bank failures had increased from below 10 banks per year in 1980 to 206 banks in 1989 and over 150 banks in 1990.[725] The Bank Insurance Fund equaled less than 0.5 percent of insured deposits, or less than $10 billion, as a result of this surge of bank failures.[726] FIRREA created the Resolution Trust Corporation (RTC) to manage assets of both the failed banks and thrifts.[727]

A. The Proposal

Given the problems in the banking industry, FIRREA required the Treasury Department to conduct a comprehensive study of the federal deposit insurance system.[728] As part of that study, the Treasury Department recommended consolidating the federal banking regulators into two agencies.[729]

1. Structural Reorganization

Following the recommendations of the Study by the Task Group on the Regulation of Financial Services in 1984, the Department of the Treasury suggested the reduction from four regulatory agencies, OCC, the Federal Reserve, the FDIC, and the OTS, down to two regulatory agencies, the Federal Reserve and a new Federal Banking Agency (FBA).[730] The Federal Reserve would become responsible for supervising all state chartered banks and their holding companies (BHCs), requiring a transfer of the regulatory functions over state banks from the FDIC to the Federal Reserve.[731] The Federal Reserve would still retain its other duties, such as managing monetary and credit policy for the United States.[732] The Federal Banking Agency would have responsibility for supervising all federally chartered banks and their BHCs.[733] Such supervision of nationally chartered financial institutions that the Federal Reserve had would have been

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[720] *Id.*
[721] *Id.*
[722] FIRREA, *supra* note 485, §401.
[723] 31 USC. §309 (1994).
[724] Frederic S. Mishkin, *An Evaluation of the Treasury Plan for Banking Reform*, 6 J. ECON PERSPECTIVES, 133, 133 (1992) (discussing the lead up to the Treasury Department's study).
[725] *Id.* at 138.
[726] *Id.*
[727] FIRREA, *supra* note 485, §501.
[728] *Id.* §1001.
[729] Dep't of the Treasury, MODERNIZING THE FINANCIAL SYSTEM 67 (1991).
[730] *Id.* at 68.
[731] *Id.*
[732] *Id.*
[733] *Id.*

transferred to the new FBA, as would the affairs of the OTS.[734] The new FBA was to be created under the Department of the Treasury.

The Federal Reserve and the FBA would be required to mutually agree on the policies and practices relating to BHCs.[735] Further, if a BHC contained both state- and nationally chartered banks, jurisdiction over the entire entity would reside with the charterer of the largest subsidiary bank.[736] States would offer a counterpoint to this joint federal regulation by continuing to charter, regulate and supervise state banks as well.[737]

All insurance and resolution programs would become consolidated in the FDIC.[738] The FDIC would no longer regulate banks.[739] The FDIC would continue to look into state chartered banks in order to decide whether those which exceed activities for a national bank should properly benefit from deposit insurance.[740]

The Treasury Department believed that the responsibilities of an insurer and of a regulator entail an essential conflict of interest.[741] An insurer must focus on solvency and security, while a regulator or supervisor must be more receptive to new ideas that might entail some risk, but allow the institutions to better adapt over the long run.[742]

Objectives: The goals of regulatory reform enumerated by the Treasury were: "greater accountability, efficiency, and consistency of regulation and supervision, through a reduction in the number of regulators; improved consumer benefits from the reduced duplication and overlap; and the separation of the regulator from the insurer."[743] Greater accountability, efficiency and consistency could be achieved through the reduction in regulators because fewer agencies consolidate the places for financial institutions, BHCs, law-makers and the public must look if they perceive issues with financial regulation.[744] Also without as many independent agencies, communication and cooperation between agencies would be increased.[745]

The elimination of duplication of supervision by several agencies for the same institution would also lead to greater efficiency.[746] Likewise banks would no longer run the risk of being required to comply with multiple, sometimes conflicting, rules.[747] Finally, two regulators, instead of four,

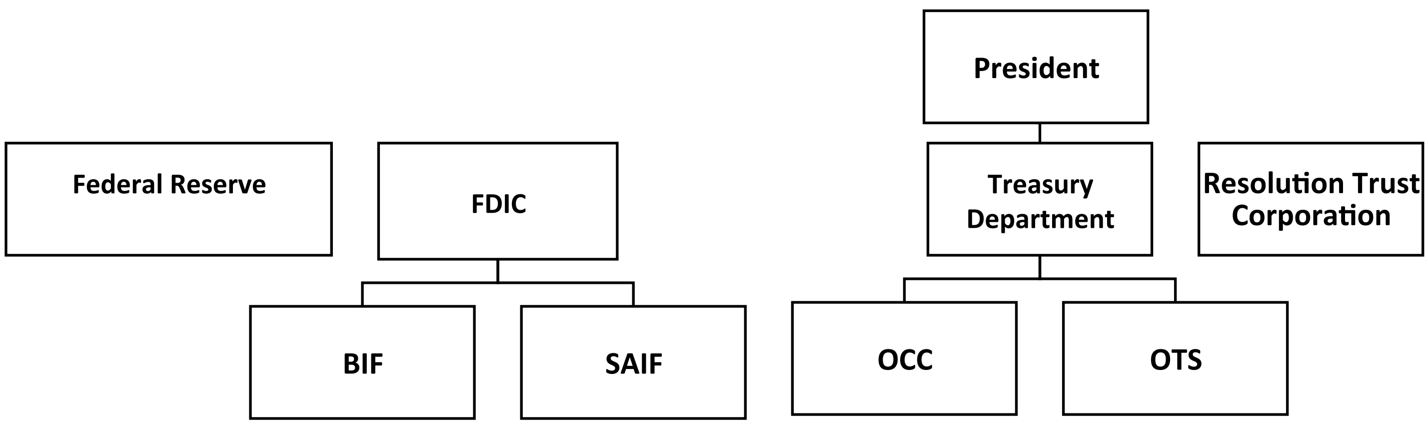
[734] *Id.*
[735] *Id.*
[736] *Id.*
[737] *Id.*
[738] *Id.* at 69.
[739] *Id.*
[740] *Id.*
[741] *Id.* at XIX-5.
[742] *Id.*
[743] *Id.* at 67.
[744] *Id.* at XIX–4.
[745] *Id.*
[746] *Id.*
[747] *Id.*

would result in a less fragmented decision making process, which can impair the ability of the institution to react to a changing market.[748]

Greater consistency among the rules would occur when fewer sets of rules exist as there would be fewer opportunities for conflicts to arise among them.[749] There would also be less differentiation between institutions which would lead to fewer inequalities among those institutions.[750] The lack of inequalities among financial institutions would negate or greatly reduce the desire to look for the most advantageous method of chartering a financial institution.[751]

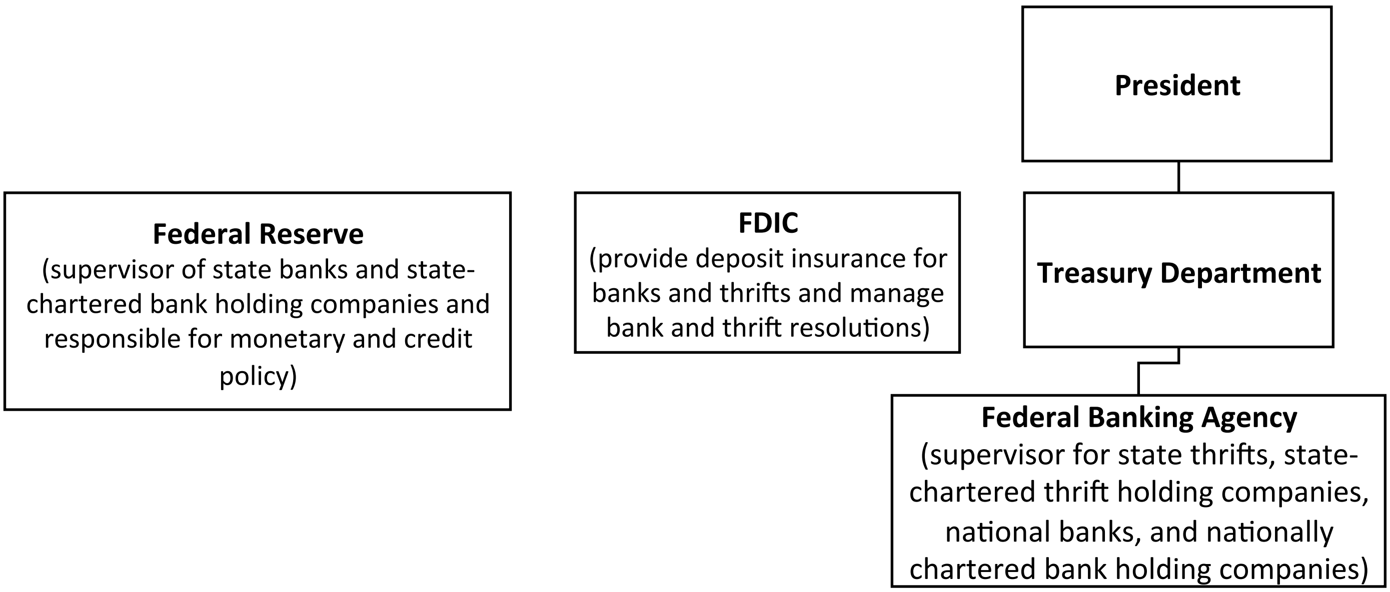
Consumers would benefit from the decrease in costs to fund the financial regulators in the United States.[752] The Treasury Department foresaw that the reduction in the unnecessary duplication of activities by state and federal agencies would lead to cost savings.[753]

Figure 26
Federal Bank and Thrift Regulators in 1990



[748] *Id.*
[749] *Id.*
[750] *Id.*
[751] *Id.*
[752] *Id.* at XIX–5.
[753] *Id.*

Figure 27
Treasury's Modernizing the Financial System Reorganizational Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The Treasury Department recognized that a consolidation of this magnitude would necessarily be incapable of happening immediately.[754] To that end, the Treasury Department suggested that the consolidation of financial regulators only occur after the other elements of their comprehensive proposal, such as strengthening of the deposit insurance system and the role of capital in maintaining bank safety and soundness, had been installed.[755] It also recommended that the reorganization be done gradually to "avoid disruption to the financial system."[756]

Personnel Issues: The Treasury Department did not discuss what would happen to the personnel of the existing agencies during the reorganization.

Funding the Reorganization: The Treasury Department did not discuss how the reorganization would be financed.

B. Arguments For and Against the Proposal

The Department of the Treasury noted several arguments against their proposal to consolidate the federal financial regulators. The Treasury found three major potential adverse effects of the

[754] *Id.* at 67.
[755] *Id.*
[756] *Id.*

consolidation: (1) concentration of power and a lack of diversity; (2) reduction of innovation; and (3) disruption of supervision.[757]

The Department was concerned that with fewer regulators the remaining ones would become inflexible in their behavior.[758] The Treasury Department was also concerned that the remaining regulators might become arbitrary in their rules because of a lack of adequate interaction with other regulatory agencies.[759]

Likewise, the Treasury Department was concerned that a single regulator at the state and federal level might become shortsighted.[760] They worried that such shortsighted regulators might become entrenched in their positions without the push from other agencies.[761] The combination of these two factors would result in a lack of regulatory innovation, which would be ill-suited to regulating in a swiftly changing financial climate.[762]

Finally, the Department was concerned about how the change would affect the agencies as they attempt to perform the consolidation.[763] They worried that such dramatic regulatory upheaval would put an unmanageable strain upon the agencies who were being forced to take on increased work-loads.[764] There would also be a setup period where the new agencies were putting all of their new employees and policies in place that could have a negative impact on the financial institutions that the agencies regulate, due to uncertainties.[765]

Frederic Mishkin, an economist and a professor at Columbia University's Business School, believed that widening the scope of available investments would allow for banks to engage in risky behaviors.[766] Such risky investments contributed to the savings and loan debacle following thrift deregulation in the early 1980s.[767] Mishkin believed that removing the FDIC from the regulatory process was ill advised because, as the insurer, the FDIC had the greatest motivation to ensure that banks do not take on too much risk.[768] The Treasury plan also created problems for the Federal Reserve's ability to handle financial crises.[769] The Federal Reserve's ability to deal with such crises required them to provide funds to solvent institutions that are illiquid as opposed to insolvent institutions.[770] Mishkin was concerned that without detailed supervision over large banks, the Federal Reserve would be unable to make the distinction between such institutions.[771]

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757 *Id.* at XIX–6
758 *Id.*
759 *Id.*
760 *Id.*
761 *Id.*
762 *Id.*
763 *Id.*
764 *Id.*
765 *Id.*
766 Mishkin, *supra* note 724, at 142.
767 *Id.*
768 *Id.* at 150.
769 *Id.*
770 *Id.*
771 *Id.*

Overall, Mishkin concluded that the Treasury's proposed regulatory reforms were poised to do more damage than good.[772]

The Treasury Department believed that the aforementioned dangers were surpassed by the benefits to be gained from the consolidation of financial regulators.[773] The Department believed that consumers would benefit from the decreased costs of funding financial regulators.[774] The Treasury anticipated that with the reduction in unnecessary regulatory duplication, there would be a significant savings.[775]

Mishkin agreed with the Treasury that allowing banks to enter the securities and insurance markets would help banks reduce their risks.[776] This risk reduction would be from the diversification of investments.[777] Mishkin believed that the entry of banks into securities and insurance would also lead to increased competition in those industries.[778] The increased competition in the securities and insurance markets would result in customer savings in those industries.[779] Raymond Sczuldo, a partner at Weil Gotshal & Manges, noted that advocates of consolidation also believed that reducing the number of regulators would help the U.S. financial services industry compete globally.[780]

C. What Happened to the Proposal?

The proposal drafted by the Treasury Department quickly became the Federal Deposit Insurance Corporation Improvement Act (FDICIA).[781] Senator Donald W. Riegle (D-MI) sponsored the FDICIA and Senator Chris Dodd (D-CT) and Senator Timothy Wirth (D-CO) co-sponsored the bill.[782] There was a major vote to resolve differences before the FDICIA was passed on to the House and ultimately to be passed into law.[783]

While the FDICIA was passed into law, the final version enacted by Congress did not contain the Treasury's proposals for the consolidation of federal bank regulators. Congress left the regulatory consolidation provisions out of the FDICIA when it enacted the FDICIA because of political conditions and maneuvers.[784]

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772 *Id.*
773 *Id.* at XIX–4.
774 *Id.* at XIX–5.
775 *Id.*
776 Mishkin, *supra,* note 724, at 142.
777 *Id.*
778 *Id.*
779 *Id.*
780 Raymond S. Sczuldo, *Consolidation of US Banking Regulation Proposed,* Int'l Fin. L. Rev. 19, 20 (1994).
781 Mishkin, *supra* note 720, at 133; Congress.gov, Legislation, 102nd Congress, S. 543, https://beta.congress.gov/bill/102nd-congress/senate-bill/543/committees [hereinafter S. 543].
782 S. 543, *supra* note 781.
783 *Id.*
784 Mishkin, *supra* note 724, at 135.

XIX. H.R. 1227 -- Bank Regulatory Consolidation and Reform Act of 1993

A. The Proposal

H.R.1227, also known as the Bank Regulatory Consolidation and Reform Act of 1993, was introduced into the House on March 4, 1993.[785] Representative James A. Leach (D- IA1) served as its sponsor.[786] It was referred to the committee on House Banking, Finance, and Urban Affairs and subsequently referred to the Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance.[787] Rep. Leach, the ranking Republican of the House Banking Committee, had led the fight in the late 1980s to bar thrifts from speculative investments and was widely regarded as Congress' "chief capital hawk."[788]

1. Structural Reorganization

In an effort to regulate depository institutions, the bill proposed to consolidate the OCC and the OTS into a Federal Bank Agency (FBA). The FBA would have been established on January 1, 1994 and would have regulated nationally chartered thrifts and nationally chartered banks.[789] The FDIC would continue to regulate state chartered thrifts and state chartered banks.[790] FDIC would regulate savings and loan holding companies (SLHCs) of any nationally chartered savings and loan and bank holding companies (BHCs) with assets in its depository institutions of less than $25 billion and whose lead bank is a nationally chartered bank.[791] The Federal Reserve would supervise the Federal Reserve Banks, any foreign bank with no insured branches, and any bank holding companies with assets in depository institutions equal to or greater than $25 billion.[792]

A single Administrator would manage the Federal Bank Agency. The President with approval from the Senate would appoint the Administrator to serve for a five-year term.[793] The FBA would also have a Deputy Administrator, appointed by the President with advice and consent of the Senate, responsible for duties that the Administrator would designate.[794] The bill also made provisions for a Deputy Administrator for Savings Associations. This person, also appointed by the President with advice and consent from the Senate, would perform the functions transferred to the FBA from the Director of the OTS until the Administrator provided otherwise.[795] The

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[785] Bank Regulatory Consolidation and Reform Act of 1993, H.R. 1227, 103rd Cong. (1993) [hereinafter H.R. 1227].
[786] *Id.,* Introduction.
[787] H.R. 1227, *supra* note 785, Introduction; Congress.gov, Legislation, 103rd Congress, H.R. 1227, https://beta.congress.gov/bill/103rd-congress/house-bill/1227 [hereinafter HR 1227 Legislative History].
[788] Robert M. Garsson, *Rep. Jim Leach Offers Prescription for Regulatory Relief Series*, 158 AM. BANKER, Feb. 22 1993.
[789] H.R. 1227, *supra* note 785, §§101,103, 201
[790] *Id.*, §§101,103, 201.
[791] H.R. 1227, *supra* note 785, §302(a); *A Brief History of Unadopted Regulatory Restructuring Proposals*, BANKING POL'Y REP. (June 3, 1996) at 7, 9, http://www.fdic.gov/news/news/speeches/archives/1996/sp30april96.html
[792] H.R. 1227, *supra* note 785, §302(a).
[793] *Id.* §103.
[794] *Id.*
[795] *Id.* §103(f)(2).

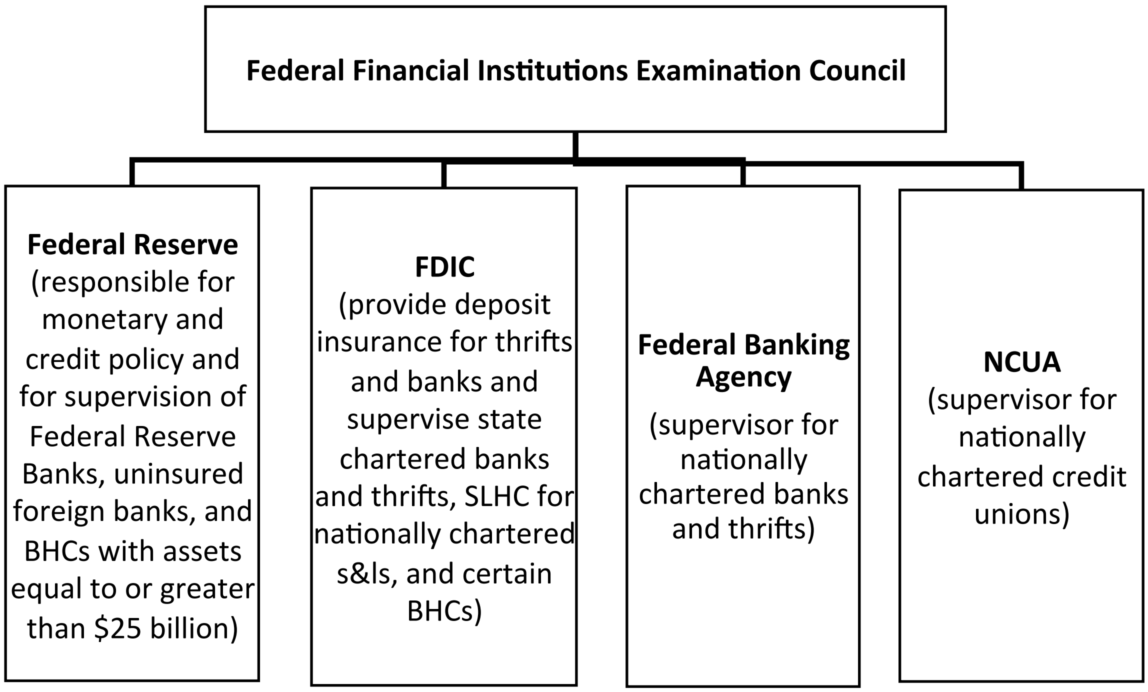
Administrator would have the power to delegate any of his authority to a FBA employee, representative, or agent.[796]

Title VI of the bill sought to establish "regulatory uniformity" by amending the Federal Financial Institutions Examination Council Act of 1978 to direct the Federal Financial Institutions Examination Council (FFIEC) to: (1) establish uniform principles and standards to be applied by member agencies for the supervision of financial institutions and other financial service providers; and (2) make recommendations for uniformity in other supervisory matters, such as identifying financial service providers in need of special supervisory attention (other than financial institutions) and the adequacy of supervisory tools for determining the impact of affiliate operations on insured depository institutions.[797] FFIEC would be comprised of the Federal Reserve, the FBA, the FDIC, and the NCUA.[798]

Title VI also prescribed procedural guidelines for the FFIEC's review of the uniformity and the efficacy of the proposed regulations submitted by each Federal financial institutions regulatory agency. In so doing, the role of the Federal Financial Institution Examination Council would have been strengthened and would have seen to the uniformity of examinations, regulation, and supervision among the three remaining supervisors.[799] In addition, the FFIEC would have rulemaking authority.[800]

[796] *Id*. §103
[797] *Id*. §601.
[798] *Id*. §601(d)(1).
[799] *Id*.
[800] *Id*.

Figure 28
H.R. 1227 Reorganizational Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The bill granted interim authority to the Administrator including the authority to consult and cooperate with the Director of OTS and the Comptroller of the Currency to facilitate orderly transfer of their functions to the FBA and the authority to take actions that may be necessary to provide for the establishment of the FBA.[801] The Secretary of the Treasury could also act as Administrator until the president appointed the Administrator.[802]

The OTS and OCC would have been required to transfer property to the FBA by January 1, 1995.[803] The Administrator was also charged with merging and consolidating the work and structures of the OTS and OCC to the "maximum extent practicable."[804] To do this, the Administrator would need to "take into account the job experience of, and the compensation and benefits provided to, the transferred employees at the prior agency."[805]

[801] *Id*. §201.
[802] *Id*.
[803] *Id*.
[804] *Id*.
[805] *Id*.

Agencies and other departments and instrumentalities of the United States which provided support services to the OTS or the OCC were authorized to continue to provide such services.[806] Similarly, all orders, resolutions, determinations, regulations, and interpretive rules in effect on December 31, 1994 were to continue in effect and be administered by the Administrator unless effectively modified, set aside, or superseded.[807]

Personnel Issues: H.R. 1227 gave the Administrator of the FBA the power to set the number of employees for the agency and their compensation beginning on January 1, 1995.[808] In addition, the bill specified that the employees of the OTS and the OCC would be transferred to the FBA.[809]

Funding the Reorganization: In terms of payment, the Administrator was authorized to collect assessments, fees, and other charges on any institution that fell under the FBA's jurisdiction.[810] To operate under a no net cost to the federal government, the charges were to be not less than the amount it would cost the federal government to provide the FBA's services.[811] Further, the Administrator was allowed to use the funds to pay the federal government's cost and such the charges received were not subject to apportionment.[812]

Interim funding was also available through the OCC and the OTS -prior to their termination date. Both the OTS and the OCC would be required to pay the Treasury Secretary one-half of the total amount determined by the Treasury Secretary as necessary to fund all direct and indirect salary and administrative expenses, including the salary of the Administrator. This funding would been available through January 1, 1995.[813]

B. Arguments For and Against the Proposal

Merging the OCC and OTS into one agency as the primary regulator for nationally chartered banks and thrifts would simplify the regulatory process and eliminate some cost differentials. The Congressional Budget Office, however, noted: "Although the combined agency could achieve some cost savings by reducing overhead expenses, those savings would most likely be minimal."[814]

The Congressional Budget Office cited the fundamental differences between banks and thrift as an obvious drawback to the bill's organizing principles.[815] Banks and thrifts might need different primary regulation because they serve different roles or are subject to different legislated rules or

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[806] *Id*. §§202-203.
[807] *Id*.
[808] *Id*. §105.
[809] *Id*. §201(b), (f).
[810] *Id*. §107.
[811] H.R. 1227, *supra* note 785, §107.
[812] *Id*.
[813] *Id*. §201(d).
[814] *Id*.
[815] CONGRESSIONAL BUDGET OFFICE, OPTIONS FOR REORGANIZING FEDERAL BANKING AGENCIES 17 (1993), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/64xx/doc6438/93doc167.pdf [hereinafter CBO 1993 Report].

mandates. For example, they differ noticeably in their commercial lending capacity.[816] Thrifts have a statutory lending limit for commercial loans of less than 20 percent of assets, of which half may only be used for small business loans. [817] Banks are not subject to this lending limit.[818] Moreover, while thrifts are allowed to engage in virtually the same activities as banks, they can more freely affiliate with securities firms and insurance companies than banks.[819] Thus, to the extent that the type of charter granted different powers or requires different activities, the argument for separate regulators would be stronger.[820] Yet, the traditional differences between banks and thrifts have diminished over time. For most purposes, banks and thrifts compete directly and are not much different in form or legislative requirements.

According to a Congressional Research Service analysis, this proposal would have put the Federal Reserve in charge of more than 40 percent of banking organization assets, with the rest divided between the FBA and the reorganized FDIC.[821] Thus, each of the three agencies would be important regulators.[822]

C. What Happened to the Proposal?

On March 17, 1993, the bill was referred to House subcommittee and died in committee.[823] There are no available transcripts of the Committee hearings.

