THE VOLCKER ALLIANCE
Working for Effective Government

Consolidated Financial Regulation: Six National Case Studies and the Experience of the European Union

Elizabeth F. Brown

This paper was prepared for the Volcker Alliance as background for its project on structural reform of the federal financial regulatory system. The views expressed in this paper are those of the author and do not necessarily reflect the position of the Volcker Alliance. Any errors or omissions are the responsibility of the author.

Ms. Elizabeth F. Brown, J.D., is an assistant professor in the Department of Risk Management and Insurance, J. Mack Robinson College of Business, Georgia State University. Contact Author: Elizabeth F. Brown, Department of Risk Management and Insurance, Georgia State University, P.O. Box 4036, Atlanta, GA 30302-4036; tel: 404-413-7501; cell: 404-247-8713; email: ebrown49@gsu.edu.

Table of Contents

Executive Summary

- This report provides an overview of how six, developed nations created consolidated regulatory structures for financial services (e.g., banking, securities, insurance). It also provides a summary of how the European Union has consolidated some forms of financial services regulation at the European Union level. It is not intended to be an exhaustive study of these regulatory structures. Instead, it highlights to what extent these experiences may provide useful lessons for the United States as it considers consolidating its financial services regulators.

- Of the six national case studies, four of the six countries – Australia, Canada, France, and the United Kingdom – have adopted variations of the twin peaks model to regulate financial products and services. Usually, a twin peaks model has one agency that predominately regulates prudential issues and another agency that predominately regulates market conduct issues. Only one nation, Japan, currently employs a single regulator.

- While four of the countries use a twin peaks model, none of these countries has consolidated all financial regulation into the agencies established for dealing prudential risks and market conduct risks. For example, the agencies insuring deposits – the Financial Services Compensation Scheme in the United Kingdom and the Fonds de Garantie des Dépôts et de Résolution in France – are independent entities and not subsidiaries of or departments within the twin peak regulators.

- In five of the six nations studied, the governments created the existing regulatory structures in response to a series of financial crises over the past two decades. Only Australia adopted its consolidated structure in a period of relative calm and not in the aftermath of a financial crisis.

- Only two of the four nations with twin peaks structures have operated them for over a decade – Australia and Canada. The twin peaks structures in France and the United Kingdom have been in place for less than four years. As a result, there is insufficient evidence to draw many useful conclusions about the success or failure of the twin peaks model based on the French and British experiences. Some evidence exists that the twin peak structures in Australia and Canada helped those nations avoid the bailouts and severity of the financial problems that the United States suffered during the 2008 financial crisis.

- The twin peaks structures are not problem-free. At least one nation, Australia, has begun to question whether it has placed too many responsibilities into its market conduct regulator. In 2014, the Economics Reference Committee of the Australian Senate assessed the performance of the Australian Securities and Investments Commissions (ASIC).[1] It noted that ASIC had far more responsibilities than its counterparts in other countries.[2] ASIC is responsible for registering corporations in addition to regulating the markets for banking, securities, and insurance products.[3] In the United Kingdom, Companies House registers and regulates corporations.[4] In the United States, state agencies register and regulate corporations. The report recommended that the Australian government move the corporate registry functions of ASIC to another agency to allow ASIC to focus on its financial services responsibilities.[5]

[1] Economics Reference Committee, Senate, Commonwealth of Australia, Performance of the Australian Securities
[2] *Id*. at 401.
[3] *Id*.
[4] *Id*.
[5] *Id*. at 416-417.

- Furthermore, the case studies illustrate that agencies that lack control over their budgets have been found to do a poorer job as regulators and supervisors than those that have control over their budgets. For example, the 2014 report on ASIC by the Economics Reference Committee of the Australian Senate raised concerns that ASIC was a "weak timid, hesitant regulator, too ready and willing to accept uncritically the assurances of a large institution that there were no grounds for ASIC's concerns or intervention."[6] The committee concluded that ASIC lacked adequate funds to adequate undertake all of its responsibilities and it recommended that changes be made to allow ASIC to move to a user-pays model under which ASIC would be funded from the fees assessed on the firms it supervises rather than from government appropriations.[7]

- Of the six nations studied in this report, less than half of them have separated into different entities the responsibilities for developing and issuing of financial services regulations from the responsibilities for implementing such regulations and supervising financial firms and markets. Canada, France, Japan, and the United Kingdom do not separate regulation from supervision. To varying degrees, Australia and Germany separate regulation from supervision. At the federal level in Australia, the Australian Treasury has responsibility for developing economic policy, which includes developing and issuing regulations for banks, insurance companies, and securities firms. Through the Council of Financial Regulators, the Australian Treasury works with the Bank of Australia, the Australian Prudential Regulatory Authority, and the Australian Securities and Investments Commission to develop regulations. At the federal level in Germany, the Ministry of Finance is responsible for developing and issuing the regulations governing banks, insurance companies, and securities firms. The German Ministry of Finance and the German Ministry of Labor share responsibility for regulating pension funds.