XX. H.R. 1214-S. 1633 -- Regulatory Consolidation Act of 1993

A. The Proposal

House Banking Committee Chairman Henry B. Gonzalez (D-TX20) introduced the Regulatory Consolidation Act of 1993 to the House of Representatives as H.R. 1214 on March 4, 1993.[824] Senator Donald W. Riegle, Jr., (D-MI) introduced a similar bill, S. 1633, to the Senate on November 8, 1993.[825] The ranking Republican on the Senate Banking, Housing, and Urban Affairs Committee, Senator Alfonse D'Amato (R-NY) co-sponsored the Senate bill.[826] Both bills sought to create a Federal Banking Commission (FBC) as an independent establishment in the executive branch. They proposed to tighten regulatory control by combining the regulatory

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816 Simon Kwan, *Bank Charters vs. Thrift Charters*, FRBSF ECONOMIC LETTER (April 28, 1998), http://www.frbsf.org/economic-research/publications/economic-letter/1998/april/bank-charters-vs-thrift-charters/.
817 *Id.*
818 *Id.*
819 *Id.*
820 CBO 1993 Report, *supra* note 815, at 4.
821 US GOV'T ACCOUNTING OFFICE, U.S AND FOREIGN EXPERIENCE MAY OFFER LESSONS FOR MODERNIZING US STRUCTURE 103 (1996).
822 *Id.* at 102.
823 HR 1227 Legislative History, *supra* note 787.
824 H.R. 1214, 103rd Cong., 1st Sess. (1993); John Hoefle, *Clinton Buys the Deregulation Line*, EIR, March 9, 1993 at 18., http://www.larouchepub.com/eiw/public/1993/eirv20n12-19930319/eirv20n12-19930319_018-banking.pdf.
825 103 CONG. REC. S15321 (November 8, 1993) (statement of Sen. Riegle), http://thomas.loc.gov/cgi-bin/query/F?r103:1:./temp/~r103hd83yH:e362.
826 *Id.*

functions of the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision.[827]

1. Structural Reorganization

The bills sought to establish a Federal Banking Commission as an independent establishment of the executive branch.[828] The House version of the bill proposed that the FBC be comprised of seven-members.[829] Three of the members would be the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, and the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation.[830] The remaining four members were to be appointed by the President with advice and consent from the Senate.[831] The President's appointments were subject to diversity in political party and at least one of the appointed members being "representatives of organizations which have more than a 2-year history of representing consumer or community interests on banking services, credit needs, or housing and financial consumer protections".[832] One of the President's appointees would be appointed by the President as Chairperson, another as Vice Chairperson — both with advice and consent from the Senate.[833]

Unlike the seven-member commission of H.R. 1214, the Senate Bill created a five-member commission.[834] Its five-members would be the Secretary of the Treasury or his designee, a Federal Reserve Board Governor, and three public members.[835]

In both bills, the FBC members would serve five-year terms, however "first appointees" would have staggered appointments.[836] Any member of the FBC could continue to serve after the expiration of the term of office until the appointed of a successor.[837] However, members of the FBC were not permitted to hold any office, position or employment in any insured depository institution or any affiliate during their service and the two years following service.[838] Also, the FBC members could not be an officer or director of any Federal Reserve Bank or Federal Home Loan Bank, and could not hold any stock in any insured depository institution or an affiliate thereof.[839]

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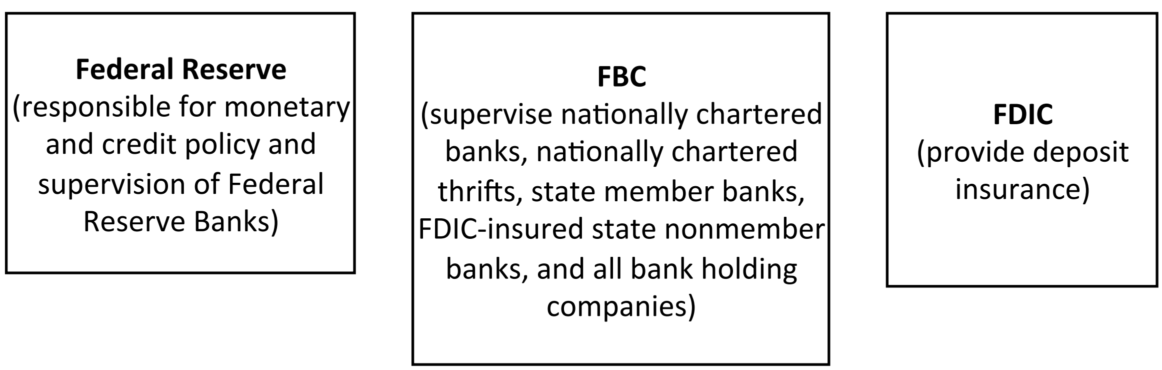
[827] Regulatory Consolidation Act of 1993, H.R. 1214, 103rd Cong., 1st Sess. (1993), §103 [hereinafter H.R. 1214].
[828] *Id*. §101.
[829] *Id.*
[830] *Id*. §102(a)(1).
[831] *Id*.
[832] *Id*. §102(a)(3)
[833] *Id*. §102(d).
[834] Regulatory Consolidation Act of 1993, S. 1633, 103rd Cong., 1st Sess. (1993) §105 [hereinafter S. 1633].
[835] *Id.* at §102.
[836] H.R. 1214, *supra* note 827, §102(c); S. 1633, *supra* note 834, §103(c) at 4-5. Specifically, H.R.1214 provided: (A) one shall be appointed for a term of five years; (B) one shall be appointed for a term of four years; (C) one shall be appointed for a term of three years; and (D) one shall be appointed for a term of ten years, as designated by the President at the time of the appointment. H.R. 1214 §102(c)(4). Specifically, S. 1633 provided: (A) one shall be appointed for a term of six years; (B) one shall be appointed for a term of four years; and (C) one shall be appointed for a term of two years, as designated by the President at the time of the appointment. S. 1633 §103(c)(3).
[837] H.R. 1214, *supra* note 827, §102(c); S. 1633, *supra* note 834, §103(c).
[838] H.R. 1214, *supra* note 827, §102(c); S. 1633, *supra* note 834, §103(c).
[839] H.R. 1214, *supra* note 827, §102(c); S. 1633, *supra* note 834, §103(c).

The newly formed FBC would then be transferred powers from several existing regulators. Namely, the bills transferred to the FBC, all regulatory functions of: (1) the OCC with respect to national banks; (2) the Board of Governors of the Federal Reserve System (and any Federal Reserve Bank) with respect to member banks, bank holding companies and affiliates, and certain international banking entities; (3) the OTS with respect to savings associations and savings and loan holding companies; and (4) the FDIC with respect to state nonmember banks and certain savings and foreign banks.[840]

The Federal Reserve would retain its powers as a central bank and would continue to supervise the Federal Reserve Banks. The FDIC would continue to administer the bank and savings and loan deposit insurance funds.[841] H.R. 1214 required the FBC to submit written reports to Congress at the end of each six-month period during the first two years following enactment detailing progress made in the consolidation of the depository institution regulatory functions within the FBC and the transition from a multi-agency regulatory structure to a single commission structure.[842]

Figure 29
Regulatory Consolidation Act Reorganization Structure



In addition, H.R. 1214 would have also established, within the FBC, a Consumer Division responsible for (1) conducting consumer examinations to determine the compliance of each insured depository institution with respect to consumer protection and community reinvestment law; and (2) implementing prescribed consumer examinations, training and developing career paths for consumer examiners, and responding to consumer complaints.[843] The Senate version of the bill would not have created a Consumer division.

2. Proposed Implementation

[840] H.R. 1214, *supra* note 827, §103; S. 1633, *supra* note 834, §104.
[841] H.R. 1214, *supra* note 827, §§103, 203; S. 1633, *supra* note 834, §§104, 203.
[842] H.R. 1214, *supra* note 827, §205.
[843] *Id*. §104.

Reorganization of Regulatory Powers: The bills did not detail exactly how the transfer of powers from the Federal Reserve, the FDIC, the OCC, and the OTS would be done. The House and Senate bills differed on the date by which the powers of those agencies had to be transferred to the FBC. H.R. 1214 said that it had to be completed no later than 180 days after the bill was enacted because at that time the OCC and the OTS would cease to exist.[844] S. 1633 provided an even shorter timeframe as it required the transfers to be complete no later than 60 days after the bill was enacted.[845]

To facilitate an effective transition from a multi-agency structure to a unitary regulatory structure, the House version of the bill authorized the president to establish a five-member transition commission.[846] This transition commission would have the same powers and duties as the Federal Banking Commission and would carry out the provisions of the act during the two-year period after enactment. Though their positions would be abolished, both the Comptroller of the Currency and the Director of the OTS would be eligible to serve on the transition commission.[847] The Senate version of the bill made no provision for a transition committee but it did specify that the Federal Reserve, the FDIC, the OCC and the OTS were responsible for winding up the affairs of their respective agencies related to the functions that they were transferring to the FBC.[848]

Personnel Issues: Both bills provided for the transfer of all functions related to the supervisory powers of the Federal Reserve and the FDIC and all of the functions of the OTS and the OCC to the FBC.[849] H.R. 1214 did not expressly state what will happen to the employees of the agencies whose powers are being transferred to the FBC.

S. 1633, however, went into detail about what would happen to the employees whose functions were being transferred to the FBC during the transition period. S. 1633 specified that the Federal Reserve, the FDIC, the OCC, and the OTS were required to manage their employees, including paying benefits and compensation, up to the transfer date.[850] In addition, S. 1633 expressly stated that the affected employees of the Federal Reserve, the FDIC, the OCC, and the OTS would be transferred to the FBC no later than 90 days from the transfer date and they would be guaranteed to positions that were equal in pay, status, and function as their prior positions.[851] S. 1633 also guaranteed that these employees would continue to be employees of the U.S. government and that this reorganization would not affect their employment status with the U.S. government.[852]

Funding the Reorganization: Neither H.R. 1214 nor S. 1633 specified how the reorganization will be funded. They also did not expressly state how the FBC would be funded after it comes into existence. Both did state that the FBC would have all of the powers of the OCC which was

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[844] *Id.* §§201-202.
[845] S. 1633, *supra* note 834, §106.
[846] H.R. 1214, *supra* note 827, §206.
[847] *Id.* §206(b).
[848] S. 1633, *supra* note 834, §205.
[849] H.R. 1214, *supra* note 827, §103; S. 1633, *supra* note 834, §104.
[850] S. 1633, *supra* note 834, §205(a)(1)(A).
[851] *Id.* §206(d).
[852] *Id.* §206(a).

funded through fees and assessments on the institutions it regulated.[853] Thus, it seems reasonable to assume that the FBC would have been funded in the same manner.

B. Arguments For and Against the Proposal

During Senate Banking, Housing, and Urban Affairs Hearings, Chairman Gonzalez, the House bill's sponsor, stated that the Senate bill would allow the Federal Reserve to be free to focus on monetary policy, and the FDIC would be free to administer the deposit insurance program. The Chairman also specified that the FBA as a super-regulator would be independent of the Treasury Department, and therefore shielded from political pressure.[854] In a letter to the Vice President, he commented that with a single agency, regulators would no longer duplicate each other's efforts or engage in unproductive interagency rivalries. The result, he said, would be lower paperwork costs for the regulated institutions and more effective enforcement.[855] The consolidation also would reduce the administrative costs of regulation, which would save insured institutions money as well.[856]

H.R. 1214 and S. 1633 faced heavy criticism. From the outset, it was widely assumed that the legislation was unlikely to pass.[857] Pushback amongst both Republican and Democratic legislators and those outside of Congress revolved around concerns of a loss of the dual banking system, an elimination of checks and balances amongst regulators, a weakened Federal Reserve, and partisanship.[858]

The Regulatory Consolidation Act was largely viewed as a threat to the preservation of the dual banking system. During Senate Committee Hearings, Senator William Roth (R-DE) questioned whether a single regulator would look more favorably upon the banks it created — the federal or nationally chartered banks — over those of other institutions.[859] Similarly, the Conference of State Bank Supervisors (CSBS) opposed the bill, fearing that reducing regulatory requirements at the federal level would make state banking regulation seem more burdensome.[860] Ellen Lamb, CSBS spokeswoman, pointed to the savings and loan crisis as an example of the problems of only one regulator acting as both the deposit insurer and the chartering authority.[861]

Also, key amongst the "super-regulator" concerns was the idea that a single regulator would eliminate a system of checks and balances. Stephen J. Verdier, a lobbyist for the Independent Bankers Association of America, dismissed the idea of a single regulator altogether. He argued that independent bankers group preferred the existing system of multiple regulators, which he

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853 H.R. 1214, *supra* note 827, §103; S. 1633, *supra* note 834, §104.
854 Charina de Guzman, *State Regulators Leery of Consolidation Plan Series,* 158 AM. BANKER, October 4, 1993.
855 Robert M. Garsson, *Gonzalez Urges Vice President to Push for Single Bank Agency Series,* 158 AM. BANKER, July 20, 1993.
856 *Id*.
857 Garsson, *supra* note 855, at 2.
858 *The Need for Major Consolidation and Overhaul of the Bank Regulatory Agencies into a New and Independent Banking Structure: Hearings on S. 1633 Before the S. Comm. on Banking, Hous., & Urban Affairs*, 103rd Cong., (1994)[S. Comm. on Banking 1994].
859 *Id.*, at x (statement of Sen. William V. Roth).
860 Guzman, *supra* note 854, at 6.
861 *Id*.

said provided "a system of checks and balances."[862] Statements of senators, regulators, and industry officials at the Senate Hearings echoed these concerns.[863] For example, Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System, also discussed the need for two federal regulators and argued that any single regulator would be prone to arbitrary actions because it would not have the checks and balances provided by two or more agencies.[864] A single regulator would thus be more likely to make sudden and, perhaps, dramatic changes in policy that would add uncertainties and instability to the banking system.[865]

Then Treasury Secretary Lloyd Bentsen, however, countered this argument by noting that congressional oversight, the courts, the State regulators, the press, the marketplace, and what would be the FBC would provide the necessary checks and balances.[866] Wolfgang Reinicke, a research associate at the Brookings Institution, also argued that the problem of excessive power or arbitrary regulation could be dealt with through congressional oversight.[867] Then Comptroller of the Currency Eugene Ludwig also challenged the idea that the checks and balances in the existing system worked by noting that they had failed to prevent the savings and loan crisis.[868] James R. Barth, Lowder Eminent Scholar in Finance at Auburn University and R. Dan Brumbaugh, Jr., an economist, commented that the proposed system would still contain checks and balances because it would have separate agencies to provide deposit insurance, to act as the lender of last resort, and to supervise the depository institutions.[869]

Critics also expressed concern about a weakened Federal Reserve. The crux of these arguments highlighted the Federal Reserve as a significant regulator. Consequently, to relinquish its supervisory powers would be detrimental in a crisis situation.[870]

Several comments also hinged on the potential for politicizing bank regulatory structure through presidential appointment. Senator Christopher Bond (R-MO) stated that “presidential appointees see conflicts of interest in their decision making roles” and also commented that at the time of Senate hearings, the only financial regulator who did not have strong connections with President Bill Clinton was the Federal Reserve — the organization losing the most “turf” in the merger.[871]

The House Bill was introduced the same day as H.R. 1227, which proposed to consolidate the OCC and the OTS into a Federal Bank Agency. This agency would regulate federally chartered thrifts and national banks, and a merger would be relatively seamless since the OTS and OCC were already agencies within the Treasury Department. H.R. 1224 and S. 1633, however,

[862] Garsson, *supra* note 855, at 2.
[863] S. Comm. on Banking 1994, *supra* note 858, at 82-83, 90, 133, 143, 290, 315, 323-324, 330 (statements of Sen. Richard Shelby, Board of Governors of the Federal Reserve System, John Shivers, Chairman of Southwest Bank, Howard McMillan for the American Bankers Association, and James Gilleran for the Conference of State Bank Supervisors).
[864] *Id.* at 90 (statement of Alan Greenspan, Federal Reserve Chairman).
[865] *Id.*
[866] *Id.* at 20 (statement of Lloyd Bentsen, Secretary of the Treasury).
[867] *Id.* at 355 (statement of Wolfgang Reinicke, a research associate of the Brookings Institution).
[868] *Id*. at 159 (statement of Eugene Ludwig, Comptroller of the Currency).
[869] *Id.* at 361 (statement of R. Dan Brumbaugh); *Id.* at 362-363 (statement of James R. Barth).
[870] *Id*. at 9 (statement of Senator Connie Mack, R- FL); *Id.* at 82 (statement of Senator Richard Shelby, R- AL).
[871] *Id*. (statement of Senator Christopher Bond, R-MO).

allowed for more comprehensive reform by including the Federal Reserve and FDIC in the merger and thereby avoiding what some called a limited approach of just merging the OTS and the OCC because the few benefits from the merger would hardly outweigh the effort needed to make the merger successful. To balance the Bills' breadth, they each created a Commission, rather than H.R. 1227's single Administrator.

C. What Happened to the Proposal?

S. 1633 was referred to Senate committee on November 8, 1993. It was read twice and referred to the Committee on Banking. H.R. 1214 was referred to House subcommittee on March 17, 1993. It was subsequently referred to the Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance. Both bills died in committee when the term of the 103rd Congress expired.[872] Neither bill was ever voted upon by either the House or the Senate.

XXI. Clinton Administration Consolidating the Federal Bank Agencies Plan, 1993

A. The Proposal

In the wake of what it deemed a convoluted web of regulators and an erosion in the differences between commercial banks, savings banks, and other financial institutions, the Clinton Administration proposed a plan (Clinton Plan) advocating for consolidating depository institution regulators.[873] The Clinton Plan was released on November 23, 1993, by Frank. N. Newman, Under Secretary of the Treasury.[874] Treasury Secretary Lloyd Bentsen presented the plan to the Senate Committee on Banking, Housing and Urban Affairs on March 1, 1994.[875]

Senator Donald W. Riegle, Jr., (R-MI), the Chairman of the Senate Committee on Banking, Housing and Urban Affairs, based his bill, S. 1895, also known as the Regulatory Consolidation Act of 1994, on the Clinton Plan.[876] Senator Riegle introduced S. 1895 to the Senate on March 7, 1994.[877] The description of the Clinton Plan in this report will reference the relevant sections of S. 1895 that would have implemented the Clinton Plan if it had been enacted.

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[872] Congress.gov, 103rd Congress, H.R. 1214, https://beta.congress.gov/bill/103rd-congress/house-bill/1214; Congress.gov, Legislation, 103rd Congress, S. 1633, https://beta.congress.gov/bill/103rd-congress/senate-bill/1633.

[873] FRANK N. NEWMAN, CONSOLIDATING THE FEDERAL BANK REGULATORY AGENCIES (1993) (reprinted in A.L.I.-A.B.A., *Developments in Bank Regulation: Redefining Banking in a Shrinking Industry*, R182 A.L.I.-A.B.A. 495, 554 (1994)) [hereinafter Clinton Plan] Frank N. Newman, the Under Secretary of the Treasury, presentation of the Clinton Administration's plan to the Senate Committee on Banking, Housing, and Urban Affairs on November 23, 1993.

[874] *Id.*

[875] S. Comm. on Banking 1994, *supra* note 858, at 15-66 (statement of Lloyd Bentsen).

[876] Regulatory Consolidation Act of 1994, S. 1895, 103rd Cong. (1994) [hereinafter S. 1895]; American Bar Association Banking Law Committee Financial Restructuring Task Force, Group 1: History and Background of Previous Regulatory Reform and Restructuring Proposals 20 (draft as of July 29, 2009) [hereinafter ABA Financial Restructuring Task Force History].

[877] S. 1895, *supra* note 876.

The Clinton Plan enumerated five goals including: (1) consistent regulations and policies for comparable activities, regardless of charter; (2) consistent implementation of the regulations and policies; (3) regulation of banking organizations as a unit and elimination of interagency rulemakings; (4) clearly defined rules and functions of the remaining agencies; and (5) an independent regulator that is still responsible to the electorate.[878]

1. Structural Reorganization

The Clinton Plan called for bank and thrift regulators to be divided into three groups, based on their core functions: deposit insurance, central banking, and safety and soundness regulation.[879] The FDIC would insure deposits.[880] The Federal Reserve Board would "conduct monetary policy, administer the payment system, and provide liquidity through the discount window."[881] A new agency, to be called the Federal Banking Commission, (FBC) would supervise all FDIC-insured depository institutions and their holding companies, U.S. banks' foreign operations, and foreign banks' U.S. operations.[882] Additionally the FBC would charter national banks and federal savings associations. Essentially, the FBC would carry out all the functions exercised by the OCC and OTS, as well as the FDIC's functions as primary federal regulator of state nonmember banks and the Federal Reserve's functions as primary federal regulator of bank holding companies, state member banks, and foreign banks.[883] The Clinton Plan, however, did not provide specifics concerning the merging or termination of the OCC and the OTS. Still, the Administration's proposal purported to leave the "core functions" of the FDIC and the Federal Reserve undisturbed.[884]

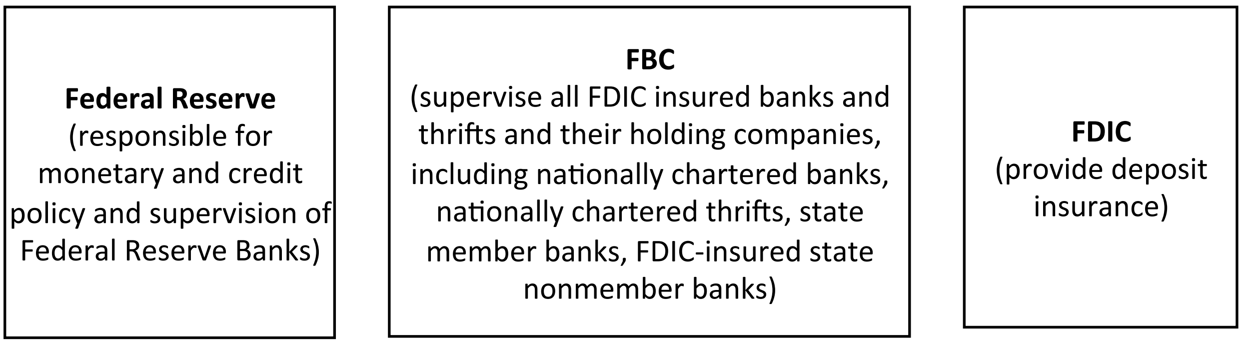
The FBC would be an independent agency consisting of five members: the Secretary of the Treasury (or the Secretary's designee); a member of the Federal Reserve Board, designated by the Board; and three members appointed by the President and confirmed by the Senate.[885] One of the three appointed members would be specifically appointed and confirmed as Chairperson of the FBC, and would serve a four-year term (both as a member and as Chairperson) expiring on the last day of March following a Presidential election. The two other appointed members would serve staggered five-year terms. One of these two members would be require to be from another political party. [886]

The Clinton Plan professed to maintain the integrity of the dual banking system by keeping the states as primary regulators of the banks they chartered. Moreover, the Federal Banking Commission would use state examinations as appropriate, consistent with the statute requiring periodic examinations.[887] Also, while the Federal Reserve and the FDIC would not have

[878] Clinton Plan, *supra* note 873, at 541-542.
[879] *Id*. at 542.
[880] *Id*.
[881] *Id*.
[882] *Id*.
[883] *Id*.
[884] *Id*.
[885] *Id*. at 543.
[886] *Id*. at 536.
[887] *Id*. at 537.

regulatory functions, both organizations would have full access to bank supervisory information in order to make independent judgments on matters most directly bearing on their core functions. The FBC would be required to provide the FDIC and Federal Reserve timely and accurate information on the condition of the banking and thrift industries and on individual depository institutions.[888]

Figure 30
Clinton Plan (S. 1895) Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The Clinton Plan as embodied in S. 1895 provided a timetable for certain actions. Within 60 days after the law's enactment, the Treasury Secretary had to set a date by which the transfer of all of the functions to the FBC would be completed, although the Treasury Secretary could change the date under certain conditions.[889] The Treasury Secretary had to select a date that was more than 120 days after the law's enactment but not more than one year after the law's enactment.[890] The Treasury Secretary would have been allowed to change the date to one that fell more than one year after the law's enactment but only if he notified the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Banking, Finance and Urban Affairs.[891]

Personnel Issues: Initially all OCC and all OTS employees would have been transferred to the FBC.[892] Certain Federal Reserve, FDIC, and FFIEC employees would have been transferred to the FBC based on whether the functions associated with their existing jobs had been transferred to the FBC.[893] Which of the Federal Reserve, FDIC and FFIEC employees would have been transferred to the FBC would have been jointly determined by the FBC and the relevant agency.[894]

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[888] *Id*. at 544.
[889] S. 1895, *supra* note 876, §202.
[890] *Id*.
[891] *Id*.
[892] *Id*. §403.
[893] *Id*.
[894] *Id*.

The bill guaranteed that employees from the OCC, the OTS, the FDIC and the FFIEC would have been transferred to a position in FBC that was the same status and tenure as their position at the OCC, the OTS, the FDIC and the FFIEC.[895] Employees of the Federal Reserve, however, would have been transferred to the FBC at the same status and tenure as someone from the OCC whose position in the OCC had been similar to their position at the Federal Reserve.[896]

Once it was operational, the FBC would be allow to hire and set the compensation and benefits for its employees and it was not required to follow the civil service rules when it did this.[897]

Funding the Reorganization: Like the OCC, OTS, and FDIC, the FBC would not require any taxpayer funds, instead it would recover all its costs through non-appropriated means.[898] The Administration's proposal incorporated a funding method for the FBC that was equitable to both national and state banks and institutions of all sizes.[899] Under the Clinton Plan, the FBC would be funded from three sources: (1) the FDIC would earmark a small portion — 1 basis point — of the deposit insurance premiums that it collected from all depository institutions to pay for Federal supervision; (2) for a transition period, the Federal Reserve would make annual payments to the FBC in an amount equal to the Federal Reserve's savings from transferring supervisory functions to the FBC. This payment would begin to phase out in the sixth year after consolidation and would be fully phased out after the fourteenth year; and (3) the rest of the FBC's funds would be generated by fees levied on the institutions it examined.[900] Assessments would be based on the asset size of the institutions. National banks and thrifts would pay fees on the full amount of their assets. State chartered banks would not pay any fees on their first $1 billion in assets and would pay fees on assets of more than $1 billion at no more than half of the rate for national banks of comparable size.[901]

B. Arguments For and Against the Proposal

The Clinton Plan proposed to make regulation more efficient because a single regulator would be responsible for the entire banking organization: the depository institutions, their holding company, and affiliates. The Administration claimed that this would put an end to fragmented regulatory decision-making, duplicative rulemaking, and delayed supervisory action.[902] Consolidation into a single agency would also fix accountability for regulating depository institutions and provide a focal point for Administration, congressional, and public concerns regarding regulatory policy.[903] It would also allow customers to readily ascertain which agency

[895] *Id*.
[896] *Id*.
[897] *Id*. §303.
[898] S. Comm. on Banking 1994, *supra* note 858, at 19.
[899] *Id*. at 55.
[900] *Id*. at 55.
[901] *Id*.
[902] Clinton Plan, *supra* note 873, at 541-542.
[903] *Id*.

regulates their bank.[904] This would further enhance the accountability of the financial institutions and the regulators.

Consolidation would eradicate the then existing opportunities for “charter-shopping” and other competition in laxity.[905] A single banking regulator would eliminate regulatory gaps that allowed some problems to go unaddressed. It would also provide a comprehensive, uniform, and coordinated mechanism for enforcing applicable laws and regulations.[906]

Additionally, consolidation would reduce costs. It would benefit customers by eliminating the needless compliance costs through regulatory consolidation.[907] The then Comptroller of the Currency Eugene Ludwig claimed that the Clinton Plan would save the federal government between $150 million and $200 million annually in direct savings, while banking institutions would save even more from the reduction in their compliance costs.[908]

Not everyone agreed with the Clinton Administration’s rosy assessment of its plan. Some legislators expressed grave concerns about the Clinton Plan’s implications. For example. Senator Kit Bond (R-MO) commented at the March 1994 Senate Banking Committee hearing that the Plan would eliminate the dual banking system and would politicize the banking regulatory structure.[909] Similarly, Howard L. McMillan, Jr., president of Deposit Guaranty National Bank in Mississippi and representing the American Bankers Association, commented that “[c]ollapsing all federal regulatory power into one monolithic agency would eventually make the dual banking system an empty shell - a state-charter versus a national charter would be a distinction without a difference.”[910] Federal Reserve Governor, John P. LaWare commented that the plan for a single-regulator would essentially override any of the states’ powers as regulators.[911]

The Clinton Administration through its representatives, like the Comptroller of the Currency Eugene Ludwig, argued their proposal would preserve the dual banking system because state banking commissioners would “remain the primary supervisor of the banks that they charter.”[912] Ludwig also noted that the FBC would not examine small state banks that the state authorities had examined and it would cooperate with the states with regard to on-site examinations and examiner training.[913]

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[904] *Id.* at 545-546.
[905] *Id*.
[906] Clinton Plan, *supra* note 873, at 541-542.
[907] *Id.* at 545-546.
[908] S. Comm. on Banking 1994, *supra* note 858, at 157 (statement of Eugene Ludwig, Comptroller of the Currency). He did not disclose how the Clinton Administration had calculated these amounts.
[909] S. Comm. on Banking 1994, *supra* note 858, at 7 (statement of Sen. Christopher “Kit” Bond).
[910] Robert M. Garsson, *Bankers and Senate Leaders Rally Against Plan to Merge Regulators,* 159 AM. BANKER, March 4, 1994.
[911] Claudia Cummins, *Fed Girding to Fight Plan for Single Bank Regulator Series: 2,* 158 AM. BANKER, December 20, 1993.
[912] S. Comm. on Banking 1994, *supra* note 858, at 164 (statement of Eugene Ludwig, Comptroller of the Currency).
[913] S. Comm. on Banking 1994, *supra* note 858, at 164. Ludwig would likely have been nominated to be the head of the FBC if Congress had enacted the Clinton Plan. *See*, *United States: Bank Regulation,* OXFORD ANALYTICA DAILY BRIEF SERVICE, December15, 1993, at 1.

The Federal Reserve was a staunch critic of the Administration's Plan. The Federal Reserve contended that the Clinton Plan's proposed FBC was an inflexible "monolithic monopoly-regulator" jeopardizing the dual-system and that the Clinton Plan removed the Federal Reserve from a supervisory role that was needed to maintain the "skills and clout to engage in the crisis management so vital to macroeconomic stability."[914] John D. Hawke, a partner at Arnold & Porter law firm and a former general counsel for the Federal Reserve, also opined that the Federal Reserve's power came, in part, from its regulatory power over banks, such as the ability to approve bank applications, and it would lose this leverage if the Clinton Plan was enacted.[915]

Because the Clinton Plan was deemed so objectionable, Federal Reserve Governor LaWare devised an alternative proposal to the Clinton Plan. LaWare's proposal was endorsed in a closed meeting with the Federal Reserve's top officials. LaWare's proposal envisaged that two agencies, the Federal Reserve and a new Federal Banking Commission, would take over all bank-supervision functions of the other existing federal regulators.[916] The LaWare Plan will be discussed in detail in Part XXII below.

In response, at the Senate Banking Committee Hearings, the Administration argued that much of the Federal Reserve's supervisory activities in connection with bank holding companies with national bank subsidiaries are duplicative of the work already performed by the OCC and the States.[917] Comptroller of the Currency Ludwig clarified that the Federal Reserve would maintain access to the information needed to be able to meet fully all of its core functions and it could "participate in examinations conducted by the FBC of the largest banking organizations and a cross-section of small, state chartered banks."[918] At that time, the Federal Reserve examined only six of the twenty-five largest banks in the United States.[919] As a result, the Clinton Plan would significantly expand the Federal Reserve's information-gathering capacity. The Federal Reserve would also have a representative on the FBC board.[920]

The FDIC Review also reported that an early 1994 revision of the Clinton Plan expanded the Federal Reserve's participation to include joint examinations of a sampling of large and small banks and the largest banking holding companies, lead examinations of holding companies whose main bank is state chartered and backup authority to correct emergency problems in any of the twenty largest banks.[921] The Clinton Plan would have also eliminated some agency jobs, although they did not indicate specifically which ones or how many would be eliminated.[922] The

[914] Clinton Plan, *supra* note 873, at 556.
[915] Barbara A. Rehm, *Fed Signals Opposition to Merging Regulators Series: 1,* AMERICAN BANKER, November 24, 1993.
[916] *Id.*
[917] S. Comm. on Banking 1994, *supra* note 858, at 57 (statement of Lloyd Bentsen).
[918] *Id.*
[919] *Id.* at 57 n.15.
[920] *Id.* at 55.
[921] Kushmeider, *supra* note 409, at 4.
[922] Saul Hansell, *Fed Rebutted by Bentsen on Regulatory Plan*, N.Y. TIMES, December 17, 1993, http://www.nytimes.com/1993/12/17/business/fed-rebutted-by-bentsen-on-bank-regulatory-plan.html. Treasury Secretary Lloyd Bentsen commented "there is no question our proposal will result in the reduction of jobs, saving the taxpayers money." *Id.*

Clinton Administration had contended that it would have lowered the costs of credit.[923]

The General Accounting Office issued a report that favored the Federal Reserve's argument that it should remain an independent regulator.[924] The GAO cited the German Bundesbank as an example of a central bank that had benefited from combining monetary policy responsibilities with bank regulatory supervision.[925] The Congressional Budget Office also claimed that any savings under the Clinton plan would be "quite small."[926] The Treasury Department did not offer any estimates of cost savings.[927]

C. What Happened to the Proposal?

The Clinton Plan was presented to the Senate's Committee on Banking, Housing, and Urban Affairs as S. 1895. It incorporated many of the elements of the bills introduced in the Senate and House, in particular, S. 1633, which was sponsored by Senator Riegle (D-MI), Chairman of the Senate Committee on Banking, Housing, and Urban Affairs, and Senator D'Amato (R-NY), and H.R. 1214, which was sponsored by House Chairman Gonzalez (D-TX20). The Administration's plan also built upon the many previous proposals for regulatory consolidation that have emerged over the past 45 years.[928] As noted above in the discussion on its costs and benefits, the Clinton Plan was strongly opposed by many congressmen, the Federal Reserve, and many of the executives at the nation's largest banks.

The Clinton Administration abandoned its effort to overhaul the banking regulation on May 28, 1994. Frank N. Newman commented that it was not going to be the year "to get regulatory consolidation done."[929] He also noted that the complicated health care legislation and two other banking bills had left important committees and members of Congress too busy to begin the lengthy process of working on new banking legislation from scratch.[930]

XXII. LaWare Proposal, 1995

A. The Proposal

In a signed article published by *American Banker* on January 4, 1994, John P. LaWare, one of seven members of the Federal Reserve Board, responded (LaWare Proposal) to the Clinton Administration's plan (Clinton Plan) for a new independent financial banking commission.[931]

1. Structural Reorganization

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923 *Id*.
924 Keith Bradsher, *Deal Reported on Bank Regulation*, N.Y. TIMES, May 10, 1994.
925 *Id*.
926 Keith Bradsher, *Tug of War of Bank Regulation*, N.Y. TIMES, Jan, 25, 1994.
927 *Id*.
928 *Id*. at 48.
929 Keith Bradsher, *White House Drops Bank-Regulation Bid,* N.Y. TIMES, May 28, 1994.
930 *Id*.
931 John P. LaWare, *LaWare Finds Flaws in Regulatory Reform*, 159 AM. BANKER, Jan. 4, 1994.

By differing from the Clinton Plan, which sought to create a single regulator, LaWare argued that his plan would maintain a "healthy process of dynamic tension in bank rule-making" and avoid a single regulator, which he said could become "a monolithic monopoly regulator."[932] To do this, he proposed that federal bank regulatory duties be split between a new agency, the Federal Banking Commission (FBC) and the Federal Reserve.[933] The FBC would be comprised of the OTS and the OCC.[934] Merging both offices should be done "as soon as possible."[935] The FDIC would be relieved from regulatory functions but would be authorized to join in the examination of problem banking institutions.[936]

The LaWare Proposal also called for a division of responsibilities defined by charter class.[937] Specifically, the FBC would be the examiner for "any organization whose lead depository institution is a bank or a thrift" and the Federal Reserve would be the organization's examiner if "the lead entity was a state bank."[938] The designated examiner would then be responsible for examining all the bank's or thrift's affiliates, including depository affiliates, regardless of their charter class.[939] The Federal Reserve would also continue to regulate foreign banks.[940]

As an exception to the examination by charter class rule, the Federal Reserve would supervise the holding companies and nonbank subsidiaries of "a group of banking organizations that are of particular importance to the stability of the entire financial system."[941] The primary regulator of the lead bank for that financial conglomerate would supervise all of the conglomerate's banking subsidiaries.[942] LaWare explained that the decision about which organizations should be classified as important to the financial stability of the system and thus subject to Federal Reserve supervision "would be based on criteria related to systemic risk, e.g., relative size, relative activity in payments and clearing, relativity in foreign exchange, etc."[943]

The LaWare Proposal called for the Federal Reserve continuing to control the rulemaking for holding companies.[944] The FBC would promulgate the regulations for national banks and thrifts, while the Federal Reserve would promulgate the regulations for state banks. In addition, LaWare proposed that the agencies should craft their regulations to be as consistent with one another as possible.[945]

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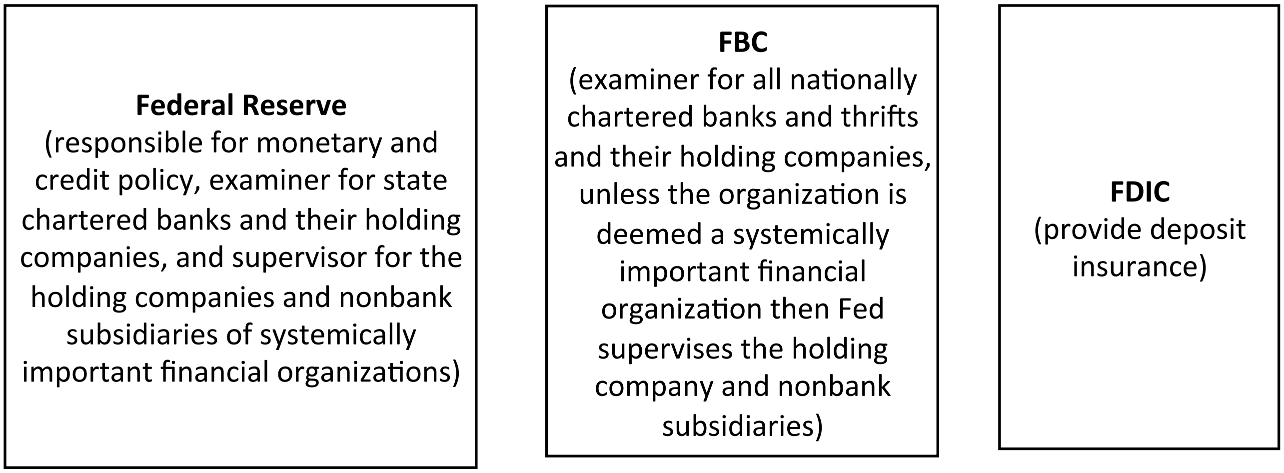
932 *Id.*
933 *Id.*
934 *Id.*
935 *Id.*
936 *Id.*
937 *Id.*
938 *Id.*
939 *Id.*
940 *Id.*
941 *Id.*
942 *Id.*
943 *Id.*
944 *Id.*
945 *Id.*

Figure 31
LaWare Proposal Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The LaWare Proposal did not provide specifics on how the OTS and the OCC would be merged but did mention that this merger should happen as soon as possible.[946] The LaWare Proposal did not provide a timeframe for the plans to merge the staff of the two agencies or what would happened if the merger was not done in a timely fashion.

Personnel Issues: The LaWare Proposal did not discuss what would happen with the staffs of the OCC and the OTS when the two agencies merged. Presumably most of the employees of the OCC and the OTS would be transferred to work at the new FBC but the proposal did not expressly state this.

Funding the Reorganization: The LaWare Proposal did not indicate how it would obtain the funding needed to create the FBC.

B. Arguments For and Against the Proposal

In his proposal, LaWare enumerated the benefits of his plan including: (1) condensing four regulators into two regulators; (2) providing one examiner per organization; (3) creating autonomy of banks to choose examiner by changing its lead bank charter; (4) maintaining the "healthy process of dynamic tension" through rulemaking; and (5) maintaining the dual banking system through separate federal supervisor and regulator for state banks coupled with a choice of federal supervisor (by changing charter).[947] In his critique of the Clinton Plan, LaWare also

[946] *Id.*
[947] *Id.*

stated that his proposal maintained the Federal Reserve's supervisory role, which he felt was necessary to maintain the Federal Reserve's skills and clout to engage in monetary policy.[948]

Testimony by Alan Greenspan before the Senate Banking Committee reiterated LaWare's ideas.[949] He also advocated that a bank be allowed to choose between a national-charter and state-charter on the grounds that such a choice provided protection against a regulator's arbitrary action.[950] Greenspan believed that the LaWare proposal would avoid the micromanagement of banks, which would foster economic growth.[951] Greenspan also argued that the LaWare proposal would better protect the dual banking system than a single regulator because it would facilitate "diversity, inventiveness, and flexibility."[952] As Paul Volcker had done in the 1980s and LaWare did when setting out his plan, Greenspan emphasized the need for the Federal Reserve to maintain its supervisory role because its function as an examiner provided it with the knowledge necessary to carry out effective monetary policy.[953]

Indeed, the importance of the Federal Reserve's supervisory role for its ability to fulfill its monetary policy obligations was an important difference between the Clinton Plan and the LaWare Proposal. Richard Herring, a professor at the University of Pennsylvania's Wharton School, called the Federal Reserve's examination power a "stick" that could be used to engender financial cooperation from banks in a financial crisis.[954] In other words, the Federal Reserve could implicitly threaten "to block a bank's expansion" if it failed to cooperate with the Federal Reserve's dictates.[955]

E. Gerald Corrigan, the president of the Federal Reserve Bank of New York, also thought that to properly execute monetary policy, the Federal Reserve needed to understand the "conditions in financial markets and financial institutions, including a detailed working knowledge of such markets and institutions."[956] It could only get this knowledge if it was actively engaged in the supervision of banks and bank holding companies.

Edward Boehne, president of the Federal Reserve Bank of Philadelphia, also thought that the Federal Reserve's regulatory role provided it with data on the health of the economy that helped to inform its monetary policy. [957] When referring to himself and his colleagues at the Federal Reserve, Boehne noted, "[w]e'd be like a fire department without any trained firefighters" and

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[948] *Id.*
[949] S. Comm. on Banking 1994, *supra* note 858, at 86 (statement of Alan Greenspan, Chairman, Board of Governors, Federal Reserve Board).
[950] *Id.*
[951] *Id.*
[952] *Id.*
[953] *Id.* at 88.
[954] Andrew Cassel, *The Fed Fights a Plan to Cut Power Many Agencies Regulate Banks. A Treasury Proposal Could Change That,* PHILADELPHIA INQUIRER, Jan. 9, 1994, http://articles.philly.com/1994-01-09/business/25823706_1_state-chartered-banks-federal-banking-commission-bank-regulatory.
[955] *Id.*
[956] E. Gerald Corrigan, *Balancing Progressive Change and Caution in Reforming the Financial System*, 16 FED. RESERVE BANK OF N.Y. QTRLY REV. 1, 11 (Summer 1991).
[957] Cassel, *supra* note 954.

that "the Fed relies on its bank examiners to provide detailed information about the financial system's health."[958]

Not everyone agreed that the Federal Reserve should be involved in bank supervision. Catherine England, the president of England Economics, in a 1994 article in the CATO JOURNAL, however, maintained that the Federal Reserve's regulatory function constituted a conflict of interest.[959] For example, the Federal Reserve would be more willing to lend to insolvent institutions because bank failures were often viewed as regulatory shortcomings.[960] In addition, England contended that the regulatory role was unnecessary because controlling the money supply did not necessitate regulation.[961] She suggested that the Federal Reserve should only conduct monetary policy, like the German Bundesbank where necessary information was provided from external sources.[962] In the Federal Reserve's case, the remaining financial regulators could provide this information.[963]

Based on estimates of assets of commercial banks and thrifts performed by the Congressional Research Service, the LaWare Proposal would have put the FBC in charge of more commercial bank assets than the Federal Reserve.[964]

C. What Happened to the Proposal?

The LaWare Proposal was never presented as a formal legislative proposal, according to Federal Reserve officials.[965] Alan Greenspan, the Chairman of the Federal Reserve, outlined the LaWare Proposal in his testimony before the Committee on Banking, Housing, and Urban Affairs of the U.S. Senate on March 2, 1994.[966]

There was a predictable reaction to the LaWare Proposal based on its apparent effort to maintain the Federal Reserve's turf. For example, an Associated Press article reported that the Federal Reserve oversaw about a thousand of the larger state chartered banks. LaWare's plan would give it additional authority over the roughly 7,000 state chartered banks now regulated by the FDIC.[967] Richard Carnell, Assistant Secretary of the Treasury for Financial Institutions commented that the Federal Reserve's proposal would have given it direct regulatory authority

[958] *Id*.
[959] Catherine England, *Regulatory Restructuring: Resolving the Fed's Conflicting Roles,* 13 CATO JOURNAL 378 (1994), http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/1994/1/cj13n3-4.pdf.
[960] *Id.* at 378.
[961] *Id*. at 379.
[962] *Id*.
[963] *Id*.
[964] US Gov't Accountability Office, GAO-08-32, Financial Regulation: Industry Trends Continue to Challenge the Federal Regulatory Structure (2007), http://www.gao.gov/assets/270/267961.html.http://www.gao.gov/assets/270/267961.html.
[965] *Id*.
[966] S. Comm. on Banking 1994, *supra* note 858, at 86 (statement of Alan Greenspan Chairman, Board of Governors of the Federal Reserve System).
[967] Dave Skidmore, *Countering Administration Move, Board Member Proposes Expanding Fed Power*, Associated Press, Jan. 4, 1994, http://www.apnewsarchive.com/1994/Countering-Adminstration-Move-Board-Member-Proposes-Expanding-Fed-Power/id-674737a68df8f1bce9cf5e3eee228a9d

over 40 percent of the nation's banking system, as measured by assets, compared with 18 percent it had in 1995.[968] Frank N. Newman, Under Secretary of the Treasury for Domestic Finance, was also very vocal in his opposition to the LaWare Proposal. He warned that this could prompt regulators to compete in leniency, and noted the lenient regulation that allowed the collapse of the savings and loan industry in the 1980s.[969] On the other hand, Kenneth A. Guenther, executive vice president of the Independent Bankers Association of America, a trade group representing small- and medium-sized banks, said his group preferred the Federal Reserve's plan to the Clinton Plan because it would limit the concentration of regulatory power.[970]

XXIII. H.R. 17 -- Bank Regulatory Consolidation and Reform Act of 1995

A. The Proposal

The Bank Regulatory Consolidation and Reform Act of 1995, H.R. 17, was introduced on January 14, 1994, by Representative James "Jim" Leach (D-IA1).[971] It proposed establishing the Federal Bank Agency (FBA), abolishing the positions of the Comptroller of the Currency and Director of Thrift Supervision, and consolidating and reforming the regulation of insured depository institutions.[972]

1. Structural Reorganization

H.R. 17 proposed to establish a Federal Bank Agency, effective January 1, 1996, which would be headed by an Administrator.[973] The Administrator would be appointed by the President with advice and consent from the Senate and would serve a term of five years.[974] Additionally, H.R. 17 made provisions for a Deputy Administrator and a Deputy Administrator for Savings Associations, both also appointed by the President with Senate advice and consent.[975] The Deputy Administrator would be responsible for duties prescribed by the Administrator and would serve in the absence of the Administrator.[976] The Deputy Administrator for Savings Associations would perform the functions transferred to the FBA from the Director of Office of Thrift Supervision, until the Administrator provided otherwise.[977] Both Deputy roles would take effect January 1, 1996.[978]

H.R. 17 would have made the FBA the appropriate federal banking agency of: (1) federal depository institutions that were not under the jurisdiction of the Federal Reserve or the FDIC

[968] Keith Bradsher, *Fed Assails President's Bank Plan*, The New York Times, Jan. 5, 1994, http://www.nytimes.com/1994/01/05/business/fed-assails-president-s-bank-plan.html.
[969] *Id*.
[970] *Id*.
[971] Bank Regulatory Consolidation and Reform Act of 1995, H.R. 17, 104th Cong., Introduction (2005) [hereinafter H.R. 17]
[972] *Id*.
[973] *Id*. §101.
[974] *Id*.
[975] *Id*. §103.
[976] *Id*.
[977] *Id*.
[978] *Id*.

and those institutions' subsidiaries that were not under the jurisdiction of the Federal Reserve or the FDIC; (2) district banks chartered by the Administrator; (3) federal agencies of a foreign bank other than an agency regulated by the Board of Governors of the Federal Reserve; (4) savings and loan holding companies whose principal depository institution is federal savings association; (5) bank holding companies whose depository assets are less than $25 billion and whose principal depository institution is a federal depository institution or a district bank.[979] The FDIC would supervise: (1) state depository institutions which were not subsidiaries of a federal bank; (2) foreign banks with worldwide assets less than $25 billion; (3) holding companies with assets less than $25 billion and whose principal depository is a state depository institution; and (4) savings and loan holding companies whose principal depository institution is a state savings association.[980] Lastly, the Federal Reserve would be responsible for supervising: (1) state member banks not under the jurisdiction of the FBA or the FDIC; (2) foreign banks which do not operate insured branches; (3) any agency or commercial lending company other than a federal agency; (4) bank holding companies with assets equal to or greater than $25 billion; (5) foreign banks with assets equal to or greater than $25 billion; and (6) depository institutions with assets less than $25 billion whose principal depository is a state member bank.[981]

H.R. 17 also sought to expand the mandate of the Federal Financial Institutions Examination Council (FFIEC) to ensure consistent rulemaking. To the extent practicable, the FFIEC was responsible to establish uniform principles and standards for the examination and supervision of financial institutions.[982] To this extent, each regulatory agency would be required to submit proposed regulation to the FFIEC for comments and recommendations.[983] The FFIEC could also, by unanimous vote, issue uniform regulations, interpretations, guidelines, orders or other administrative actions to the regulatory agencies.[984] Additionally, H.R. 17 provided for supervision of insured credit unions by the National Credit Union Administration under comparable standards as the federal depository institutions.[985]

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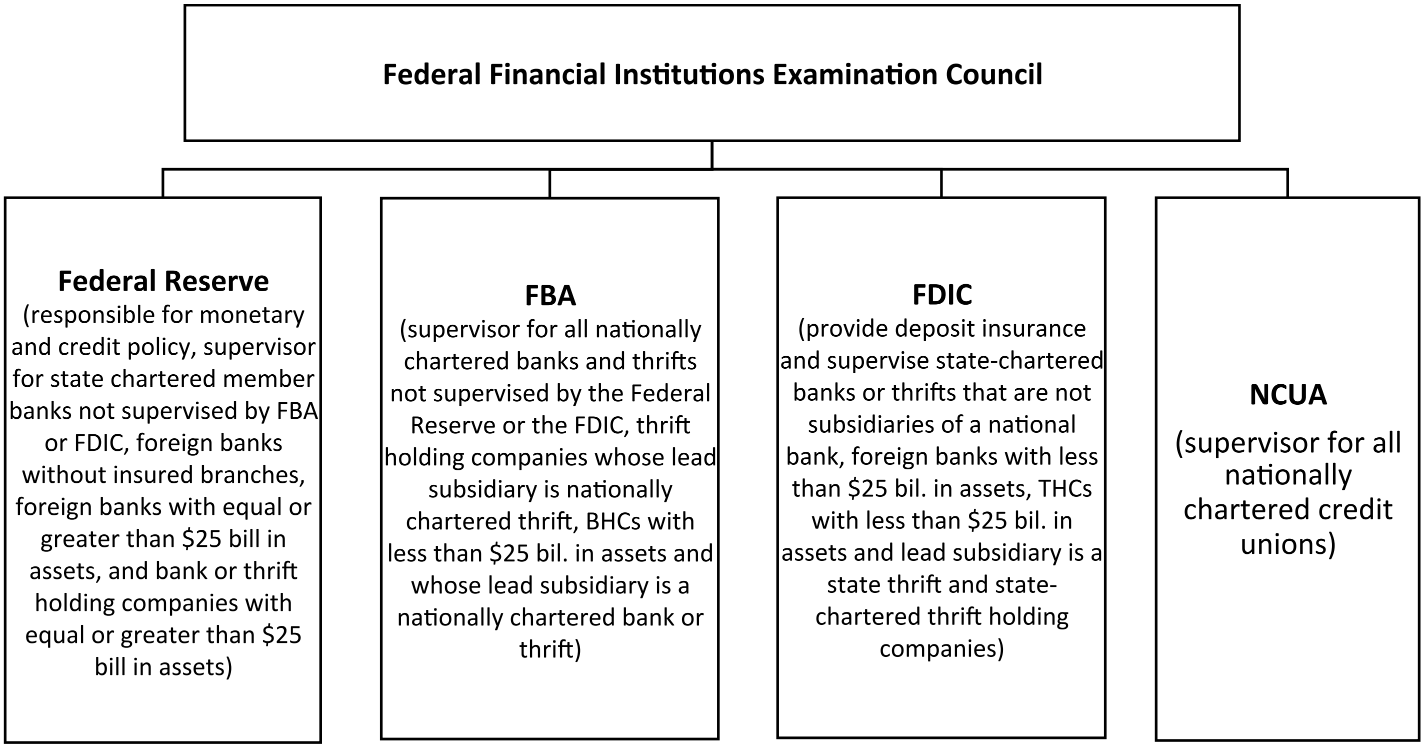
[979] *Id*. §301.
[980] *Id*. §201.
[981] *Id*. §302.
[982] *Id*. §601.
[983] *Id*.
[984] *Id*.
[985] *Id*. §701.