- Of the six nations studied, only one nation, the United Kingdom, experimented with a single financial regulator before adopting its current modified twin peaks structure. In 2000, the United Kingdom created the UK Financial Services Authority (UK FSA) to both regulate and supervise financial services firms. It was responsible for both prudential and market conduct regulation and supervision. In the wake of the 2008 financial crisis, however, the UK government deemed the experiment unsuccessful. Internally, the UK FSA's structure employed an institutional and functional organizational structure with different offices or departments for different financial services sectors (i.e., banks, insurance companies, etc.). The United Kingdom's consolidated structure did not handle the financial crisis any better than the fragmented US structure. In 2010, the newly elected UK government announced that it was restructuring the way that financial services were regulated and proceeded to adopt a modified twin peaks regulatory structure.[8] The UK government concluded that the UK FSA had failed to adequately fulfill its prudential supervisory functions. The UK government moved those functions back to the Bank of England with the Bank of England serving as a macroprudential regulator and the newly formed Prudential Regulatory Authority, which is a subsidiary of the Bank of England, serving as the microprudential regulatory authority.

- Japan's single regulatory structure is the only one that was formed from a spin-off rather than a consolidation of agencies, although both Canada and the United Kingdom experimented with more consolidated structures before adopting their present regulatory structures. Japan removed the responsibilities for financial services supervision and regulation from the Ministry of Finance and created the Financial Services Agency to handle these responsibilities. Japan highlights the potential

---

[6] *Id*. at xviii.
[7] *Id*. at xxxii.
[8] H.M. GOVERNMENT, THE COALITION: OUR PROGRAMME FOR GOVERNMENT 9 (2010) [hereinafter UK Government 2010 Reform Proposal].

dangers of allowing a highly political government agency, such as the Ministry of Finance, to have control over the regulation and supervision of financial services.

- The difference types of legal systems employed in the six nations studied might affect how well their consolidated financial regulatory structures would work in the United States. France, Germany, and Japan are civil law countries. In fact, the Japanese legal system is based on the German civil law system. Canada, Australia, and the United Kingdom are common law countries, like the United States. As a result, the way that financial regulations and laws get interpreted by the courts in Canada, Australia, and the United Kingdom will more closely resemble how US courts would interpret financial regulations and laws.

- France, Germany, and the United Kingdom are members of the European Union. The European Union has created supra-national entities to harmonize the national regulations for banking, insurance, and securities. Across the European Union, the European Central Bank (ECB) plays a role in harmonizing banking regulations, the European Insurance and Occupational Pensions Authority (EIOPA) plays a role in harmonizing insurance regulations, and the European Securities and Markets Authority plays a role in harmonizing securities regulations. As a result, the national financial services regulators in France, Germany, and the United Kingdom must comply with the standards and practices established by the European Union financial services regulators. Thus, they lack the level of independence of action that the regulators in Australia, Canada, and Japan have.

- The European Union has created the Single Supervisory Mechanism (SSM) to supervise banks operating within the European Union. Under the SSM, the European Central Bank works with national banking regulators to ensure the safety and soundness of banks operating within the European Union. The European Central Bank "directly supervises 123 significant banks" that hold about 82 percent of the banking assets within the European Union.[9] The SSM only came into force on November 4, 2014.

- The European Union created the European Insurance and Occupational Pensions Authority (EIOPA) to harmonize the national regulations governing insurance and pensions. Its immediate impact on the United States rests in its finalization and implementation of Solvency II, which sets the prudential and market conduct standards for insurance companies operating within the European Union. Solvency II would require that non-EU insurance companies be regulated both at the entity and group levels by a supervisory authority equivalent to the national authorities within the European Union in order for their capital held outside of the European Union to count towards their capital requirements. It is unclear at this time if US state regulation would be deemed equivalent under this standard, or to what extent the states would have to change their laws and regulations to be deemed equivalent. For now, the European Union has unilaterally resolved the matter by allowing the European Commission and EIOPA jointly to classify a non-EU country, like the United States, as having solvency standards that are "provisionally equivalent" to those required under Solvency II as long as they meet certain standards. The European Union felt pressured to enact this compromise after lobbying from many large EU insurers with US operations. Prudential, one of the United Kingdom's largest insurance companies, evened warned that it was considering relocating its operations out of London because of the Solvency II equivalence requirements and the questions raised about whether the United States would meet them.