Figure 32
H.R. 17 -- Bank Regulatory Consolidation and Reform Act Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: Prior to a transfer of the OTS and the OCC roles, H.R. 17 authorized the Administrator to cooperate with the heads of both agencies to facilitate an orderly transfer and each agency would be responsible for detailing to the FBA the personnel appropriate to assist the Administrator in carrying out the FBA's prescribed duties.[986] The Secretary of the Treasury could provide the administrative services necessary to support the FBA prior to the termination of the OCC and the OTS. Each agency would also be responsible for paying one-half of the amount the Treasury Secretary deemed necessary to fund the FBA's salaries, including the Administrator's salary. This interim funding would continue through January 1, 1997.[987] The Treasury Secretary was also authorized to perform the functions of the Administrator until one was appointed.[988] Effective January 1, 1997, both the OTS and the OCC were to be abolished and their property transferred to the FBA.[989]

Personnel Issues: The Administrator was responsible, beginning January 1, 1996, for merging the work force structures of both agencies to the maximum extent practicable and would establish procedures which took into account the job experience of, and the compensation and

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[986] *Id*. §201.
[987] *Id*.
[988] *Id*.
[989] *Id*. §§202, 203.

benefits provided to, the transferred employees at the prior agency.[990] Effective January 1, 1997, the Administrator would be responsible for fixing the number and compensation of, and appointing and directing, all employees of the FBA.[991]

Funding the Reorganization: Also effective January 1, 1997, the Administrator could impose and collect fees and charges from any institution under the FBA's jurisdiction.[992] In order to avoid a net cost to the federal government, the FBA services would be covered by the monies from the charges.[993]

B. Arguments For and Against the Proposal

Essentially, H.R. 17 was similar, but not identical, to Rep. Leach's H.R. 1227 from the 103rd Congress. H.R. 17 attempted to align the supervisory responsibility for holding companies with the principal subsidiary depository institution and give consistent regulatory authority oversight over all of the affiliates of that organization.[994]

A reoccurring topic in the House Committee on Banking and Financial Services hearings in 1996 concerned the need for a separate charter for thrifts because thrifts and banks no longer differed as sharply as they did in years past and thrifts no longer needed a specialized charter. Instead federally chartered thrifts that did not convert to bank charters would automatically become national banks. State chartered thrifts that retained their existing charters would, for purposes of federal banking law, be treated as state chartered banks.[995]

An ancillary, but key topic to the proposal to dispose of the thrift charter involved the treatment of the personnel of the OTS. John Hawke, Jr., then Undersecretary of the Domestic Finance in the Department of the Treasury, posed two alternatives for addressing the issue of OTS employees at the end of the Act's transition period. First, OTS employees would have a period of time to find new employment. This period would last about two years. Eligible employees at the end of that period would receive selection priority over other applicants for positions in federal banking agencies. Second, OTS employees would be assigned to one of the three banking agencies, after thrifts have made their charter choices, and those agencies would decide on their ultimate staffing needs.[996] The American Federation of Government Employees argued that Hawke's suggestions did not ensure adequate staff protections, nor a smooth transition of OTS functions and its experienced staff.[997] They argued, among other suggestions, that all external

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[990] *Id.* §201.
[991] *Id.* §105.
[992] *Id.* §107.
[993] *Id*.
[994] *The Federal Financial Institutions Regulatory System: Hearing Before the H. Comm. on Banking & Fin. Services,* 104th Cong. 48 (1996) [hereinafter FFIRS Hearings] (statement from James L. Bothwell, Director, Financial Institutions and Markets Issues, General Accounting Office).
[995] *Id.* at 88 (statement of John D. Hawke, Jr., Under Secretary of the Treasury for Domestic Finance).
[996] *Id.* at 85 (statement of John Hawke, Jr., Undersecretary of Domestic Finance Department of the Treasury).
[997] *Id.* at 223 (statement of Patricia Goings, President of AFGE, AFL-CIO).

hiring by the affected agencies should be restricted to temporary status for the period prior to and for a period up to two years after the consolidation.[998]

The issue of preserving the dual-banking system was another key issue of the hearings. Though most favored a dual-banking system, they disagreed over the best method for how to preserve it. James Bothwell of the GAO argued for reducing the number of regulators from three to two by eliminating the FDIC's oversight of state chartered non-member banks.[999] In contrast, James F. Montgomery, the Chairman of America's Community Bankers, argued for maintaining the FDIC's supervisory role because its primary examination authority was important for carrying out its insurance function.[1000] The FDIC obtains timely and vital information about banks and banking economy through examinations.[1001] Consequently, a lack of knowledge in a timely fashion could adversely affect their ability to react in a financial crisis.[1002]

C. What Happened to the Proposal?

H.R. 17 was introduced to the House with little of the fanfare that accompanied earlier bills to consolidate banking regulators. Rep. Leach commented on the strength of inertia to maintain the status quo.[1003] He noted that prior proposals had failed because the banking agencies had constituencies that supported their continued existence, the agencies themselves resisted efforts to merge or terminate them, and the banking industry preferred the existing structure that allowed them to engage in regulatory arbitrage.[1004]

The bill was referred to the Subcommittee on Financial Institutions and Consumer Credit and died in committee.[1005]

XXIV. H.R. 1769 - Federal Deposit Insurance Amendments Act of 1995

A. The Proposal

Rep. Ira William (Bill) McCollum (R-FL5) introduced H.R. 1769, also known as the Federal Deposit Insurance Amendments Act of 1995, on June 7, 1995.[1006] This bill was referred to the House Banking and Financial Services Committee.[1007] The purpose of the bill was to attempt to address the weak condition of the Savings Association Insurance Fund (SAIF) during the 1990s

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[998] *Id*. at 222.
[999] *Id.* at 47-48 (statement of James L. Bothwell, Director, Financial Institutions and Markets Issues, General Accounting Office).
[1000] *Id*. at 199 (statement of James F. Montgomery, Chairman, American's Community Bankers).
[1001] *Id*.
[1002] *Id*.
[1003] *Id.* at 2 (statement of Rep. Jim Leach).
[1004] *Id.*
[1005] Congress.gov, Home > Legislation > 104th Congress > H.R. 17, https://beta.congress.gov/bill/104th-congress/house-bill/17?q=%7B%22search%22%3A%5B%22hr+17+bank+consolidation%22%5D%7D .
[1006] Federal Deposit Insurance Amendments Act of 1995, H.R. 1769, 104th Cong., 1st Sess. (1995) [hereinafter H.R. 1769].
[1007] Thomas.gov, Legislation, 104th Cong. (1995-1996), H.R. 1769, https://beta.congress.gov/bill/104th-congress/house-bill/1769?q={%22search%22%3A[%22hr+1769%22]}.

and to mitigate the risk to U.S. taxpayers.[1008] In 1995, the SAIF insured institutions were required to pay the interest and carrying cost on the debt of the Financing Corporation (FICO), a U.S. government sponsored entity, which assumed all of the debt of FSLIC when it became insolvent.[1009] Rep. McCollum believed that the SAIF suffered from two main problems. First, he thought it likely lacked sufficient funds necessary to meet the FICO obligations.[1010] Second, he feared that the financial losses of the SAIF would be borne by U.S. taxpayers.[1011]

1. Structural Reorganization

H.R. 1769 sought to "provide for adequate funding for the Financing Corporation, to provide for the merger of the deposit insurance funds, to merge the position of Comptroller of the Currency and Director of the Office of Thrift Supervision, to provide for the conversion of savings associations into banks, and for other purposes."[1012]

The proposal was divided in three parts. The first part discussed the merger the Savings Association Insurance Fund and the Bank Insurance Fund (BIF) into a single deposit insurance fund (DIF).[1013] The second part dealt with the transfer of the functions of the OCC and the OTS into the new Federal Bank Agency (FBA) that would supervise national banks, saving banks as well as any foreign bank.[1014] The last part described a study regarding mergers and charters that the Secretary of the Treasury would be required to perform and to report to the Congress in order to allow the consolidation of national banks and saving associations.

Title I of H.R.1769 provided amendments relating to the management of the BIF and SAIF. The bill discussed a variety of issues involving the FDIC's management of the BIF and SAIF. In terms of their administrative structure, H.R. 1769 would have required the FDIC to merge the SAIF and the BIF. The new fund would be called the deposit insurance fund. The deposit insurance fund would contain the assets and liabilities of both the SAIF and the BIF. The FDIC would maintain the deposit insurance fund. The FDIC would also collect all amounts assessed against insured depository institutions, which were authorized users of the deposit insurance fund.[1015]

Title II of the bill would have created the Federal Bank Agency out of the merger of the OCC and the OTS. The FBA would have been an independent agency headed by an Administrator who was appointed by the President for a five-year term.[1016] It would have two Deputy Administrators, one for National Banks and one for Savings Associations. The Deputy Administrator for National Banks would have been appointed by the President and would have performed the duties assigned by the Administrator. The Deputy Administrator for Savings

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[1008] Extension of Remarks, 104th Cong., 1st Sess., Congressional Record E 1197 (June 8, 1995).
[1009] *Id.*
[1010] *Id.*
[1011] *Id.*
[1012] H.R.1769, *supra* note 1006, Enacting Clause.
[1013] *Id.* §101(e).
[1014] *Id.* §§201, 221.
[1015] *Id*. §102(c).
[1016] *Id*. §202.

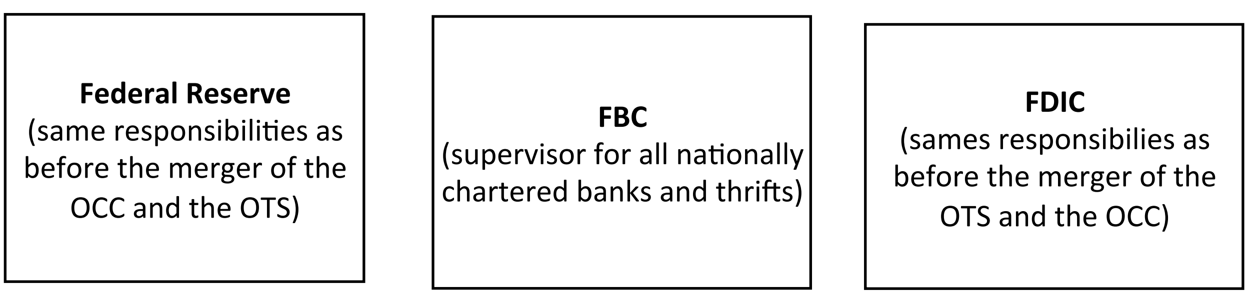
Associations would have been appointed by the President and would perform duties assigned by the Administrator.

At the same time as the FBA was coming into existence, the FDIC would be reorganized. The FDIC's Board of Directors would be changed so that it was composed of only three members.[1017] All of the board members would be appointed by the President. No more than two members of the FDIC's Board could be members of the same political party.[1018]

Title III of H.R. 1769 described the required study on mergers of charters assigned to the Secretary of the Treasury. Indeed, the Treasury Secretary would have had a period of 12 months starting from the date of enactment of H.R. 1769 to research the consolidation of national banks and savings association charters into a unified charter for depository institutions,[1019] find an adequate way to convert national banks and savings association into depository institutions with a unified charter[1020] and determine any problems that may arise from such conversions.[1021] In addition, the Treasury Secretary would then make recommendations to Congress about the consequences resulting from the conversion of banks and savings association into depository institutions with a unified charter.[1022]

Finally, before the end of the 12-month period following the date of publication, in the Federal Register, of the merger of the SAIF and BIF into a single deposit insurance fund, H.R. 1769 would have required every federal saving association to surrender their savings association charter and obtain a bank charter.[1023] After that 12-month period, the FDIC would have the power to terminate the insured status of any depository institution which was not a bank by the end of the period.[1024]

Figure 33
H.R. 1769 - Federal Deposit Insurance Amendments Act Reorganization Structure



[1017] *Id*. §241(a).
[1018] *Id.*
[1019] *Id*. §301(a).
[1020] *Id.*
[1021] *Id*.
[1022] *Id.* §301.
[1023] *Id*. §302(a).
[1024] *Id.* §302(b).

2. Proposed Implementation

Reorganization of Regulatory Functions: H.R. 1769 did provide a timetable for when the mergers of the BIF and the SAIF and the OCC and the OTS should occur. The merger of BIF and SAIF would occur the first calendar year during which both funds were determined by the FDIC to have achieved the designated reserve ratio required of each fund under the Federal Deposit Insurance Act.[1025] The functions of the Comptroller of the Currency would have been transferred to the FBA and put under the Deputy Administrator for National Banks, effective on January 1, 1996.[1026] The functions of the Director of the OTS would have been transferred to the FBA and put under the Deputy Administrator for Savings Associations, effective on January 1, 1996.[1027]

The bill set forth many of the procedures for how the merger of the OCC and the OTS would be done and initial ways that the FBA would operate. As of January 1, 1996, the FBA's Administrator would have had the authority to determine the number of FBA's personnel, their appointment, and their compensation.[1028] H.R. 1769 required the FBA's Administrator to communicate with the OTS and the OCC to facilitate the transfer of their functions to the FBA, including the transfer of their personnel to the FBA prior the abolition of the OTS and the OCC.[1029] Until the OCC and the OTS were abolished, the Treasury Secretary would provide the necessary administrative support services to the FBA.[1030] The service providers to the OCC and the OTS would provide those services to those agencies until January 1, 1997, when the FBA would replace the OTS or the OCC, as the case maybe, as the party to the contract. The merger of OTS and OCC would not affect any existing rights, duties, obligations, suits or administrative rules, which were in existence before the merger.[1031] Effective on January 1, 1997, all powers and duties of OTS and OCC would be transferred to the Administrator.[1032]

Personnel Issues: Beginning on January 1, 1996, the Administrator would have merged the workforces of OCC and the OTS.[1033] After January 1, 1997, the Administrator would have the power to fix the number of employees working at the FBA and their salaries.

Funding the Reorganization: In addition, the Administrator was given authority to impose and collect assessments, fees and other charges on any institution or entity under the supervision of the FBA in order to raise the necessary funds to cover the cost to the federal government of the

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[1025] *Id.* §104(a).
[1026] *Id.* §202.
[1027] *Id.*
[1028] *Id.*, §204.
[1029] *Id*. §211(b).
[1030] *See Id*.at §211(a). Prior to the date upon which the Office of the Comptroller of the Currency and the Office of Thrift Supervision are abolished, each such Office shall pay to the Secretary one-half of the total amount determined by the Secretary to be necessary to fund all direct and indirect salary and administrative expenses of the Agency, including the salary of the Administrator, through January 1,1997, from the funds obtained by such offices through assessments, fees and other charges which they are authorized to impose by law. *Id*. §211(d).
[1031] *Id*. §211.
[1032] *Id*. §221(a).
[1033] *Id.* §211(f).

services provided by the FBA.[1034] The new FBA would be funded out of fees and assessments on the institutions it regulated.[1035] During the interim period, the OCC and the OTS will each cover one-half of the funds needed to cover the costs of the FBA as determined by the Treasury Secretary.[1036]

B. Arguments For and Against the Proposal

When he introduced the bill to Congress on June 8, 1995, Rep. McCollum identified two potential benefits of H.R. 1769. First, it would address the weak condition of the SAIF.[1037] Second, the bill would reduce the potential risks to the U.S. taxpayers posed by SAIF's condition.[1038] Rep. McCullom did not discuss the benefits that the bill would provide from its creation of the FBA. He only alluded to the fact that it was similar to H.R. 17, which Rep. Jim Leach had introduced earlier in 1995.

The commentators on H.R. 1769 mostly focused on the merger of SAIF and BIF, although they would note that it was similar to H.R. 17. The advantages and disadvantages of the FBA created by H.R. 1769 would be the same as those raised for H.R. 17.

C. What Happened to the Proposal?

After being introduced to the House Committee on Financial and Banking Services on June 7, 1995, H.R.1769 was referred to the Subcommittee on Financial Institutions and Consumer Credit on June 6, 1995.[1039] On July 20, 1995, co-sponsor Rep. David Dreier (R-CA28) was added to the proposal and on August 3, 1995, co-sponsor Rep. Edward "Ed" Royce (R-CA39) was added also.[1040] Then, the bill died in the Subcommittee and never was given a hearing.

Although the Subcommittee on Financial Institutions and Consumer Credit did not conduct a hearing or provide any report after the Congress referred H.R. 1769 to it, the House did discuss some of H.R. 1769 provisions under other resolutions and proposals such as the Saving Association Insurance Fund Capitalization Act of 1995 which was introduced by Rep. Floyd H. Flake (R-NY6).[1041] That bill included a provision that required the FDIC to merge the SAIF and BIF into one deposit fund after the SAIF achieved its designated reserve ratio.[1042] However, that

[1034] *Id.* §206(a).
[1035] *Id*. §206.
[1036] *Id*. §211(d).
[1037] Extension of Remarks, *supra* note 1008, at E 1197.
[1038] *Id.*
[1039] Library of Cong., Committees, H.R. 1769 — 104th Congress (1995-1996), https://beta.congress.gov/bill/104th-congress/house-bill/1769/committees?q={%22search%22%3A[%22hr+1769%22]}.
[1040] Govtrack.us, Bills, 104th Cong. (1995-1996), H.R. 1769, https://www.govtrack.us/congress/bills/104/hr1769#overview; Thomas.gov, Member, Representative David Dreier, https://beta.congress.gov/member/david-dreier/317?q={%22search%22%3A[%22david+dreier%22]}; Thomas.gov, Member, Representative Edward R. Royce, https://beta.congress.gov/member/ed-royce/998?q={%22search%22%3A[%22edward+royce%22]}.
[1041] Thomas.gov, Bills, Resolutions, Bill Summary & Status, 104th Cong., (1995-1996), H.R.2123.
[1042] H.R.2123, 104th Cong., 1st Sess., §2(5) (1995).

bill also died after being referred to the Subcommittee on Financial Institutions and Consumer Credit on August 11, 1995.[1043]

Antoine Martin, an economist from the Federal Reserve Bank of Kansas City, believed that the merger of SAIF and BIF as proposed in H.R. 1769 did not pass during the 1990s because the thrift industry was riskier than the banking industry.[1044] Martin thought that the higher cost of recapitalizing SAIF compared to BIF would also prove to be an impediment to the proposed merger.[1045]

XXV. H.R. 2363 & S. 1415 -- Thrift Charter Conversion Act of 1995

A. The Proposal

Rep. Marge Roukema (R-NJ5) introduced H.R. 2363, known as the Thrift Charter Conversion Act of 1995, on September 19, 1995.[1046] The bill was referred to the House Banking and Financial Services Committee and the House Ways and Means. Representative Roukema introduced the bill as a response to the savings and loan crisis.[1047] Indeed, Rep. Roukema believed that the bill would "prevent the need for any future bailouts of the thrift industry."[1048] On September 29, 1995 the bill was referred to the Subcommittee on Financial institutions and Consumer Credit.[1049]

On November 15, 1995 at the Senate Committee of Banking, Housing and Affairs, Senator Alfonse D'Amato (R-NY) introduced S. 1415, which also was known as the Thrift Charter Conversion Act.[1050] S. 1415 provided for the consolidation of the federal thrift industry and included a provision for the termination and conversion of the federal savings association charters to national bank charters or state depository institution charters.[1051] When Senator D'Amato introduced S. 1415, he noted that he was introducing the Thrift Charter Conversion Act "exactly as it was reported out by the Subcommittee on Financial Services and Consumer Credit of the House Committee on Banking and Financial Services."[1052] Thus, the provisions of S. 1415 were similar to the ones of H.R. 2363. The discussion of the Thrift Charter Conversion Act will focus on the H.R. 2363 version of this bill.

1043 H.R.2123, Bill Summary, *supra* note 1041.
1044 Antoine Martin. *A Guide to Deposit Insurance Reform*, FED. RES. BANK OF KANSAS CITY ECON. REV. 41 (2003).
1045 *Id*.
1046 H.R.2363, 104th Cong., 1st Sess. (1995); Thomas.gov, Legislation, 104th Cong. (1995-1996), H.R. 2363 - Thrift Charter Conversion Act of 1995, https://beta.congress.gov/bill/104th-congress/house-bill/2363?q={%22search%22%3A[%22hr+2363%22]}[hereinafter HR 2362 Summary].
1047 Introduction of BAIF-SAIF Bill, 104th Cong., 1st Sess., CONG. REC. H 9250 (daily ed. Sept. 20, 1995).
1048 *Id.* at H 9250.
1049 HR 2362 Summary, *supra* note 1046.
1050 Thomas.gov, Legislation, 104th Cong., S.1415- Thrift Charter Conversion Act, https://beta.congress.gov/bill/104th-congress/senate-bill/1415.
1051 S.1415, 104 Cong., 1st Sess., (1995).
1052 *Statements on Introduced Bills and Joint Resolutions*, 141 CONG. REC. S17094 (November 15, 1995) (statement by Senator Alfonso D'Amato).

1. Structural Reorganization

The main objective of H.R. 2363 was “to provide for adequate funding for the Financing Corporation, to provide for the merger of the deposit insurance funds, to provide for the conversion of Federal savings associations into banks and the treatment of State savings associations as banks for purposes of Federal banking law, to abolish the position of Director of the Office of Thrift Supervision, and for other purposes.”[1053]

Title I of the bill, relating to SAIF and BIF, would have imposed a single special assessment on each SAIF member and each BIF member that had insured SAIF-deposits, in the amount equal to the SAIF assessment base of the institutions subject to such assessment.[1054] This amount would be paid to the FDIC by the later of January 1, 1996 or the 60-days after the bill was enacted.[1055] The bill allowed the FDIC’s Board of Directors to exempt any insured depository institution from paying the special assessment if the exemption would reduce the risk to SAIF of an institution becoming insolvent.[1056] In addition, the bill would have amended the Federal Deposit Insurance Act (FDIA) to require that the assessment rates for the SAIF members could not be less than the ones for the BIF members.[1057] This amendment would take effect on January 1, 1996.

H.R. 2363 would have amended the FDIA to create a deposit insurance fund.[1058] The FDIC would maintain and administer this deposit insurance fund, which would be composed of the SAIF and BIF assets and liabilities.[1059] Moreover, the bill would authorize the FDIC to transfer the amounts in this special reserve under special conditions, in which the FDIC’s Board of Directors has determined that the reserve ratio of the deposit insurance fund is less than 50 percent of the designated reserve ratio, and it finds that the reserve ratio of the deposit insurance fund will likely be less than the designated reserve ratio of the fund for each of the four calendar quarters beginning after the date of such determination.[1060] In the case of an assessment overpayment by an insured depository agency to the FDIC, H.R. 2363 would allow the FDIC to refund the excess payment to the insured depository institution, or credit the refund amount toward the payment of subsequent semiannual payments until the exhaustion of the credit.[1061]

Title II of H.R. 2363 would have amended the then existing laws related to the status of banks and savings associations. The bill would have required federal savings associations to convert their charters into charters for national banks or state depository institutions by January 1, 1998.[1062] The bill stated that any federal savings association which has not taken any action by January 1, 1998, would automatically become a national bank and will cease to exist as a federal

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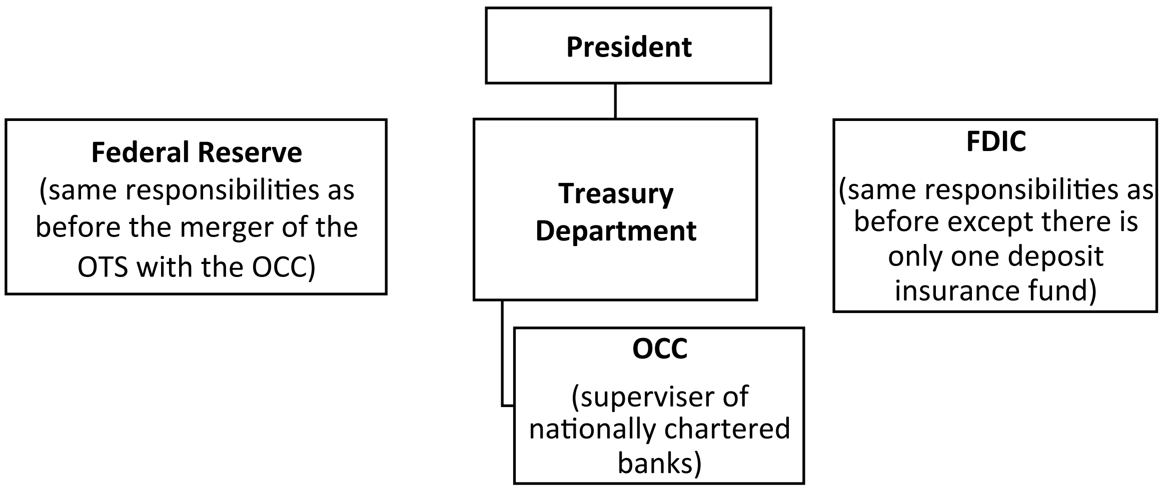
[1053] H.R.2363, *supra* note 1046, at 1.
[1054] *Id*. §101.
[1055] *Id.*
[1056] *Id*.
[1057] *Id.* §102.
[1058] *Id*. §103.
[1059] *Id.*
[1060] *Id.*
[1061] *Id.,* §104.
[1062] *Id.* §201(a).

savings association by operation of law.[1063] H.R. 2363 also would have amended the registration process of bank holding companies resulting from conversions of savings associations to banks or treatment of savings associations as banks.[1064]

Title III of H.R. 2363 would have abolished the OTS and the position of the Director of the OTS.[1065] The bill reaffirmed that the existing administrative rules, rights, duties and obligations would not be affected by the changes to the OTS.[1066]

Figure 34
H.R. 2363 -- Thrift Charter Conversion Act Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: Under H.R. 2363, the FDIC would have been required to create the deposit insurance fund by January 1, 1998.[1067] Effective on January 1, 1998, the FDIC would establish, maintain and administer a special reserve of the deposit insurance fund.[1068] The abolition of the OTS and the position of the Director of the OTS was required to take effect on January 1, 1998.[1069]

Personnel Issues: The OTS employees would have been transferred to the OCC, the FDIC, or the Board of Governors of the Federal Reserve System, who would determine the functions and activities of the employees.[1070]

[1063] *Id.*
[1064] *Id.* §202.
[1065] *Id.*, §301.
[1066] *Id.,* §303(a).
[1067] *Id.*, §103.
[1068] *Id.*
[1069] *Id.*, §301.
[1070] *Id.*, §302.

Funding the Reorganization: The bill did not expressly state how the reorganization would be funded. The OCC, the OTS, the FDIC, and the Federal Reserve were required to work together to complete the transfer of the functions to the relevant agencies "in an orderly fashion."[1071]

B. Arguments For and Against the Proposal

On September 21, 1995, the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Banking and Financial Services, chaired by Representative Marge Roukema, held a hearing regarding the issues with the deposit insurance funds and merging the thrift and bank charters.[1072] Representative Roukema argued that a major benefit of the bill was that it would prevent the need for any future bailouts of the thrift industry.[1073]

Alan Greenspan, the Chairman of the Federal Reserve Board in 1995, asserted that a merger of the BIF and SAIF could accomplish the objective of having a deposit insurance system that has an unquestionable status "so that the depositories can appropriately focus their attention on the extension and management of credit in our country."[1074] He also said that the merger of SAIF and BIF would give an opportunity for Congress to strengthen the U.S. depository institutions.[1075]

John Hawke, who was the Treasury Secretary in 1995, advised that a merger of the OCC with the OTS would be preferable rather than a liquidation of the OTS and its transfer of functions and employees among the three federal bank regulators, as proposed in H.R. 2363.[1076] He explained that since, in the process of conversions, thrifts would become state chartered, and would be "regulated by an agency other than the OCC-OTS. Thus, some relocation of personnel will be necessary. Consideration must be given to the timing and method for reallocating employees in a way that matches personnel resources to the new regulatory constituents at each of the agencies."[1077]

Other witnesses at the Hearings identified several issues that might arise from H.R, 2363. According to Ricki Tigert Helfer, Chairman of the FDIC in 1995, the process of resolving SAIF's difficulties would be delayed by the activities of the merger of the bank and the thrifts charters.[1078] She stated that H.R. 2363 could "change the FDIC's authority to set, collect and retain deposit insurance assessments"[1079] and "set premiums at zero for all insured institutions – regardless of the risk an institution presents to the fund – when the reserve ratio is at the designated level."[1080]

[1071] *Id.*
[1072] H.R. REP. NO. 104-32, 104th Cong., 1st Sess., 1 (1995).
[1073] *Legislation Relating to the Reform of the Deposit Insurance Funds (BAIF AND SAIF): Hearings Before the Subcomm. on Fin. Inst. & Consumer Credit of the H. Comm. on Banking & Fin. Services*, 104th Cong. 16 (1995).
[1074] *Id.* at 11.
[1075] *Id.*
[1076] *Id.* at 14.
[1077] *Id.*
[1078] *Id.* at 15.
[1079] *Id.*
[1080] *Id.* at 15.

Jonathan Fiechter, who was Acting Director at the OTS in 1995, was concerned about the requirement that all federal thrifts must convert to commercial banks. He stated that this proposition could harm the "thrift institutions that have operated in strict adherence to current statutes."[1081] He said that these institutions should not be penalized by legislative changes, since the SAIF and FICO issues were not caused by these thrift institutions.[1082] He mentioned that Title III of H.R. 2363 regarding the abolition of OTS provided "few specifics regarding what, if any, rights and protections OTS employees might be granted."[1083] Howard McMillan representing the American Bankers Association claimed that it would be beneficial to make the regulatory change before the elimination of the thrift charter since bank regulators would have more "time to review S&Ls financial condition before they become an obligation to the BIF."[1084]

In October 1996, the FDIC prepared a study in which they analyzed the pros and cons of bank and thrift charter unification.[1085] The main argument for the charter unification was the fact that structural changes in housing finance had made the thrift industry unnecessary.[1086] In addition, the study advocated that the one-charter system as a replacement for the two-charter system for depository institutions would enhance competition between thrifts and banks.[1087]

Concerning the arguments against the unification of charters, the study explained that some implementation issues could arise from the unification of bank and thrift charters at both the institution and the holding company level.[1088] At the depository institution, implementation issues would include the assets powers of the depository institutions, the powers of a thrift service corporation, and the branching restrictions.[1089] Commercial banks were allowed to invest in a broader array of assets than S&Ls and thus, a combined charter would require that the remaining institutions have the powers of a national bank rather than an S&L.[1090] Thrift service corporations could engage in certain real estate and insurance activities that national banks were not allowed to conduct.[1091] As a result, the regulators would need to formulate one set of rules that would apply to institutions using the new unified charter.[1092] Finally, bank branching restrictions were narrower than those for savings associations.[1093] As a result, the regulators would need to agree upon one set of rules for the institutions using the unified charter. The article recommended allowing full intrastate and interstate branching to solve this problem.[1094] At the holding company level, the study discussed the elimination of the distinctions between

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[1081] *Id.*
[1082] *Id.*
[1083] *Id*. at 17.
[1084] *Id*. at 42.
[1085] FDIC Staff, *A Unified Federal Charter for Banks and Savings Associations: A Staff Study*, 10 FDIC BANKING REV. 1 (1996), https://www.fdic.gov/bank/analytical/banking/1997summ/bkreview.pdf
[1086] *Id.* at 6.
[1087] *Id.* at 8.
[1088] *Id*. at 7-10.
[1089] *Id*. at 8.
[1090] *Id*.
[1091] *Id*.
[1092] *Id*.
[1093] *Id*. at 8-9.
[1094] *Id*. at 9.

savings-and-loan holding companies and bank holding companies.[1095] It recommended allowing bank holding companies to expand into financial activities that the savings holding companies permitted but to continue to prevent the bank holding companies from engaging in nonfinancial activities.[1096]

The study also discussed what would happen to state–chartered savings associations if federally chartered savings associations were eliminated. The Deposit Insurance Funds Act of 1996 required the merger of BIF and SAIF if both federal and state savings associations ceased to exist.[1097] It discussed the difficulties that the federal government would face if it tried to ban state chartered savings associations, such as the states creating similar institutions but with different names.[1098] The study suggested an easier solution would be to limit the activities that state chartered savings associations could engage in to those that were permitted for nationally chartered banks.[1099]

C. What Happened to the Proposal?

After being introduced on September 19, 1995 at the House Committee on Banking and Financial Services as well as the Committee on Ways and Means, H.R.2363 was been referred to the House Subcommittee on Financial Institutions and Consumer Credit.[1100] The House Subcommittee on Financial Institutions and Consumer Credit held a hearing on September 21, 1995 to discuss the proposed merger of the SAIF and BIF by the FDIC as well as the proposal to rescind the federal charter for thrifts effective on January 1, 1998 and to require federal savings associations to liquidate or convert to a national or state bank charter.[1101] On September 27, 1995, the House Subcommittee on Financial Institutions and Consumer Credit approved the bill for the full committee to consider.[1102]

As noted above, Senator D'Amato introduced S. 1415, which was based on the markup of H.R. 2363 produced by the House Subcommittee on Financial Institutions and Consumer Credit, into the Senate. S. 1415 was referred to the Senate Banking Committee.[1103]

Congress did not enact either H.R. 2363 or S. 1415 before the end of the term for the 104th Congress.

[1095] *Id.* at 9-10.
[1096] *Id*. at 10.
[1097] *Id*.
[1098] *Id*.
[1099] *Id*.
[1100] H.R. 2362 Summary, *supra* note 1046.
[1101] H.R. 2362 Summary, *supra* note 1046; H.R. REP. No. 104-32, *supra* note 1072, at 2
[1102] H.R. 2362 Summary, *supra* note 1046.
[1103] Library of Congress, Thomas, Bill Summary & Status, 104th Congress (1995-1996), S.1415, All Congressional Actions, http://thomas.loc.gov/cgi-bin/bdquery/D?d104:6:./temp/~bdxm3p:@@@X|/home/LegislativeData.php?n=BSS;c=104|.

XXVI. H.R. 718 -- Markets and Trading Commission Act of 1995

A. The Proposal

Rep. Ron Wyden (D-OR3) introduced H.R. 718, the Markets and Trading Commission Act, to the House of Representatives on January 27, 1995.[1104]

1. Structural Reorganization

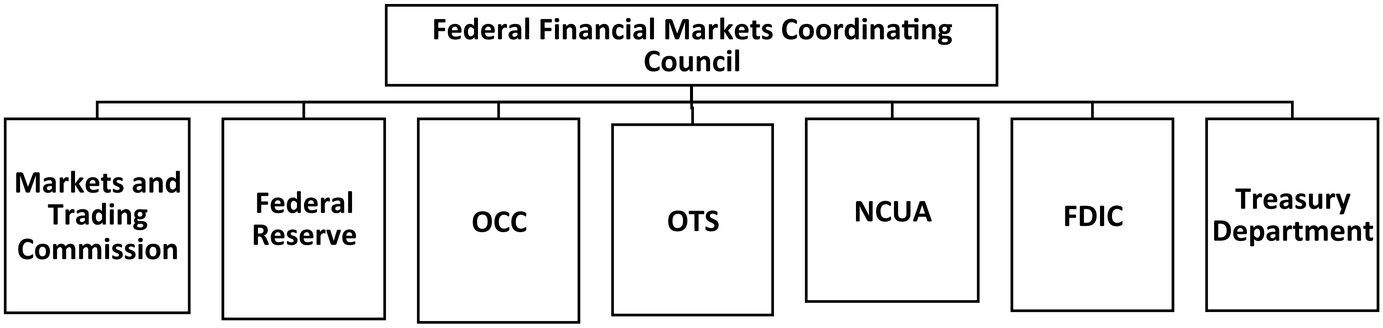
H.R. 718 called for the merger of the SEC and the CFTC to create a Markets and Trading Commission (MTC).[1105] The bill also transferred the Federal Reserve's authority to set margin requirements for securities to the MTC.[1106] Like the SEC, the MTC would be run by a five-member commission whose members would be appointed by the President with the advice and consent of the Senate. The commissioners would serve for five year terms.[1107] The bill attempted to head off potential Congressional opposition to the merger by expressly stating that the new MTC would be subject to oversight by the same Congressional committees that had overseen the SEC and the CFTC.[1108]

Section 505 of H.R. 718 stated that the existing rules and regulations issued by the SEC and the CFTC would continue to be in force until they are modified or revoked by the President, the MTC, or another authorized official.[1109] This provision gave the SEC and the CTFC pause because they were worried that it gave the President a veto power of SEC and CFTC rules and regulations.[1110] As long standing independent agencies, they were not in favor of the President having that type of power over their rulemaking. It is extremely doubtful that §505 was intended to give the president such powers. The provision, however, was poorly drafted and could have been interpreted as granting the president the power to modify or veto a rulemaking by the SEC or CFTC.

H.R. 718 also would have created the Federal Financial Markets Coordinating Council (FFMCC) to coordinate financial regulations among the Federal Reserve, the OCC, the OTS, the MTC, the NCUA, the FDIC and the Treasury Department.[1111] A representative from each of those agencies would serve on the FFMCC. The FFMCC would not have the power to make rules. It only would be able to facilitate the coordination and cooperation among the agencies that were its members.

[1104] Markets and Trading Commission Act of 1995, H.R. 718, 104th Cong. (1995) [hereinafter H.R. 718].
[1105] *Id*. §101.
[1106] *Id*. §203.
[1107] *Id*. §102.
[1108] *Id*. §4.
[1109] *Id*. §505.
[1110] Bothwell, *supra* note 656, at 7.
[1111] H.R. 718 §301.

Figure 35
H.R. 718 -- Markets and Trading Commission Act
Federal Financial Markets Coordinating Council



2. Proposed Implementation

Reorganization of Regulatory Powers: H.R. 718 stated that the merger of the SEC and CFTC and the other provisions in the bill would take effect within 180 days of the first MTC commissioner assuming office or at a later date set by the president, provided that such date was not later than October 1, 1996.[1112] Title V of the bill set forth the procedures for transferring the functions of the SEC and the CFTC to the MTC. It primarily focused on the transfer of the personnel of the SEC and the CFTC to the MTC, although it did state that the property of those two agencies would also be transferred to the MTC.[1113]

Personnel Issues: H.R. 718 stated that the employees of the SEC and the CFTC would be transferred to the MTC at the same salaries and grades that they held at the SEC and the CFTC.[1114] Once it was operational, the MTC would have the power to hire and the set the compensation of its employees as long as it complied with the civil service rules.[1115] In addition, the MTC could request that Office of Personnel Management allow it to offer the supergrade positions (e.g., GS-17 or GS-18) and professional and technical positions that the SEC and the CFTC had been allowed so that the new MTC could offer the types of compensation needed to attract quality employees.[1116] The MTC could also request that Office of Management and Budget allow the MTC to offer the senior executive service (SES) positions.

The bill does not guarantee that positions or units within the MTC will continue to exist after the merger. It allows the MTC to reorganize its internal structure and eliminate units if it deems it "necessary or appropriate."[1117]

[1112] *Id*. §601.
[1113] *Id*. §§501-505.
[1114] *Id*. §§501, 502.
[1115] *Id*. §401.
[1116] *Id*.
[1117] *Id*. §413.

Funding the Reorganization: Like the SEC, the MTC would have been funded through congressional appropriation. The bill did not expressly indicate how much the reorganization would cost or how it would be financed. Given that the MTC would be funded through appropriations, it is reasonable to assume that the reorganization would have been funded through appropriations.

B. Arguments For and Against the Proposal

James Bothwell, the Director of Financial Institutions and Markets Issues in the General Government Division of the GAO, in his testimony before the House Subcommittee on Capital Markets, Securities and Government Sponsored Entities, outlined several advantages and disadvantages of merging the SEC and the CFTC. He noted that such a merger would reduce the uncertainty about which agency had the authority to regulate certain hybrid products, reduce regulatory overlap and duplication, and enhance the United States' ability to negotiate international standards.[1118] He said that the uncertainty regarding what rules would apply to certain products would not be eliminated by the merger unless the existing laws were amended or clarified. Director Bothwell also commented that a merger of the SEC and the CFTC would reduce regulatory competition and allow one regulatory strategy to dominate the market.[1119]

H.R. 718 did not specify whether the FMCC that it created would replace the President's Working Group, which had been created following the 1987 stock market crash, or be in addition to that coordinating body. The President's Working Group was made up of representatives from the Treasury Department, the Federal Reserve, the SEC, and CFTC. Two coordinating councils would be needlessly duplicative and wasteful.

H.R. 718 also would have created confusion over the funding of the new MTC. The SEC and the CFTC are funded from different sources and H.R. 718 did not specify how the MTC would be funded.

Another potential problem with H.R. 718 is that it possibly gave the President greater authority over the new agency. As mentioned above, §505 of H.R. 718 implied that the President had the power to modify or revoke existing SEC or CFTC regulations. Both the SEC and the CFTC are independent agencies. Allowing the President to have the power to modify or revoke rulemaking decisions by the MTC could politicize the regulations for securities, futures, and derivatives in ways that would be detrimental to the stability of the markets.

Finally, it was unclear if the merger would be cost-effective. Director Bothwell from the GAO commented that merging the SEC and the CFTC probably would result in some budgetary savings resulting from economies of scale that could be achieved in some support functions like human resources or information technology but that these savings would be marginal.[1120] SEC Chairman Arthur Levitt expressed concern about the time and expense that the actual merger process would cost.

[1118] Bothwell, *supra* note 656, at 2.
[1119] *Id*. at 5.
[1120] *Id*. at 4.

C. What Happened to the Proposal?

H.R. 718 was referred to the House Committee on Banking and Financial Services on January 27, 1995, which referred it to its Subcommittee on Capital Markets, Securities, and Government Sponsored Entities on February 10, 1995. That Subcommittee held hearings on the bill on March 30, 1995, May 3, 1995, and October 25, 1995. This subcommittee, however, never voted on the bill. The House Committee on Banking and Financial Services also referred the bill to its Subcommittee on Financial Institutions and Consumer Credit, which never acted upon it.

H.R. 718 also was referred to the House Committees on Agriculture and on Commerce on January 27, 1995. On February 3, 1995, the House Agricultural Committee referred the bill to its Subcommittee on Risk Management and Specialty Crops, which never acted upon it. On February 21, 1995, the House Commerce Committee referred the bill to its Subcommittee on Telecommunications and Finance, which never acted upon it.

Ultimately, H.R. 718 died when the session for the 104th Congress expired. In 2013, a new bill was introduced to Congress to merge the SEC and the CFTC. While Congress is still considering this bill, it is unlikely to enact it.

XXVII. GAO Report on Bank Regulation, 1996

A. The Proposal

In his testimony before the Committee on Banking and Financial Services in the House of Representatives on May 2, 1996, James L. Bothwell, Director of the Financial Institutions and Market Issues in the General Government Division of the General Accounting Office (GAO), proposed a reform based on four principles that could improve the U.S. regulatory structure.[1121] These four principles were that: (1) the regulatory structure should require "consolidated and comprehensive oversight of companies owning federally insured banks and thrifts, with coordinated functional regulation and supervision of individual components," (2) the regulatory structure should have "independence from undue political pressure, balanced by appropriate accountability and adequate congressional oversight," (3) the regulatory structure should have "consistent rules, consistently applied for similar activities,[1122] and (4) the regulatory structure should "enhanced efficiency and reduced regulatory burden."[1123]

1. Structural Reorganization

First, the GAO recommended that the OTS, the OCC, and the FDIC's primary supervisory responsibilities for state chartered banks should be transferred into a new federal banking agency

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[1121] *Bank Oversight: Fundamental Principles for Modernizing the US Structure: GAO Testimony before the Committee on Banking and Financial Services, House of Representatives*, 104th Cong., 1 (1996) (Statement of James L. Bothwell, Director, Financial Institutions and Markets Issues, General Government Division).
[1122] *Id.*
[1123] *Id.*

in order to help consolidating the U.S. financial system.[1124] The GAO did not give the new federal banking agency a name and so this report will refer to it by the acronym FBA for federal banking agency. This new agency should be an independent agency like the FDIC.[1125] The new banking agency and the Federal Reserve would jointly supervise bank and thrift holding companies on a consolidated basis.[1126] The individual subsidiaries of those holding companies would be subject to functional supervision by the appropriate financial regulator (e.g., the SEC for securities firms, state insurance commissions for insurance companies, etc.).[1127]

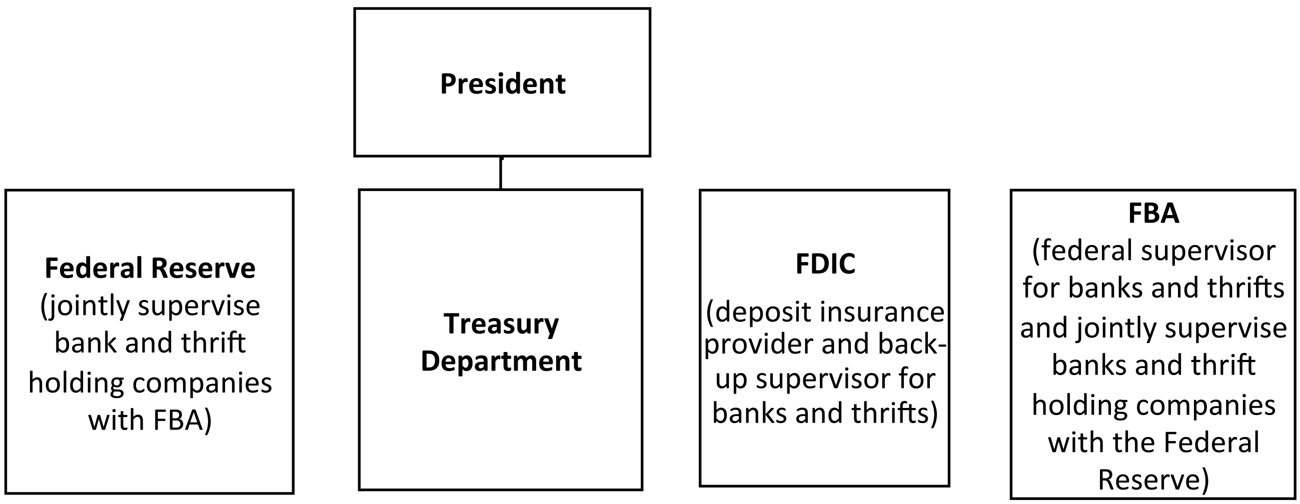
Second, the GAO recommended that the Federal Reserve and the Treasury should continue to play some role in bank supervision.[1128] Unfortunately, it was a bit vague about what that role should be as it suggested several alternatives without indicating which one would be the best. For example, the GAO suggested that the Federal Reserve might continue its supervisory role over state chartered member banks, be given a new role as the supervisor for the largest banking institutions, or serve on the board of directors of the new banking agency or the FDIC.[1129] At a minimum both the Federal Reserve and the Treasury needed access to the supervisory information that the new banking agency would obtain from its examinations of banks and thrifts. The Treasury Department needed direct access "to supervisory information about the condition of the banking industry, as well as the safety and soundness of those banking institutions that could affect the stability of the overall financial system."[1130]

Third, the GAO recommended that the FDIC should retain its back-up supervisory authority, which it felt was necessary to enable the FDIC to protect the deposit insurance funds.[1131] This authority would allow the FDIC to conduct examinations of problem banks and thrifts without seeking the prior approval of another agency, like the new banking agency or the Federal Reserve. It would also allow the FDIC to undertake enforcement actions.

Finally, the GAO recommended that additional mechanisms be adopted to "improve the consistency of oversight and reduce regulatory burden.[1132] These would include, among other things, expanding the powers of the Federal Financial Institutions Examination Council to allow it to coordinate the standards for rulemaking as well as those for examinations and requiring better cooperation between the bank's external auditors and the bank examiners.[1133]

[1124] *Id*. at 8, 9.
[1125] *Id*. at 8.
[1126] *Id*. at 9.
[1127] *Id*. at 9.
[1128] *Id*. at 9.
[1129] *Id*.
[1130] *Id*.
[1131] *Id*. at 9-10.
[1132] *Id*. at 10.
[1133] *Id*.

Figure 36
GAO Report on Bank Regulation Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The GAO did not provide any details regarding the steps to complete the reorganization.

Personnel Issues: The GAO did not state what would happen to the employees of the existing agencies whose functions were moved to the FBA. Presumably at least some of them would be transferred to the FBA.

Funding the Reorganization: The GAO did not discuss how the reorganization should be financed.

B. Arguments For and Against the Proposed Consolidation

One of the benefits of the GAO proposal was that it would provide consolidated supervision of bank and thrift holding companies. Bothwell criticized the U.S. bank regulatory system for lacking accountability.[1134] This lack of accountability arose, in part, from the fact that the Federal Reserve supervised the U.S. bank holding companies while their subsidiaries are supervised by other regulatory authorities.[1135]

In addition, the experiences of other nations indicated that the GAO proposal meet the four principles for an efficient and effective bank regulatory structure. The GAO conducted a study of the structure and operations of bank oversight in Canada, France, Germany, Japan, and the

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[1134] *Id.* at 3.
[1135] *Id.*

United Kingdom.[1136] The study demonstrated that each of these foreign countries "had fewer national agencies involved with bank regulation and supervision than is the case of the United States, "had substantial oversight roles for their central banks, and ensured that their ministries of finance were, at the least, kept informed of important industry, and supervisory developments," "had relatively narrow roles for their deposit insurers," and "incorporated mechanisms and procedures to ensure consistent, consolidated oversight and limit regulatory burden."[1137] The GAO noted that the regulatory structures in each of these countries reflected these four principles in some way and those principles should be taken into account in the restructure of the U.S. banking system.

On July 26, 1996, Federal Reserve Chairman Alan Greenspan in his testimony before the Senate Committee on Banking, Housing and Urban Affairs commented on the GAO recommendations.[1138] He stated that the Federal Reserve had taken into account some of the GAO recommendations. For example, he said that the Federal Reserve retained an independent accounting firm in order to audit and clarify the combined financial statements of the Reserve Banks.[1139] He also mentioned that the Federal Reserve was efficiently and effectively reviewing the appropriate infrastructure for providing certain services, including, among others the Federal Reserve's future role in providing payment services.[1140]

Concerning the Federal Reserve's cost effectiveness, Greenspan revealed that the cost structure of each of its functions was affected by various factors. Nevertheless, Greenspan disagreed with the GAO's analysis and recommendations by saying that the Federal Reserve was taking "exception to the broad implication of the GAO report that the Federal Reserve has not exercised appropriate budget constraint and that it has not adequately addressed the changing technological and financial situation in which it operates."[1141]

Heidi Mandanis Schooner, a professor of law at Catholic University in Washington, DC, explained that the consolidation process of the federal banking regulators constituted a threat to the dual banking system.[1142] She asserted that if the FDIC, the Federal Reserve and the OCC were to be consolidated into one agency, "the federal entity that would be responsible for supervision of state chartered banks would also be the entity in charge of the supervision and chartering of national banks."[1143] She explained that this situation might create an institutional bias in favor of national banks over state banks.[1144] Schooner also claimed that it could become

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[1136] *Id.* at 4.
[1137] *Id.*
[1138] *Recent Reports on Federal Reserve Operations: Testimony before the Committee on Banking, Housing, and Urban Affairs, US Senate,* 104th Cong. (1996) (Statement of Alan Greenspan, Chairman of the Federal Reserve), http://www.federalreserve.gov/boarddocs/testimony/1996/19960726.htm.
[1139] *Id.*
[1140] *Id.*
[1141] *Id.*
[1142] Heidi Mandanis Schooner. *Recent Challenges to the Persistent Dual Banking System,* 41 ST. LOUIS U. L. J. 263, 271 (1996)
[1143] *Id.*
[1144] *Id.* at 273.

impossible for the OCC to reduce its fees in order to be more competitive without congressional intervention.[1145]

C. What Happened to the Proposal?

Congress did not enact the bulk of the GAO's recommendations. Congress did eventually enact a few reforms that were partial steps toward the GAO's recommendations. In 1999, Congress in the Gramm-Leach-Bliley Act established the Federal Reserve as the supervisor for financial holding companies.[1146] This was a limited step towards the GAO's recommendation that the Federal Reserve should supervise all bank and thrift holding companies.

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, which merged the OTS into the OCC and moved the OTS's supervisory functions for thrift holding companies to the Federal Reserve. Both actions were along the lines of GAO's proposed reforms. Neither action, however, was inspired by the GAO's recommendations in 1996. Congress took these actions because of the 2008 financial crisis and the view that the OTS had performed its supervisory functions poorly in the run up to the crisis.

XXVIII. H.R 10 --The Financial Services Act of 1997

A. The Proposal

Rep. James "Jim" Leach (R-IA1) introduced H.R. 10, which was initially known as the Financial Services Competitiveness Act, into the House of Representatives on January 7, 1997.[1147] Rep. Michael Castle (R-DE), Rep. Rick Lazio (R-NY2), and Rep. Marge Roukema (R-NJ2) were the bill's co-sponsors.[1148] On the day that it was introduced in the House of Representatives, H.R. 10 was referred to the House Committee on Banking and Financial Services and the House Committee on Commerce.

On July 3, 1997, the House Committee on Banking and Financial Services approved sending an amended version of H.R. 10 to the House Committee on Commerce for its consideration. Among other things, the amendments in the House Committee on Banking and Financial Services changed the name of the proposed act to the Financial Services Competition Act of 1997.[1149] The House Committee on Commerce substantially amended H.R. 10 including changing the proposed act's name to the Financial Services Act of 1997. On November 3, 1997, the House Committee on Commerce approved sending its amended version of H.R. 10 to the full House of Representatives for its consideration. The House of Representatives passed the Financial Services Act version of H.R. 10 on May 13, 1998. No version of this bill was ever passed by the Senate.

[1145] *Id.*
[1146] Gramm-Leach-Bliley Act, Pub. L. 106-112, §113, 113 Stat 1368 (1999).
[1147] Financial Services Competitiveness Act of 1995, H.R 10, 105th Cong. (1997) [hereinafter Financial Services Competitiveness Act].
[1148] *Id.*
[1149] Financial Services Competition Act of 1995, H.R. 10 as amended, 105th Cong. (1997) [hereinafter H.R. 10].

This report will analyze the amended version of H.R. 10 known as the Financial Services Act of 1997. All references will be to sections of that version of the bill, unless otherwise noted.

H.R. 10 was the third bill that Rep. Leach introduced attempting to consolidate the OCC and the OTS – the first was H.R. 1227 in 1993 and the second was H.R. 17 in 1995.[1150] Like the prior two bills, this bill was motived, in part, by a view that the distinctions between thrifts and banks had disappeared because of deregulation and it no longer made sense to issue national charters for thrifts and to have them regulated by a different regulator from the one that regulated nationally chartered banks.

1. Structural Reorganization

The Financial Services Act was designed primarily to "enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, and other financial service providers, and for other purposes."[1151] Nevertheless, it also included provisions for reorganizing the federal regulatory structure for financial services. It made six major changes to the federal regulatory structure for financial services but only two of these would have consolidated federal agencies or programs.

The first three changes all focused on eliminating the distinctions between banks and thrifts. First, the Financial Services Act would have merged the OTS with the OCC and would have transferred the OTS's supervisory functions for thrift holding companies to the Federal Reserve.[1152] Second, the bill would also have required the FDIC to merge the Bank Insurance Fund (BIF) with the Savings Association Insurance Fund (SAIF).[1153] Third, because the Director of the OTS served on the Board of Directors of the FDIC, the abolition of the OTS would have caused reconfiguration of the FDIC's Board.[1154]

At the same time that the regulatory structure for thrifts was being reconfigured, the charters for thrifts would also be changing. All nationally chartered savings associations would be required to either convert to a state savings association, state bank, or another state depository institution, convert to a national bank, or cease to operate as a national savings association.[1155]

The fourth major change to the federal financial regulatory structure under H.R. 10 would have been the creation of a National Council on Financial Services (NCFS).[1156] The council would have been comprised of ten members. These members would be the Treasury Secretary, the Federal Reserve Board Chairman, the FDIC Chairperson, the Comptroller of the Currency, SEC Chairman, the CFTC Chairman, one person with state securities regulation experience, two people with state insurance regulation experience, and one person with state bank regulation

[1150] For a discussion of H.R. 1227, please see Part XIX of this report. For a discussion of H.R. 17, please see Part XXIII of this report.
[1151] H.R. 10, *supra* note 1149, Introduction.
[1152] *Id.* §§421-431.
[1153] *Id.* §421.
[1154] *Id.* §§421-431.
[1155] *Id.* §401(a)(1).
[1156] *Id*. §121(a).

experience.[1157] Thus, the membership of the NCFS looks very similar to the membership of the Financial Stability Oversight Council (FSOC) that was ultimately created by the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1158]

The NCFS was to enhance the coordination of regulation among the federal financial regulatory agencies and to monitor financial innovations.[1159] The NCFS had no mandate to monitor systemic risks or propose regulations specifically aimed at dealing with systemic risk.

The fifth major change would have given the SEC the power to regulate investment bank holding companies. An investment bank holding company was defined as any financial services holding company that had at least one subsidiary that either was engaged in the underwriting of equity securities, was a wholesale financial institution, or was a foreign bank.[1160] The bill did allow investment bank holding companies the option of choosing to be supervised by the Federal Reserve if they did not want to be supervised by the SEC.[1161] An investment bank holding company would have been able to revoke this election if it changed its mind in the future.[1162]

In 1997, no agency at the federal level had the authority to regulate an investment bank holding company unless that company would have also been classified as a bank or a thrift holding company. In 1997, the Federal Reserve only had the authority to supervise bank holding companies, which generally were defined as any company that owned at least one commercial bank, on a consolidated basis.[1163] At the same time, the OTS supervised savings and loan holding companies on a consolidated basis.[1164] If a financial conglomerate did not own a commercial bank or thrift, then it had no federal regulator supervising the entire group on a consolidated basis. Its subsidiaries would be supervised by the relevant functional regulator (e.g., brokerage firms would be supervised by the SEC, insurance companies would be supervised by the state insurance commissions, etc.).

When H.R. 10 was first introduced in January of 1997, it had envisioned the Federal Reserve would have the authority to examine and set capital requirements for investment bank holding companies.[1165] This provision, however, was amended to give the SEC the authority to supervise investment bank holding companies when the bill was placed before the entire House for its consideration in November of 1997.[1166]

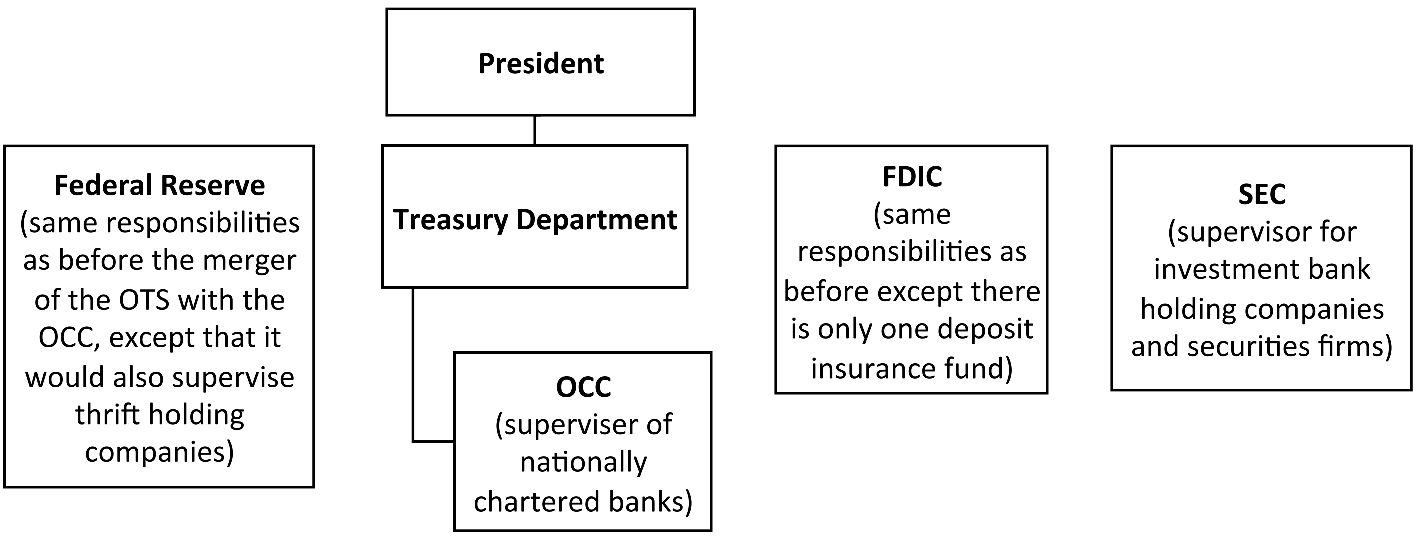
The SEC was the federal regulator primarily responsible for regulating securities. Functional regulation would eventually become further codified in the Gramm-Leach-Bliley Act of 1999.

[1157] *Id*. §121(b).
[1158] Dodd-Frank Wall Street and Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 USC. §5301) [hereinafter DODD-FRANK ACT].
[1159] H.R. 10, *supra* note 1149, §121(a).
[1160] *Id.*
[1161] *Id.* §131.
[1162] *Id*.
[1163] Bank Holding Company Act of 1956, 12 USC. §1842.
[1164] Home Owners' Loan Act, 12 USC. §1461.
[1165] Financial Services Competitiveness Act, *supra* note 1147, §116.
[1166] H.R. 10, *supra* note 1149, §131.

The final major change to the federal financial regulatory structure under the Financial Services Act would have been the creation of the National Association of Registered Agents and Brokers (NARAB).[1167] NARAB would have been a non-profit corporation that was not an agency of the U.S. government but it would be under the supervision of the NFSC.[1168]

The reorganization proposed in H.R. 10 is illustrated in Figure 38 below.

Figure 38
H.R 10 --The Financial Services Act Reorganization Structure



2. Proposed Implementation

Reorganization of Regulatory Powers: The Financial Services Act provided detailed steps for implementing the merger of the OTS with and into the OCC and the transfer of OTS's supervisory powers over thrift holding companies to the Federal Reserve. The bill required the OTS be abolished no later than 30 days after the enactment of the bill.[1169] This change would be implemented by merging the OTS with and into the OCC.[1170] Any existing rights, duties and obligations of the OTS would still be in effect up until the date the OTS would be abolished.[1171] The Financial Services Act would have required the merger of the BIF and the SAIF by the FDIC to take effect on January 1, 1999.[1172]

Since the OTS would no longer exist, the FDIC's Board of Directors needed to be reconfigured. The Financial Services Act specified that the FDIC's Board would be comprised of the

[1167] *Id.* §402.
[1168] *Id.*
[1169] *Id.* §421.
[1170] *Id.*
[1171] *Id.* §422.
[1172] *Id.* §431.

Comptroller of the Currency and four directors, who would be appointed by the president.[1173] The Senate would give advice on candidates and must consent on all appointments.[1174] All candidates to be on the FDIC's Board must be U.S citizens and at least one of them must have State bank experience.[1175] All of these changes were made effective January 1, 1998.[1176] The bill did not discuss what would happen if the time table was not kept or what funds would be set aside to cover the costs for these changes to the FDIC's Board.

Personnel Issues: The Financial Services Act did not expressly state what would happen to the existing employees of the OTS. It required the Treasury Secretary to merge the OTS with the OCC within two years of the enactment of the Financial Services Act.[1177] It seems likely that, because the OTS would be merged with the OCC, all of the personnel of the OTS would be transferred to the OCC.[1178]

Funding the Reorganization: The bill did not state how the closing of the OTS or the merger of the BIF and the SAIF by the FDIC would be funded.

B. Arguments For and Against the Proposal

There were several supporters of the idea of creating a National Council of Financial Services. Mark J. Griffin was the President of North American Securities Administrators Association at the time. He argued that with federal and state security regulation there will be great oversight in the capital market place.[1179] He stated that although the SEC provides solid insight on domestic and foreign issues facing our markets, it fails to provide insight for local markets and individual investors. "According to the Wall Street Journal (January 29, 1997), the SEC closed or solved 345 cases in 1996. State securities regulators solved or closed over 6,740 cases during that period."[1180] This shows that state regulators are in the best position to observe the effects of regulatory policies on individual investors.

Federal Reserve Chairman Alan Greenspan felt that the bill went too far at the time in mixing commerce and banking. He noted that the bill would remove the then existing legal barriers between banking and commercial activities, which could be detrimental.[1181] The bill would allow both banks and nonfinancial corporations each to originate up to 15 percent of their revenue from

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1173 *Id.* §425.
1174 *Id.*
1175 *Id.*
1176 *Id.*
1177 *Id.* §332.
1178 *Id.*
1179 Testimony of Mark J. Griffin, President, North American Securities Administrators Association, and Director, Utah Division of Securities, Before the House Subcommittee on Finance and Hazardous Materials, US House of Representatives (July 17, 1997), http://www.nasaa.org/930/nasaa-testimony-on-h-r-10-the-financial-services-competition-act-of-1997/, §4.
1180 *Id.* §4.
1181 Testimony of Chairman Alan Greenspan, The Financial Services Competition Act of 1997 Before the Subcommittee on Finance and Hazardous Materials of the Committee on Commerce, US House of Representatives (July 17, 1997), http://www.federalreserve.gov/boarddocs/testimony/1997/19970717.htm [hereinafter Greenspan 1997 Testimony].

the other's activities.[1182] Another new activity that the bill allowed was additional bank and commercial affiliations beyond these holding company affiliate baskets and permit some affiliation within the bank or a bank subsidiary.[1183]

Greenspan recommended doing incremental steps such as integrating banking and finance with limited combinations of banking and commerce and assets along the way.[1184] He also advised against banks performing new activities in their own subsidiaries because of the extension of the safety net which does not allow for a level playing field.[1185]

There are many ways to look at how the mergers would have affected the overall state of the economy. According to Jean Wells and William D. Jackson, it would increase the federalization of financial regulation, increase the flexibility of companies owning a bank, and end the federal system of savings institutions. [1186] If the bill was enacted, the states would have still had the right to charter savings associations but the federal government would not.[1187] Since the thrift industry would be converted into the commercial banking industry, federal thrifts could be converted into state charters. This would allow the Federal Home Loan Bank to expand and provide bank-like financing.[1188]

This would be the first time since 1970 with the Bank Holding Company Act Amendments that commercial and banking interests would be combined.[1189]

Not only did H.R. 10 merge the OTS into the OCC, it required federal thrifts to convert their charters to either a state thrift charter, a national bank charter, or a state bank charter. As a result, it was opposed by the thrifts that did not want to be forced to change their charters. Such a change would not only affect what activities the thrifts would be able to engage in but it would be costly. An ordinary thrift might spend up to $135,000 to convert and might have to spend up to $75,000 more if it needed shareholder approval before it converted its charter.

C. What Happened to the Proposal?

As noted above, after its introduction in the House on January 7, 1997, H.R. 10 was referred to the House Committee on Banking and Finance Services and the House Committee on Commerce. On July 7, 1997, the House Committee on Banking and Financial Services approved sending an amended version of H.R. 10 to the House Committee on Commerce.[1190] The House Committee on Commerce considered the amended version and substantially amended it

[1182] *Id.*
[1183] *Id.*
[1184] *Id.*
[1185] *Id.*
[1186] Williams Jackson and Jean Wells, *Financial Services Competition Act: A Brief Overview*, ProQuest Congressional Economics Division, (December 10, 1997) at 4.
[1187] *Id.* at 5.
[1188] *Id.*
[1189] *Id.*
[1190] The Library of Congress Thomas database, Bill Summary and Status, 105th Congress (1997-1998), H.R. 10, All Congressional Actions with Amendments, http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR00010:@@@S [hereinafter H.R. 10 105th Congressional Actions].

again.[1191] On November 3, 1997, the House Committee on Commerce approved sending their amended version of H.R. 10, which was then referred to as the Financial Services Act of 1997, to the full House of Representatives.[1192]

The House debated the Financial Services Act and considered a series of amendments to it on May 13, 1998.[1193] Among the amendments considered by the House was an amendment sponsored by Rep. Roukema.[1194] The amendment sought to increase from 5 percent to 10 percent the amount of annual gross revenue a financial services holding company may derive from commercial activities.[1195] Growth above the 10 percent annual gross revenue cap would be only allowed at the discretion of the Federal Reserve Board on a case by case basis for up to an additional five percent.[1196] This amendment narrowly passed on a vote of 218 for and 204 against, with Republicans being the primary supporters of the amendment.[1197]

The House narrowly passed H.R. 10 on May 13, 1998 on a vote of 214 for and 213 against, with supporters being mainly Republicans.[1198] The Senate received the amended version of the Financial Services Act of 1997 on May 14, 1998 and referred it to the Senate Committee on Banking.[1199]

On September 11, 1998, the Senate Committee on Banking approved sending the bill to the full Senate for its consideration.[1200] The full Senate considered the bill but never voted upon it.[1201] As a result, the bill died when the term of the 105th Congress expired.

Rep. Leach reintroduced the bill as H.R. 10, the Financial Services Act of 1999, on January 6, 1999.[1202] The new version of H.R. 10, however, did not include a proposal to merge the OTS into the OCC.

After going back through the House Committee on Banking and Financial Services and the House Committee on Commerce, H.R. 10 was considered and passed by the House of Representatives on July 1, 1999. It was received by the Senate on July 12, 1999.

At the same time that these actions were occurring in the House, the Senate was considering a similar bill introduced by Senator Phil Gramm (R-TX) on February 24, 1999. The Senate bill

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1191 Financial Services Competitiveness Act, *supra* note 1147.
1192 H.R. 10 105th Congressional Actions, *supra* note 1190.
1193 *Id*.
1194 *Id*.
1195 *Id*.
1196 *Id*.
1197 *Id*.
1198 *Id*.
1199 *Id*.
1200 *Id*.
1201 *Id*.
1202 The Library of Congress Thomas database, Bill Summary and Status, 106th Congress (1999-2000), H.R. 10, All Congressional Actions with Amendments, http://thomas.loc.gov/cgi-bin/bdquery/D?d106:1:./temp/~bdh1Gu:@@@S|/home/LegislativeData.php?n=BSS;c=106| [hereinafter H.R. 10 106th Congressional Actions].

was S. 900, also known as the Financial Services Modernization Act of 1999. S. 900 also did not include any provisions to merge the OTS into the OCC.

The Senate passed S. 900 on May 6, 1999. The House and the Senate conferees met to hammer out the differences between H.R. 10 and S.900. Ultimately, S.900 with amendments from the House would be passed by both the House and the Senate and signed into law as the Gramm-Leach-Bliley Act of 1999.[1203]

The Gramm-Leach-Bliley Act, (GLBA) however, did not contain many of the provisions in the proposed H.R. 10 -- Financial Services Act of 1997 that dealt with reorganizing the federal financial regulatory structure. For example, GLBA did not contain the proposals in the Financial Services Act of 1997 to consolidate the OTS into the OCC, to create a National Council on Financial Services, or to merge the BIF and the SAIF into a single deposit insurance fund.

The GLBA did incorporate a few of the structural changes envisioned in the Financial Services Act of 1997. Section 231 of the GLBA amended §78q of the Securities Exchange Act to give the SEC authority to act as a holding company regulator for financial conglomerates that were not regulated as bank or thrift holding companies by the Federal Reserve or the OTS.[1204] The SEC, however, could only regulate those holding companies that voluntarily elected to be subject to its regulation.[1205] The SEC did not act under this new authority until 2004.[1206] In 2004, the SEC adopted rules that allowed a financial conglomerate to voluntarily subject itself SEC supervision as either consolidated supervised entity (CSE) or as supervised investment bank holding company (SIBHC).[1207] The SEC's Division of Market Regulation acted as the prudential supervisor for both CSEs and SIBHCs.[1208] Seven firms voluntarily became CSEs — the Bear Stearns Companies, Citigroup Inc., Goldman Sachs Group Inc., JPMorgan Chase & Co., Lehman Brothers Holdings Inc., Merrill Lynch Bank & Trust Co., and Morgan Stanley.[1209] The SEC was the sole consolidated supervisor for only two of these firms – the Bear Stearns Companies and Goldman Sachs Group Inc. The Federal Reserve supervised Citigroup Inc. and JP Morgan Chase & Co., which were registered FHCs, and the OTS supervised parts of Lehman Brothers, Merrill Lynch, and Morgan Stanley, as THCs.[1210]

The 2008 financial crisis revealed that the SEC had been an extremely poor prudential supervisor

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1203 Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified at scattered sections of 12, 15, 16, 18 USC.)[hereinafter GLBA].
1204 15 USC. §78q(i) (2006).
1205 *Id.*
1206 Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities, 69 Fed. Reg. 34,428 (June 21, 2004) (to be codified at 17 C.F.R. pt. 200) [hereinafter CSE Final Rule]; Supervised Investment Bank Holding Companies, 69 Fed. Reg. 34,472 (Aug. 20, 2004) (to be codified at 17 C.F.R. pt. 200) [hereinafter SIBHC Final Rule].
1207*See* CSE Final Rule, *supra* note 1206, at 34,428; SIBHC Final Rule, *supra* note 1206, at 34,474–76 (setting forth Rule 17i-2).
1208 *See* Commodity and Securities Exchanges, 17 C.F.R. §200.30-3 (2010).
1209 US SEC. AND EXCH. COMM'N, OFFICE OF THE INSPECTOR GEN., OFFICE OF AUDITS, SEC'S OVERSIGHT OF BEAR STEARNS AND RELATED ENTITIES: THE CONSOLIDATED SUPERVISED ENTITY PROGRAM iv (Sept. 25, 2008) [hereinafter SEC IG'S CSE REPORT], http://www.sec.gov/about/oig/audit/2008/446-a.pdf.
1210 *Id.* at v.

because all of the CSEs either received bailout funds from the U.S. government to enhance their financial stability or went bankrupt. On September 26, 2008, the SEC had ended its CSE program in light of the SEC's Inspector General's report documenting how the program had contributed to the financial difficulties of Bear Stearns.[1211] By that date, all of the investment banking conglomerates that the SEC had regulated had either been acquired by financial holding companies regulated by the Federal Reserve (Bear Stearns and Merrill Lynch), gone bankrupt (Lehman Brothers), or had voluntarily subjected themselves to the regulatory authority of the Federal Reserve by beginning the process to become financial holding companies (Goldman Sachs and Morgan Stanley).[1212] Section 617 of the Dodd-Frank Act ended the SEC's authority to act as a supervisor for CSEs or SIBHCs in the future.[1213]

The GLBA also contained a provision that called for the creation of the NARAB if a majority of the states did not adopt laws to establish uniform or reciprocal licensing for insurance agents.[1214] The NARAB never came into existence because a majority of the states adopted laws granting reciprocity for insurance agents licensed in other states.[1215] The GLBA also contained a provision to allow the Federal Reserve to supervise a new form of holding company called a financial holding company that would be allowed to engage in a wider range of financial activities than the bank holding companies were allowed to engage in.[1216] This provision was similar in some respects to the provision in the original version of H.R. 10 – Financial Services Competitiveness Act of 1997 that would have allowed the Federal Reserve to supervise investment bank holding companies.

Some of the provisions of the proposed H.R. 10 -- Financial Services Act of 1997 would eventually become law when they were incorporated into other bills. The Federal Deposit Insurance Reform Act of 2005 merged the SAIF and the BIF to create a single Deposit Insurance Fund managed by the FDIC.[1217] The Dodd-Frank Act merged the OTS into the OCC.[1218]

1211 Press Release, Securities and Exchange Commission, Chairman Cox Announces End of Consolidated Supervised Entity Program (Sept. 26, 2008), http://www.sec.gov/news/press/2008/2008-230.htm.

1212 Carrick Mollenkamp et al., *Crisis on Wall Street as Lehman Totters, Merrill is Sold, AIG Seeks to Raise Cash*, WALL ST. J., Sept. 15, 2008, at A1; Robert Schroeder, *Goldman, Morgan to Become Holding Companies*, MARKETWATCH (Sept. 21, 2008), http://www.marketwatch.com/story/goldman-sachs-morgan-stanley-to-become-bank-holding-companies; Andrew Ross Sorkin & Landon Thomas, Jr., *JPMorgan Acts to Buy Ailing Bear Stearns at Huge Discount*, N.Y. TIMES, Mar. 18, 2008, http://www.nytimes.com/2008/03/16/business/16cnd-bear.html?_r=1&scp=1&sq=JP%20morgan%20to%20acquire%20bear%20stearns%202008&st=cse.

1213 Dodd-Frank Act, *supra* note 1158, §617, 124 Stat. 1616 (codified at 15 USC. §78q).

1214 GLBA §321.

1215 Richard J. Hillman, Director, Financial Markets and Community Investment, General Accounting Office, Testimony Before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, Committee on Financial Services, House of Representatives, State Insurance Regulation: Efforts to Streamline Key Licensing and Approval Processes Face Challenges 2 (June 18, 2002).

1216 *Id*. §103.

1217 Subtitle B – Deposit Insurance, Pub. L. No. 109-171, 120 Stat. 9 (2006) (codified at 12 USC 1811, 1821) [hereinafter FDIRA].

1218 Dodd-Frank Act, *supra* note 1158, §§311-313.

XXIX. U.S. Treasury Blueprint for a Modernized Financial Regulatory Structure, 2008

A. The Proposal

The U.S. Department of the Treasury released its *Blueprint for a Modernized Financial Regulatory Structure* in March 2008.[1219] It made a series of recommendations for restructuring the U.S. regulatory regime in the short-term, intermediate-term, and long-term.

The impetus for the Blueprint was the U.S. Capital Markets Competitive Conference hosted by the Treasury Department at Georgetown University in Washington, DC in March 2007. In the years immediately preceding that conference, a number of business and government groups had raised alarms that the United States was losing its competitive edge to overseas markets, particularly to London.[1220] The conclusion of many of these studies was that the United States needed to reduce the regulatory burden on the financial services industry in order to stay competitive with overseas markets and that one of the ways to do so was to streamline the regulatory structure by consolidating federal and state regulators. Thus, the mindset of the drafters of the *Blueprint* was heavily influenced by the deregulatory themes of these competitiveness studies. Unfortunately for Treasury Secretary Paulson and the drafters of the *Blueprint*, the deregulatory tide was rapidly abating by the time that the report was released because the United States was in the early throes of the 2008 financial crisis.

1. Structural Reorganization

Short Term Proposals: The *Blueprint*'s short-term proposals were very incremental changes. It called for expanding the President's Working Group on Financial Markets to include the OCC, the OTS, and the FDIC.[1221] This was essentially the same idea that the 1995 H.R. 718 – Markets and Trading Commission Act – had proposed when it suggested creating a Federal Financial Markets Coordinating Council.

[1219] Treasury Blueprint, *supra* note 485.

[1220] MCKINSEY & CO., SUSTAINING NEW YORK'S AND THE US GLOBAL FINANCIAL SERVICES LEADERSHIP (2007) [hereinafter MCKINSEY REPORT]; COMM. ON CAPITAL MKTS. REG. INTERIM REP. (2006); COMM. ON CAPITAL MKTS. REG., THE COMPETITIVE POSITION OF THE US PUBLIC EQUITY MARKET (2007); COMM'N ON THE REG. OF US CAPITAL MKTS IN THE 21ST CENTURY, US CHAMBER OF COMMERCE, REP. AND RECOMMENDATIONS (2007); RICHARD M. KOVACEVICH, ET. AL., FIN. SERVS. ROUNDTABLE, THE BLUEPRINT FOR US FIN. COMPETITIVENESS (2007); Chris Brummer, *Stock Exchanges and the New Market for Securities Laws*, 75 U. CHI. L. REV. 1435 (2008); Stephen J. Choi, *Channeling Competition in the Global Securities Market* (Univ. Cal. Berkeley Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 111, 2003); John C. Coffee, Jr., *Racing Towards the Top? The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002); James D. Cox, *Rethinking US Securities Laws in the Shadow of International Regulatory Competition*, 55 LAW & CONTEMP. PROBS. 157 (1992); Steven M. Davidoff, *Regulating Listings in a Global Market*, 86 N.C. L. REV. 89 (2007); Peter Hostak et al., An Examination of the Impact of the Sarbanes-Oxley Act on the Attractiveness of US Capital Markets for Foreign Firms (Apr. 30, 2007) (unpublished manuscript, http://ssrn.com/abstract=956020); Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (2007); Kate Litvak, *Sarbanes-Oxley and the Cross-Listing Premium*, 105 MICH. L. REV. 1858 (2007); Eric J. Pan, *Why the World No Longer Puts its Stock in Us* (Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 176, 2006); Larry E. Ribstein, *Cross-Listing and Regulatory Competition*, 1 REV. L & ECON. 97 (2005).

[1221] Treasury Blueprint, *supra* note 485, at 5.

The *Blueprint* also called for a new Mortgage Origination Commission (MOC) head by a Director and with a board comprised of representatives from the Federal Reserve, the OCC, the OTS, the FDIC, the NCUA, and the Conference of State Banking Supervisors (CSBS).[1222] The purpose of the MOC was to evaluate and rate how each state licensed and regulated participants in the mortgage origination process.[1223] The MOC would also develop uniform minimum licensing qualification standards to be enacted through federal legislation. These steps were to address gaps in the mortgage origination oversight that had led to problems in the financial markets.

Intermediate Term Proposals: In his 2010 book ON THE BRINK, Paulson reclassified the *Blueprint*'s intermediate term proposals as "shorter-term steps," perhaps because many of them had become part of the Dodd-Frank Act.[1224] In the intermediate term, the *Blueprint* called for the creation of a federal insurance office that would offer an optional federal charter for insurance, the elimination of the national thrift charter and the transfer of the OTS's duties to the OCC, a study on whether the FDIC or the Federal Reserve should become the sole federal supervisor for state chartered banks, and the merger of the SEC and the CFTC.

Long Term Proposals: In the long run, the *Blueprint* recommended that the United States adopt a multi-peaks regulatory structure in which regulatory agencies focus on particular objectives rather than particular institutions or functions.[1225] Although many commentators refer to the *Blueprint* as recommending a twin peaks restructure, what the *Blueprint* really recommended could be better characterized as a five peaks model as its optimal structure for the regulation of financial services in the United States.[1226] Under its five peaks model, the Federal Reserve would continue to operate as the nation's central bank and as a market stability regulator but four new agencies would be created.[1227] A Prudential Financial Regulatory Agency (PFRA) would regulate the chartering of depository institutions and insurance companies as well as establish solvency regulations for these institutions and activity limits to promote safety and soundness[1228] A Conduct of Business Regulatory Agency (CBRA) would provide market conduct and consumer protection regulations.[1229] A Federal Insurance Guarantee Corporation (FIGC) would be established to administer insurance for the accounts at financial services firms in the same way that the FDIC does now for banks.[1230] Finally, a Corporate Finance Regulator would be created to handle issues related to corporate governance and oversight in the public securities markets.[1231]

[1222] *Id.* at 6.
[1223] *Id.* at 7.
[1224] HENRY M. PAULSON, JR., ON THE BRINK (2010) at 127.
[1225] Treasury Blueprint, *supra* note 485, at 143-146.
[1226] *Id*. at 13-21.
[1227] *Id*. at 15-17.
[1228] *Id*. at 17-19.
[1229] *Id*. at 19-21.
[1230] *Id*. at 21.
[1231] *Id*.

The *Blueprint* called for a new chartering system. The PFRA would issue charters for federal insured depository institutions (FIDIs), which would cover all of the entities now classified as commercial banks, savings and loans, savings banks, thrifts, and credit unions. The PFRA would also charter federal insurance institutions (FIIs) and federal financial service providers (FFSPs).[1232]

Entities chartered by the PFRA would have access to the Federal Insurance Guarantee Fund (FIGF) administered by the FIGC.[1233] Currently, insurance companies are licensed by the states and have access to state guarantee funds. The Blueprint does not expressly call for the abolition of state insurance charters. It would prevent state chartered insurers from participating in the FIGF and would force them to continue to rely on state guarantee funds in the future.

Any entity chartered as a FIDI, FII, or FFSP would only be required to comply with the market conduct rules established by the CBRA and would be exempt from state business conduct rules.[1234] To the extent that the dual banking system and the state insurance system would continue to exist in the future, this preemption of state regulations would provide financial services firms with a significant incentive to obtain a federal charter, particularly if the federal government's business conduct rules were deemed weaker than the state rules. This proposal is one of the many recommendations that highlighted the deregulatory intent of the *Blueprint*.

Figure 39 illustrates the way the U.S. federal financial regulatory structure would look if the recommendations of the Treasury Blueprint were ever fully implemented.

Figure 39
Treasury Blueprint's Long-Term Reorganization Plan

2. Proposed Implementation

Reorganization of Regulatory Powers: The Treasury *Blueprint* did not specify what timeframes it considered to be intermediate or long-term. It is, thus, unclear how quickly the Treasury wanted to see the United States move to adopting the five peaks model for regulating all of financial services. In addition, the Treasury *Blueprint* provided no guidance as to how the United States should fold the existing financial services regulators into the new agencies that it has proposed.

[1232] *Id.* at 14.
[1233] *Id.* at 167.
[1234] *Id.* at 20.

Personnel Issues: The *Blueprint* did not discuss what would happen to the staff of the existing agencies as the agencies were consolidated and reorganized. The *Blueprint* certainly did not envision that all of the existing agency staff would keep their jobs. In fact, it listed a reduction in staffing needs as one of the benefits of consolidation.[1235] It did allow new agencies or commissions to hire staff. For example, the MOC would be empowered to hire qualified staff from either other government agencies or the private sector.[1236] The Blueprint did not discuss how much the MOC staff would be paid.

Funding the Reorganization: The *Blueprint* did not discuss how the reorganization that it proposed would be funded.

B. Arguments For and Against the Proposal

1. Advantages

The long term proposals of the Blueprint would potentially result in at least six major benefits. First, the multi-peaks structure would create a permanent system for coordination and cooperation concerning regulatory goals across the financial services industry. Each of the new federal regulators would cover all financial services sectors rather than focusing on only certain sectors (banking, securities, and insurance).

Second, the multi-peaks structure would be able to harmonize the regulations for financial products across sectors and eliminate duplicative regulations. Again this is possible because each of the new regulators would be responsible for covering all financial services firms. While this harmonization is possible, it will only happen if the new regulatory agencies make a concerted effort to review the existing regulations and to determine how to make them more consistent and uniform in their application. In addition, the multi-peaks structure would eliminate the debate over which agency was accountable for hybrid products and firms as all of the federal regulators would responsible for the entire range of financial products and firms.

Third, the multi-peaks structure would regulate financial conglomerates more effectively than the current structure. The multi-peaks approach would make the PFRA accountable if a financial conglomerate fails and as a result, the PFRA might be more diligent about supervising troubled institutions and making certain that they are closed down at an appropriate time because it would be held accountable by Congress if it failed to act in that manner.

Fourth, the multi-peaks approach would allow the United States to deal more effectively with the globalization of the financial markets because the United States is more likely to have a unified position in international negotiations with this structure. Again conflicts might arise between the PFRA and the CBRA if prudential considerations end up harming consumers or if the consumer protection rules threaten the safety and soundness of some financial services firms.

[1235] *Id.* at 141.
[1236] *Id.* at 80.

Fifth, the agencies in the multi-peaks structure would be less prone to capture because they would regulating competing interest groups. Agency capture occurs less frequently in agencies that regulate several competing interest groups.[1237] Market forces will ensure that a diverse mix of businesses will comprise the U.S. financial services industry in the future. If the new agencies are allowed to control their budgets that would also help them avoid capture. Studies have found that agency capture occurs more frequently when efforts to advance general interest regulation to the detriment of special interests would threaten an agency's budget or other institutional interests.[1238]

Sixth, the multi-peaks structure might improve consumer protections but that would depend on the mindset of the officials running the CBRA. If the CBRA is run by officials who favor deregulation over everything else, consumers will suffer. If that is not the case, then the creation of a multi-peaks system might improve consumer protections in several ways. By merging the existing regulators and ending duplicative regulations, it would reduce the cost of bringing new products and services to market. In addition, by merging the existing regulators, it would encourage innovation in the kinds of regulations employed, which would lead to better, more cost efficient regulations. Finally, the CBRA will not sacrifice consumer protection concerns in order to protect the entities that it regulates. Studies have found that the OCC and a number of other agencies that have attempted to implement both prudential and consumer protection rules have been willing to sacrifice consumer protection in order to protect the solvency of the institutions that they regulate. Since the CBRA's mandate would focus only on consumer protection, it will avoid such conflicts.

2. Disadvantages

Creating a multi-peaks regulatory structure may pose a number of problems. First, it may reduce regulatory competition and experimentation. Second, the new agencies may be too large, making them unwieldy and costly. Third, these new larger agencies may have difficulty responding to smaller firms and, thus, may undermine the diversity of institutions that currently comprise the U.S. financial industry. Fourth, the reorganization may result in a number of logistical problems, including the loss of staff with specialized knowledge.

C. What Happened to the Proposal?

In ON THE BRINK, Paulson claims that the Blueprint was designed to "start a discussion" and that he felt that "no major regulatory changes should be enacted while the financial system was under strain."[1239] Given the extremely detailed nature of the proposals, it seems unlikely that, when work on the *Blueprint* began in 2007, it was intended to do nothing more than "start a discussion." In fact, earlier in On the Brink, Paulson discussed the blurring of the lines between commercial and investment banking and noted:

[1237] See Elizabeth Brown, *E Pluribus Unum — Out of Many, One: Why the United States Needs a Single Financial Services Agency*, 14 U. MIAMI BUS. L. REV. 1, 50-52 (2005).
[1238] Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 15-16 (2000); Steven A. Ramirez, Depoliticizing Financial Regulation, 41 WM & MARY L. REV. 503, 541-542 (2000).
[1239] Paulson, *supra* note 1224, at 126.

> But regulation had not kept pace with these changes. Oversight bodies were too fragmented and lacked adequate powers and authorities. That was one reason Treasury was working hard to complete our blueprint for a new regulatory structure.[1240]

That statement seems to imply that the Blueprint originally was intended to lead to significant transformation of the U.S. regulatory structure. By the time it was released, however, it was certainly clear that there would be no public support for many of the *Blueprint*'s recommendations, particularly the ones that were obviously intended to further deregulate the financial system.

Some of the Blueprint's ideas made it into the Dodd-Frank Act. The Dodd-Frank Act created a Federal Insurance Office (FIO) but limited FIO to mainly monitoring the insurance industry and providing advice to other federal agencies about insurance. The Dodd-Frank Act also transferred the powers of the OTS to the OCC and the Federal Reserve and abolished the OTS. The other recommendations in the *Blueprint* were not implemented.

The only recommendation of the Blueprint that still seems to be actively considered is the proposal to merge the SEC and the CFTC. A bill currently before the House of Representatives, H.R. 3012 --the Markets and Trading Reorganization Act, would merge the SEC and the CFTC. It is discussed in Part XXX below.

XXX. U.S. Treasury Financial Regulation Reform, 2009

A. The Proposal

In the wake of the 2008 financial crisis, the Treasury Department under President Barack Obama issued a new report, *Financial Regulation Reform – A New Foundation: Rebuilding Financial Supervision and Regulation*.[1241] (This report will be referred to as the 2009 Treasury Proposal.) It recommended changes to address the perceived weaknesses in the regulatory system that contributed to the financial crisis. Congress enacted at least some of its proposed reforms in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The 2009 Treasury Report proposed, among other things, consolidating the OTS and the OCC into a new National Bank Supervisor, creating the Consumer Financial Protection Agency, and creating the Financial Services Oversight Council.[1242]

1. Structural Reorganization

The 2009 Treasury Proposal called for the creation of a National Bank Supervisor, which would assume the powers of the OTS and the OCC.[1243] It, like the OCC and the OTS, would be within

[1240] *Id*. at 95.
[1241] US DEPT. OF THE TREASURY, FINANCIAL REGULATION REFORM – A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009) (hereinafter 2009 Treasury Proposal).
[1242] *Id*. at 3, 10.
[1243] *Id*. at 32.

the Treasury Department but would operate independently of the Treasury Secretary.[1244] It would be controlled by a single executive, such as the OCC and the OTS were.[1245] The 2009 Treasury Proposal also recommended eliminating the federal thrift charter and having the existing federal thrifts convert to either banks or state thrifts.[1246] The Federal Reserve and the FDIC would retain all of the existing powers and supervisory authority.[1247] The National Credit Union Administration also would continue to exist with all of its powers.[1248]

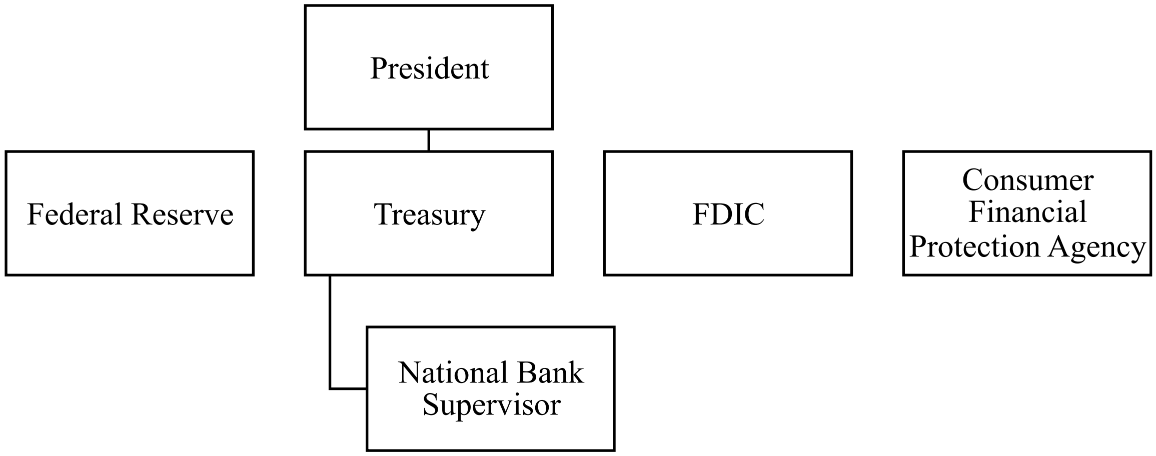
The 2009 Treasury Proposal recommended creating a new independent agency, the Consumer Financial Protection Agency (CFPA).[1249] It would have the sole authority to issue rules under the consumer financial protection statutes.[1250] Thus, it would have acted in some ways like the Conduct of Business Regulatory Agency proposed in the Paulson Blueprint. On the other hand, it would not assume the regulatory authority of agencies, like the SEC. Under the 2009 Treasury Proposal, the SEC would retain its authority to issue rules to protect investors and would have had this authority expanded.[1251]

The 2009 Treasury Proposal also recommended the creation of the Financial Services Oversight Council. It would be composed of "(i) the Secretary of the Treasury, who shall serve as the Chairman; (ii) the Chairman of the Board of Governors of the Federal Reserve System; (iii) the Director of the National Bank Supervisor; (iv) the Director of the Consumer Financial Protection Agency; (v) the Chairman of the SEC; (vi) the Chairman of the CFTC; (vii) the Chairman of the FDIC; and (viii) the Director of the Federal Housing Finance Agency (FHFA)."[1252] It would serve to facilitate coordination among the federal regulators, to identify emerging risks, and to advise the Federal Reserve regarding firms that potentially pose a risk to the stability of the financial system.[1253] It would also create a Financial Consumer Coordinating Council that would be comprised of representatives from the federal and state consumer protection agencies.[1254]

Figure 40 illustrates the federal regulatory structure that would have existed if Congress fully implemented the 2009 Treasury Proposal.

[1244] *Id*.
[1245] *Id*.
[1246] *Id*. at 32-33.
[1247] *Id*. at 32.
[1248] *Id*.
[1249] *Id*. at 14-15.
[1250] *Id*. at 14.
[1251] *Id*. at 15.
[1252] *Id*. at 10.
[1253] *Id*.
[1254] *Id*. at 15.

Figure 40
2009 Treasury Proposal Reorganization



2. Proposed Implementation

Reorganization of Regulatory Powers: The 2009 Treasury Proposal did provide a date by which the reorganization should have been implemented.

Personnel Issues: To implement the merger of the OTS and the OCC, the 2009 Treasury Proposal implies that the employees of both the OTS and the OCC would be transferred to the National Bank Supervisor.[1255] It did not specify whether the employees would maintain their existing salaries.

The 2009 Treasury Proposal did not specify where the CFPA would get its employees, how many employees it would be expected to have, or what the salaries of the CFPA's employees would be.

The 2009 Treasury Proposal did specify that the Financial Services Oversight Council would have its own full-time, permanent staff that would be housed at the Treasury.[1256] It did not specify how many staff members it would have or what their salaries would be.

Funding the Reorganization: The 2009 Treasury Proposal did not discuss how the reorganization would be funded. The new National Bank Supervisor would be funded from the fees paid by the entities that it regulates, just as the OCC is funded.[1257] The 2009 Treasury Proposal did not specify how the Consumer Financial Protection Agency would be funded. It only stated that it should have "stable, robust funding."[1258] The 2009 Treasury Proposal did not specify how the Financial Services Oversight Council would be funded.

[1255] *Id*. at 14.
[1256] *Id*. at 10.
[1257] *Id*. at 32.
[1258] *Id*.

B. Arguments For and Against the Proposal

The 2009 Treasury Proposal was similar to the other prior proposals to consolidate the OTS and the OCC. Thus, all of the prior arguments for and against this merger would apply here as well.

The climate, however, had changed strongly in support of this merger because of the perception that the OTS had done a worse job of supervising the thrifts and thrift holding companies than the other federal depository institution regulators had done with respect to the banks and credit unions in their charge. The OTS supervised some very large conglomerates as thrift holding companies, including AIG, Countrywide Financial, General Electric Company, General Motors Corporation, IndyMac Bancorp Inc., Merrill Lynch, Morgan Stanley, and Washington Mutual.[1259] All of these firms got into severe financial trouble in the 2008 crisis and received different levels of government assistance as a result. Congress felt public pressure to enact measures to prevent future bailouts and thus, was more willing to consider the merger of the OTS and the OCC as one means of doing that.

Elizabeth Warren, a Harvard law professor, had written an article in support of creating a Consumer Financial Protection Agency prior to the crisis. She argued that the existing regulators, particularly the banking regulators, tended to sacrifice consumer protection in the interest of promoting prudential regulations when the two clashed. She argued that the consumer protection functions should be separated from the prudential functions and that a separate agency should be created to deal with them. In the wake of the financial crisis and the sharp rise in home foreclosures, strong support grew for creating a regulatory agency that would be more proactive on behalf of consumers.

The Consumer Financial Protection Agency, however, faced strong opposition from large segments of the financial services industry and from the existing federal financial regulators. The financial services industry was concerned that the new agency would be overly aggressive in promoting new regulations that would deter financial innovations and harm their businesses. The existing federal agencies took exception to the idea that they had failed to adequately protected consumers and fought to maintain their consumer protection powers.

The financial crisis revealed a number of regulatory gaps within the existing U.S. regulatory structure. The Treasury Department viewed the creation of the Financial Services Oversight Council as one way to address these gaps. It would provide a forum for the agencies to share information and coordinate their responses to risks that fell within the jurisdiction of more than one agency.

In addition, the Financial Services Oversight Council would address on an ongoing basis systemic risks and the sources of those risks. It would not leave that responsibility solely up to

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1259. US GOV'T ACCOUNTABILITY OFFICE, FINANCIAL MARKET REGULATION: AGENCIES ENGAGED IN CONSOLIDATED SUPERVISION CAN STRENGTHEN PERFORMANCE MEASUREMENT AND COLLABORATION 12 (2007) [hereinafter GAO FINANCIAL MARKET REGULATION REPORT], http://www.gao.gov/new.items/d07154.pdf; Countrywide Financial Corporation, Annual Report, (Form 10-K), at 17 (Feb. 8, 2007); IndyMac Bancorp, Inc., Annual Report, (Form 10-K), at 10 (Mar. 1, 2007); Washington Mutual Inc., Annual Report, (Form 10-K), at 7 (Mar. 1, 2007).

the Federal Reserve, although the Federal Reserve would be the agency that would supervise financial conglomerates that were deemed to pose systemic risk.

One major problem with the Financial Services Oversight Council would be the difficulty of getting the agencies to work well with each other. The members of the Financial Services Oversight Council do not have a strong history of working well together. This is due in part to the fact that each of these agencies has different regulatory objectives and constituencies. Some of these agencies have engaged in bitter turf disputes in the past over who had the right to regulate a particular product or firm. The experience of FFIEC illustrates this. FFIEC only has five members, but how well those members cooperated with one another has been highly dependent on the individuals representing each agency at any given time.[1260] As a result, it suffered from cooperation and coordination problems at various times in its history. These types of problems would likely to be worse with the Financial Services Oversight Council, which would have more members than the five that participate in FFIEC. Various studies on boards of directors have found that as the number of board members increases the coordination and cooperation problems worsen.[1261]

C. What Happened to the Proposal?

The Dodd-Frank Act enacted a modified version of the 2009 Treasury Proposal's recommendation to create a National Bank Supervisor. The Dodd-Frank Act transferred the OTS's supervisory functions for thrifts to the OCC and the OTS's supervisory functions for thrift holding companies to the Federal Reserve.

The Dodd-Frank Act also enacted a modified version of the Consumer Financial Protection Agency. It created the Consumer Financial Protection Bureau as an independent entity within the Federal Reserve. The CFPB receives its funding from the Federal Reserve. It has authority to issue consumer protection rules on all financial products, except insurance.

[1260] BANKING AGENCY OFFICES OF INSPECTOR GENERAL, DEP'T OF THE TREASURY, FED. DEPOSIT INS. CORP., BD. OF GOVERNORS OF THE FED. RESERVE SYS., JOINT EVALUATION OF THE FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL 14-15 (2002) [hereinafter OIG FFIEC REPORT] (discussing problems among the banking regulators with creating uniform examination procedures and reports), 16-18 (discussing problems with expanding the number of agencies on FFIEC and problems concerning coordination efforts between the banking agencies and the SEC).

[1261] Theodore Eisenberg, Stefan Sundgren, & Martin T. Wells, *Larger Board Size and Decreasing Firm Value in Small Firms*, 48 J. FIN. ECON. 35, 53 (1998) (finding that larger boards in small firms led to lower firm performance due in part to problems with communication and coordination); David Yermack, *Higher Market Valuations of Companies With a Small Board of Directors*, 40 J. FIN. ECON. 185, 185-186 (1996) (finding that the stock markets reward companies with small boards of directors with higher stock valuation); Martin A. Lipton and Jay W. Losch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. LAWYER 59, 70-72 (1992) (noting that boards with more than ten members are slower to make decisions, and have less candid discussions). *But see* Mohamed Belkhin, *Board of Directors' Size and Performance in the Banking Industry*, 5 INT'L J. MANAGERIAL FIN. 201 (2009) (finding no negative relationship associated with size of board and the firm's performance); Kenneth M. Lehn, Sukesh Patro, & Mengxin Zhao, *Determinates of the Size and Composition of US Corporate Boards: 1935-2000*, 38 FIN. MANAGEMENT 747, 748 (Winter 2009) (finding "no robust relationship" between board size and firm performance); Jeffrey L. Coles, Naveen D. Daniel, & Lalitha Naveen, *Boards: Does One Size Fit All*, 87 J. FIN. ECON. 329, 351 (2008) (concluding that certain types of firms benefit from larger boards).

Finally, the Dodd-Frank Act created the Financial Stability Oversight Council (FSOC), which is equivalent to the 2009 Treasury Proposal's Financial Services Oversight Council. The number of members of the FSOC, however, is larger than the number that the Treasury originally proposed. The FSOC is chaired the Treasury Secretary and is comprised of nine other voting members who are the Chairman of the Federal Reserve Board of Governors, the Comptroller of the Currency, the Director of the FDIC, the SEC Chairman, the CFTC Chairman, Director of the Consumer Financial Protection Bureau (CFPB), the Director of the FHFA, the Chairman of the NCUA, and an insurance expert appointed by the president.[1262] The FSOC also has five nonvoting members, including the Director of the Federal Insurance Office (FIO), the Director of Office of Financial Research, and three representatives from the state financial regulators with one of these representing each of the major sectors - banking, securities, and insurance.[1263]

The FSOC has all of the powers that the 2009 Treasury Proposal recommended for the Financial Services Oversight Council as well as some additional powers. The Dodd-Frank Act gave the FSOC the power to classify any entity that is not already a financial holding company, a bank holding company, or a thrift holding company, which are all subject to supervision by the Federal Reserve, as a nonbank financial company to be supervised by the Federal Reserve.[1264] In order to classify a firm as a nonbank financial company supervised by the Federal Reserve, two-thirds of the voting members then serving on the FSOC must conclude that it warrants such supervision because the firm is a nonbank financial company and that its "material financial distress" or "the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities" of the company "could pose a threat to the financial stability of the United States."[1265] To help the FSOC make this determination, the Dodd-Frank Act lists ten factors that they should consider as well as concluding that they may consider "any other risk-related factors" that they consider appropriate.[1266]

Nonbank financial companies are defined as those whose gross revenues or total assets from financial activities equal or exceed 85 percent of their total gross revenues or total assets from all sources.[1267] This recognizes that such a bright line rule could lead to some firms attempting to avoid being classified as a nonbank financial company by keeping either their total gross revenues or total assets from financial activities under the 85 percent threshold. The act includes an antievasion provision which allows two-thirds of the voting members of the FSOC to agree to place a financial company under the supervision of the Federal Reserve even though that company has organized itself in such a way as to fall outside the definition of a nonbank financial company, provided that the "material financial distress" of the company poses a threat to the financial stability of the United States.[1268]

[1262] DODD-FRANK ACT, *supra* note 1158, §111(b)(1)(codified at 15 USC. §5321(b)(1)).
[1263] *Id.,* §111(b)(2)(codified at 15 USC. §5321(b)(2)).
[1264] *Id.,* §113 (codified at 12 USC. §5323).
[1265] *Id.,* §113(a)(1) (codified at 12 USC. §5323)
[1266] *Id.,* §113(a)(2) (codified at 12 USC. §5323).
[1267] *Id.,* §102(a)(6), 124 Stat. 1392 124 Stat. 1391 (to be codified at 12 USC. §5311).
[1268] *Id.,* §113(c), 124 Stat. 1399 (to be codified at 12 USC. §5323).

XXXI. H.R. 3012 -- Markets and Trading Reorganization Act of 2013

A. The Proposal

Rep. Barney Frank in his last year in Congress proposed a bill, the Markets and Trading Reorganization Act that would have merged the SEC and the CFTC to create a new Securities and Derivatives Commission (SDC). This bill was reintroduced in the next session of Congress as H.R. 3012 by Rep. Michael Capuano (D-MA7), a Democrat.[1269] He had four cosponsors for this bill: Rep. John Delaney (D-MD6), Rep. James Himes (D-CT4), Rep. Stephen Lynch (D-MA8) and Rep. Denny Heck (D -WA10).

1. Structural Reorganization

Like the SEC, the proposed SDC would be governed by a five-member commission, whose members would be appointed by the President with the advice and consent of the Senate, for five-year terms.[1270] The SDC would have three divisions: a Markets and Trading Division, an Issuers and Financial Disclosure Division, and an Enforcement Division.[1271] It would be created by having the SEC and the CFTC transfer all of their functions and employees to the SDC.

The bill does not address which congressional committees would oversee it. Thus, it does not address one of the major stumbling blocks of prior proposals to merge the SEC and the CFTC, the unwillingness of congressional committees to have their oversight powers reduced. Because it fails to address this issue, it is unclear which congressional committees would oversee the new agency.

2. Proposed Implementation

Reorganization of Regulatory Powers: H.R. 3012 requires the merger to be completed within one year after H.R. 3012 is enacted.[1272] The bill would allow the initial commissioners to have staggered terms so that their terms do not all end at the same time.[1273] The bill does not discuss exactly how the functions of the agencies will be transferred to the SDC.

Personnel Issues: To implement the merger, all the employees of both the SEC and the CFTC would be transferred to the SDC.[1274] In addition the salaries of the transferred employees would be adjusted so that they "align" with one another and no employee will have his salary lowered because of this adjustment.[1275] Each transferred employee will be placed in a position within the SDC that fulfills the same functions as the one that they held at their prior agency.[1276]

[1269] H.R. 3012, 113th Cong., 1st Sess. (2013).
[1270] *Id.* §102.
[1271] *Id.* §103.
[1272] *Id.* §601.
[1273] *Id.* §301.
[1274] *Id.* §301(b).
[1275] *Id.* §301.
[1276] *Id.*

Funding the Reorganization: Like the SEC and CFTC, the SDC would collect fees from the entities that it regulates, but its budget would be determined by appropriations from Congress.[1277]

B. Arguments For and Against the Proposal

All of the same advantages and disadvantages for a merger between the SEC and the CFTC that were first identified by the Brady Commission in 1988 and the GAO in 1995 apply to this proposed merger. As noted above, the main benefit to be derived from this bill is the elimination of the existing duplication and overlap between the SEC and the CFTC.

C. What Happened to the Proposal?

On August 2, 2013, the bill was referred to House Committee on Financial Services and the House Committee on Agriculture.[1278] GovTracks predicted that the chances of this bill becoming a law are only 7 percent.[1279] The 113th Congress did not enact this bill prior to the expiration of its term.

Conclusion

In reviewing the history of proposals to consolidate federal financial regulators, three major conclusions can be drawn about the prior proposals. First, the pressure necessary to support the consideration of consolidation proposals occurs in relatively short bursts of only a few years. When reviewing the past proposals, they have tended to come in clusters or waves, in which multiple proposals are put forward by different people or groups within six relatively short groups or clusters: (1) cluster one in 1915-1921, (2) cluster two in 1937-39, (3) cluster three in 1961-65, (4) cluster four in 1975-77, (5) cluster five in 1983-89, and (6) cluster six in 1993-97.[1280] What this pattern suggests is that there are narrow windows when the idea of consolidation and the will to act upon it have held some currency. Unfortunately, in most of the cases examined, those windows closed before the proposed reforms were implemented. The actual implementation of proposals to consolidate federal financial regulators has only occurred in two instances: (1) the merger of the FDIC and the FSLIC in 1989 following the savings and loan crisis and (2) the transfer of the supervisory functions of the OTS to the Federal Reserve and the OCC as part of the Dodd-Frank Act after the 2008 financial crisis.

All of the prior proposals to consolidate the federal banking regulators discussed in this paper can generally be placed into one of the following ten categories:

1. proposals to create a new agency (most frequently referred to as the Federal Banking Agency) that will assume the supervisory powers of the OCC, the FDIC, and the Federal Reserve;

[1277] *Id.* §401.
[1278] Bill Summary & Status, 113th Congress (2013 - 2014), H.R.3012, All Congressional Actions, Library of Congress Thomas Database, http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR03012:@@@X.
[1279] govTracks.us, Congress, Bills, H.R. 3012, https://www.govtrack.us/congress/bills/113/hr3012.
[1280] See Appendix A, which helps illustrate this point because it provides a timeline for the prior proposals.

2. proposals to transfer the supervisory powers of the OCC and the FDIC to the Federal Reserve;
3. proposals to transfer the supervisory powers of the FDIC and the Federal Reserve to the OCC;
4. proposals to transfer the supervisory powers of the OCC and the Federal Reserve to the FDIC;
5. proposals to merge the OCC and the OTS while leaving the other regulators alone;
6. proposals to transfer the powers of the OTS to the OCC and the Federal Reserve as appropriate;
7. proposals to place all of the bank supervisory powers within the Treasury Department but not within the OCC;
8. proposals to consolidate the national bank supervisory powers into one agency and to consolidate the state bank supervisory powers into a separate agency;
9. proposals to create a twin peaks regulatory structure with one agency in charge of managing prudential risk and the other agency in charge of managing market conduct and consumer protection risks; and
10. other proposals that do not fall into any of the other nine categories.

Of these ten categories, the type of proposals that have been made most frequently fall into category 1 — proposals to create a new agency that will assume all of the supervisory powers of the OCC, the FDIC, and the Federal Reserve. While this proposal probably makes the most rational sense if the United States were building its regulatory structure from scratch while keeping the traditional institutional categories for financial services (banking, insurance, and securities), it has been too dramatic of a change to garner enough support within Congress, the Executive Branch, and the financial services industry to be enacted. Too many congressmen, bank regulatory administrators, and financial services firms have vested interests in the existing structure to allow them to be upended by a new agency.

The next type of proposals that were made frequently fall into category 2 — proposals to transfer the supervisory powers of the OCC and the FDIC to the Federal Reserve. Most of those proposals, however, occurred shortly after the Federal Reserve was created and the last one of these proposals was made in 1961. Since then, concerns about the Federal Reserve having too much power have made proponents of consolidation leery about consolidating banking supervision solely within the Federal Reserve.

The third most popular category of proposals and the only one to eventually be implemented was category 5 — proposals to only merge the OCC and the OTS while leaving the other regulators alone. The incremental nature of this proposal and dramatically poor performance of the OTS as a holding company supervisor in the run up to the 2008 financial crisis combined to create the forces necessary to get this proposal enacted.

The second conclusion to be drawn from this study of prior proposals is that narrow, incremental proposals are more likely to be adopted than proposals calling for dramatic changes to the regulatory structure. Of the ten variations of the proposals to consolidate the federal banking regulators, the one raised most frequently was not one of the ones that was ultimately enacted.

The most frequent proposal put forth was one to create a new Federal Banking Agency or Commission. The enacted proposals, however, were more limited in scope and involved merging all or part of an existing agency into another existing agency rather than creating a new agency. A comparison of the characteristics of these two different categories of proposals reinforces the view that Congress is extremely reluctant to make dramatic changes to the financial regulatory system.

The final conclusion to be drawn from this review of prior proposals is that future consolidation proposals are likely to be broader than most of the prior consolidation proposals. The vast majority of the prior proposals to consolidate federal financial regulators only focus on the banking regulators because they have evidenced the most duplication and overlap among regulators at the federal level. The next most frequent set of proposals are calls to merge the SEC and the CFTC. Only one prior proposal, the *Blueprint for a Modernized Financial Regulatory Structure* by the U.S. Department of the Treasury called for a more sweeping consolidation of financial regulators from different industry segments. It is also the only one to include consolidating some of the state regulation of financial services into one or more federal financial regulators.

The prior proposals reflect the fact that the United States has traditionally viewed banking, securities, and insurance as discrete industries that should have their own separate regulators. Only within the past decade have views begun to shift as financial innovations and hybrid products have blurred or eliminated the traditional distinctions between banking, securities, and insurance and as the growth of financial conglomerates that offer a wide array of financial services have underscored the need for more effective consolidated supervision. Simply consolidating all banking supervision into a single agency, like the OCC or the FDIC, will not address the problems caused by financial conglomerates, such as AIG or Lehman Brothers, in the 2008 financial crisis. Financial services in the past two decades have become far more complex and interconnected than they were for most of the 70 years after the creation of the Federal Reserve. Consolidation proposals that made sense in simpler times might not reap the benefits needed to address the risks posed by today's hybrid products and financial conglomerates.

Appendix A

Timeline for the Creation of Federal Financial Regulators and Proposals for Their Consolidation

Date	Event
1863	Creation of the OCC within the U.S. Department of the Treasury
1913	Creation of the Federal Reserve
1919-21	Four congressional bills proposed abolishing the OCC and transferring its powers to the Federal Reserve
1932	Creation of the FHLBB
1933	Creation of the FDIC
1934	Creation of the SEC
1934	Creation of the NCUA in the Farm Credit Administration
1934	Creation of the FSLIC
1937	The Brownlow Committee issued its report on reorganizing the administrative agencies.
1937	The Brookings Institute issued its report recommending that the FDIC become the sole federal agency supervising banks.
1949	The Hoover Commission issued its report recommending that the Treasury assume control of the FDIC while three of the Hoover Commission task forces recommended that the Federal Reserve assume the bank supervisory powers of the OCC or the FDIC or both.
1956	Bank Holding Company Act of 1956 enacted. The Federal Reserve becomes responsible for supervising bank holding companies in addition to its other responsibilities.
1961	Commission on Money and Credit issued its report recommending that the bank supervision and examination powers of the FDIC and OCC be transferred to the Federal Reserve.
1962	The OCC's Advisory Committee on Banking issued its report recommending that the bank supervision and examination powers of the Federal Reserve be transferred to the OCC.
1965	H.R. 6885 -The Banking Act of 1965 bill (aka, the Patman Bill) proposed transferring the bank supervisory authority of the OCC, the FDIC, and the Federal Reserve as well as the depository insurance functions of the FDIC to the Treasury Department.
1970	Creation of the SIPC
1970	NCUA becomes an independent agency.
1970	Creation of the NCUSIF within the NCUA.
1971	The Hunt Commission proposed creating three new agencies: the Administrator of National Banks to take over the OCC's supervision of national banks, the Administrator of State Banks to take over the FDIC's and the Federal Reserve's supervision of state banks, and the Federal Deposit Guarantee Administrator to take over the insurance obligations of the FDIC, the FSLIC, and the NCUSIF.
1974	Creation of the PBGC.

Date	Event
1974	Creation of the CFTC.
1975	The Senate Banking Committee commissioned the Compendium of Major Issues in Bank Regulation, which recommended that the FDIC become the primary federal bank supervisor.
1975	FDIC Chairman Frank Wille proposed the creation of a five-member Federal Banking Board to handle the deposit insurance system and the creation of a Federal Supervisor of State Banks to assume the FDIC's and the Federal Reserve's supervisory functions for state banks.
1975	The House Banking Committee released a four-volume work entitled Financial Institutions and the Nation's Economy "Discussion Principles" which became known as the FINE Study. It recommended the creation of the Federal Depository Institutions Commission to administer all the supervisory functions of the FDIC, the Federal Reserve, the OCC, the FHLBB, and the NCUA.
1977	The Senate Governmental Affairs Committee proposed the Consolidated Banking Regulation Act, which would have merged supervisory functions of the banking regulators into a five-member Federal Bank Commission.
1983	The FDIC released its Deposit Insurance in a Changing Environment study, which recommended merging the FDIC and the FSLIC into a single agency and merging the supervisory functions of the FHLBB, the Federal Reserve, and the OCC into another agency.
1984	The Task Group on Regulation of Financial Services produced its Blueprint for Reform, which recommended that the federal supervision of banks be concentrated in the Federal Reserve for state banks and the new Federal Banking Agency for national banks. Because this group was chaired by then-Vice President George H.W. Bush, it was referred to as the Bush Task Group.
1987	Rep. Druie Barnard (GA-10) introduced H.R. 3799 – Depository Institution Affiliation Act, which would have created a National Financial Services Committee to establish uniform principles and standards for the examination and supervision of financial institutions and other providers of financial services.
1988	The Presidential Task Force on Market Mechanisms issued its report that suggested that it might be beneficial to merge the SEC and the CFTC. The Task Force was chaired by Nicholas Brady and so it was sometime referred to as the Brady Commission.
1989	FHLBB abolished.
1989	Creation of the OTS.
1989	FSLIC merged with the FDIC.
1990	The National Commission on Financial Institution Reform, Recovery and Enforcement issues its report that recommended transferring the supervisory and chartering powers of the OCC and the OTS to the FDIC.
1991	The Treasury issued its report on Modernizing the Financial System, in which it recommended that the banking regulators be reduced to two – the Federal Reserve that would supervise state banks and the Federal Banking Agency in the Treasury that would supervise national banks.

Date	Event
1993	H.R. 1227 – Bank Regulatory Consolidation and Reform Act bill proposed merging the OCC and the OTS into a new Federal Bank Agency.
1993	H.R.1214/S. 1633 – Regulatory Consolidation Act bills proposed creating a Federal Banking Commission that would assume control of the supervisory functions of the OCC for national banks, of Federal Reserve for member banks, of the OTS for thrifts, and of the FDIC for insured banks and thrifts and for foreign banks.
1993	The Clinton Administration released its plan for consolidating the supervision of all FDIC-insured banks and thrifts into a new Federal Banking Commission.
1995	Federal Reserve Board member John P. LaWare proposed that the federal bank supervisory duties be split between the Federal Reserve and the Federal Banking Commission created from the merger of the OCC and the OTS.
1995	H.R. 17 – Bank Regulatory Consolidation and Reform Act bill proposed creating the Federal Bank Agency that would combine the supervisory powers of the OCC and the OTS.
1995	H.R. 1769 – Federal Deposit Insurance Act Amendment bill proposed merging the Savings Insurance Fund and the Bank Insurance Fund of the FDIC into a single Deposit Insurance Fund and merging the OCC and the OTS into a Federal Bank Agency.
1995	H.R. 2363 – Thrift Charter Conversion Act bill proposed abolishing the OTS and transferring its personnel and powers to the OCC, the FDIC, or the Federal Reserve as appropriate.
1995	H.R. 718 – Markets and Trading Commission Act bill proposed merging the SEC and the CFTC.
1996	James L. Bothwell of the GAO proposed, among other things, consolidating the bank supervisory functions of the OCC, the OTS, and the FDIC.
1997	H.R. 10 – Financial Service Competition Act bill proposed merging the OTS with the OCC and to merge the BIF and the SAIF.
2005	Federal Deposit Insurance Reform Act of 2005 was enacted and it required the FDIC to merge the BIF and the SAIF into a single deposit insurance fund managed by the FDIC.
2006	The merger of the BIF and the SAIF to form the Deposit Insurance Fund (DIF) takes effect on March 31.
2008	The U.S. Treasury released its Blueprint for a Modernized Financial Regulatory Structure that outlined a series of structural changes that ultimately would have created a twin peaks regulatory structure in the United States at the federal level.
2011	Creation of the CFPB.
2011	Dodd-Frank Act merged the OTS's functions with the OCC and the Federal Reserve as appropriate.
2013	H.R. 302 – Markets and Trading Reorganization Act bill proposed to merge the SEC and the CFTC into a new Securities and Derivatives Commission.

Appendix B

Reorganizational Structures in Proposals

Date	Proposal	Merge bank supervision into Federal Reserve	Merge bank supervision into Treasury Dept. but not into OCC.	Merge bank supervision into OCC	Merge bank supervision into FDIC	Merge bank supervision into a new agency (FBA, FBC, etc.)	Consolidate bank supervision in the Federal Reserve and the FDIC	Create one agency for national banks and another for state banks	Merge the OCC and the OTS into a single agency	Merge SEC and CFTC into a single agency	Reorganize to regulate by objective in a multi-peak structure	Other reorganizational structures
1915	Federal Reserve Advisory Council Proposal	X										
1919	H.R. 15983/S. 5537 Bills	X										
1919	S. 1370 Bill	X										
1920	S. 4907 Bill	X										
1937	Brownlow Committee Proposal		X									
1937	Brookings Institution Proposal						X					
1949	Hoover Commission Proposal		X									
1949	Hoover Commission Task Force on Regulatory Commissions	X										
1949	Hoover Commission Task Force on Fiscal Budgeting and Accounting	X										
1949	Hoover Commission Task Force on Lending Agencies	X										
1961	Commission on Money and Credit	X										
1962	OCC Advisory Committee on Banking							X				
1965	Patman Bill – H.R. 6885		X									
1965	Multer Bill – H.R. 107					X						
1971	Hunt Commission Proposal							X				
1975	Compendium of Major Issues in Banking Regulation – Robertson Proposal					X						
1975	Compendium of Major Issues in Banking Regulation – Bucher Proposal					X						
1975	Compendium of Major Issues in Banking Regulation – Sheehan Proposal	X										
1975	Compendium of Major Issues in Banking Regulation – Carter H. Golembe Associates, Inc. Proposal				X							
1975	Compendium of Major Issues in Banking Regulation – Saulnier Proposal				X							
1975	Wille Proposal							X				
1975	Financial Institutions and the Nation's Economy (FINE) Study's Proposal					X						
1977	Senate Governmental Affairs Committee Proposal					X						
1983	FDIC's Deposit Insurance in a Changing Environment Report's Proposal					X						
1984	Bush Task Group's Blueprint for Reform					X						
1987	S. 1905 – Depository Institution Affiliation Act											X
1988	Brady Commission – Initial Proposal											X
1988	Brady Commission – Second Proposal									X		

Date	Proposal	Merge bank supervision into Federal Reserve	Merge bank supervision into Treasury Dept. but not into OCC.	Merge bank supervision into OCC	Merge bank supervision into FDIC	Merge bank supervision into a new agency (FBA, FBC, etc.)	Consolidate bank supervision in the Federal Reserve and the FDIC	Create one agency for national banks and another for state banks	Merge the OCC and the OTS into a single agency	Merge SEC and CFTC into a single agency	Reorganize to regulate by objective in a multi-peak structure	Other reorganizational structures
1990	National Commission on Financial Institution Reform, Recovery & Enforcement Commission Proposal				X							
1991	U.S. Treasury Report on Modernizing the Financial System Proposal					X						
1993	H.R. 1227 – Bank Regulatory Consolidation & Reform Act					X						
1993	H.R. 1214/S. 1633 – Regulatory Consolidation Act					X						
1993	Clinton Plan – S. 1895					X						
1995	LaWare Proposal							X				
1995	H.R. 17 – Bank Regulatory Consolidation & Reform Act											X
1995	H.R. 1769 – Federal Deposit Insurance Amendments Act								X			
1995	H.R. 2363/S. 1415 – Thrift Charter Conversion Act								X			
1995	H.R. 718 – Markets and Trading Commission Act											X
1996	GAO Report on Bank Regulation Proposal								X			
1997	H.R. 10 – Financial Services Act								X			
2008	U.S. Treasury Blueprint – Short Term Proposal									X		X
2008	U.S. Treasury Blueprint – Intermediate Term Proposal								X			X
2008	U.S. Treasury Blueprint – Long Term Proposal										X	
2009	U.S. Treasury Regulation Reform Proposal								X			X
2013	H.R. 3012 – Markets & Trading Reorganization Act									X		

Appendix C

Glossary of Acronyms

Acronym	Meaning
BIF	Bank Insurance Fund
CBA	Cost-benefit analysis
CFMA	Commodities Futures Modernization Act
CFPB	Consumer Financial Protection Bureau
CFTC	Commodities Futures Trading Commission
CSBS	Conference of State Bank Supervisors
CSE	Consolidated supervised entity
DIAA	Depository Institution Affiliation Act
DIF	Deposit Insurance Fund
Exim Bank	U.S. Export-Import Bank
FBA	Federal Banking Agency or Federal Bank Agency
FBC	Federal Banking Commission
FDIC	Federal Deposit Insurance Corporation
FDICIA	Federal Deposit Insurance Corporation Improvement Act
FFSP	Federal financial service provider
FHLBB	Federal Home Loan Bank Board
FIDI	Federal insured depository institution
FII	Federal insurance institution
FINE Study	Financial Institutions and the Nation's Economy Study
FMCC	Financial Markets Coordinating Council
FSLIC	Federal Savings and Loan Insurance Corporation
H.R.	House of Representatives bill
MOC	Mortgage Origination Commission
MTC	Markets and Trading Commission
NASAA	North American Securities Administrators Association
NAIC	National Association of Insurance Commissioners
NCUA	National Credit Union Administration
NCUSIF	National Credit Union Share Insurance Fund
NFSC	National Financial Services Committee
OCC	Office of the Comptroller of the Currency in the U.S. Department of the Treasury
OTS	Office of Thrift Supervision in the U.S. Department of the Treasury
PBGC	Pension Benefit Guaranty Corporation
RFC	Reconstruction Finance Corporation
S.	Senate bill
SAIF	Savings Insurance Fund
SDC	Securities and Derivatives Commission
SEC	Securities and Exchange Commission
SIBHC	Supervised investment bank holding company
SIPC	Securities Investor Protection Corporation
SLHC	Savings and loan holding company

Acronym	Meaning
SRO	Self-regulatory organization
THC	Thrift holding company
UMRA	Unfunded Mandates Reform Act