- EIOPA might also serve as a template for the United States if the United States eventually decides to give the federal government a role in insurance regulation. Currently, insurance is regulated at the

[9] European Central Bank, Banking Supervision, About, Single Supervisory Mechanism, https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html.

state level in the United States and the federal government plays little or no role in regulating individual insurance companies.

- To the extent that the ECB, the EIOPA, and the ESMA harmonize the regulations and practices of the EU national financial services regulators, it will give the EU nations greater influence over the development of international standards for banking, insurance, and securities regulations because they will share the same regulatory preferences when negotiating at international forums, like the Basel Committee, the International Association of Insurance Supervisors, the International Organization of Securities Commissions, or the Financial Stability Board.

CASE STUDIES

Australia

I. Background

Australia's current regulatory structure resulted from the Financial System Inquiry, also known as the Wallis Inquiry, which was conducted by the Australian Government in 1996.[10] It took place during a period of relative calm in Australia's financial markets and was not a reaction to any particular financial crisis.[11] The Wallis Inquiry recommended that the Australian government reorganize its financial regulators into a twin peaks model, in which the agencies aim to control certain risks. Australia created the Australian Securities and Investment Commission (ASIC) to regulate market conduct risks, such as market integrity and consumer protection issues, and the Australian Prudential Regulation Authority (APRA) to regulate prudential risks.[12] These two agencies are responsible for regulating these risks for the entire financial services sector in Australia.

While the Australian system is called a twin peaks model, ASIC and APRA are not the only agencies which regulate the financial system. The Reserve Bank of Australia (RBA) regulates systemic risks to the financial system, primarily by setting monetary policy.[13] The Australian Treasury also plays a key role by advocating policy reforms to enhance financial services regulation.[14] The Australian Competition and Consumer Commission (ACCC) affects financial services regulation through its management of Australia's anti-competition laws, which are equivalent to the antitrust laws in the United States.[15] In addition, some specialist financial firms are regulated by the governments of the provinces and territories, not ASIC.

In 1992, Australia enacted the Superannuation Guarantee (Administration) Act 1992[16] and the Superannuation Guarantee Charge Act 1992,[17] which required all employers to make a tax deductible contribution equal to a fixed percentage of an employee's salary into a superannuation plan[18] on behalf of their employees or pay a charge equal to the shortfall in contributions for individual employees, an interest fee, and an administration fee.[19] As a result of legislation enacted by the Australian government in 2012, the mandatory contribution rate is being raised incrementally from 9 percent in 2012 to 12 percent

---

[10] Jeremy Cooper, *The Integration of Financial Regulatory Authorities — the Australian Experience,* Paper Presented to the Comissão de Valores Mobiliários 30th Anniversary Conference "Assessing the Present, Conceiving the Future," (Sept. 4-5, 2006) at 2. This inquiry was also known as the Wallis Inquiry because it was chaired by Stan Wallis, a noted Australian businessman. *Id.*

[11] *Id.*

[12] Cooper, *supra* note 10, at 4.

[13] *Id*. at 4.

[14] Australian Government, The Treasury, WHO WE ARE AND WHAT WE DO 7 (2009-10), http://www.treasury.gov.au/documents/1308/PDF/Who%20We%20Are%202009_W.pdf

[15] *Id.*

[16] Superannuation Guarantee (Administration) Act 1992, Commonwealth Consolidated Acts (2010), http://www.austlii.edu.au/au/legis/cth/consol_act/sga1992430/

[17] Superannuation Guarantee (Administration) Amendment Act of 2012 (2012); Commonwealth Consolidated Acts (2010), *supra* note 16.

[18] According to the Association of Superannuation Funds of Australia (ASFA), "superannuation" is" a long-term savings arrangement which operates primarily to provide income for retirement." ASFA Dictionary of Superannuation, http://www.superannuation.asn.au/Dictionary.aspx (search "superannuation"). ASFA defines a "superannuation fund or plan or scheme" as "usually a trust fund, established primarily to provide benefits for members on their retirement, or alternatively, on their resignation, death, disablement or other specified events." *Id.* (search "superannuation fund or plan or scheme"). According to Investopedia, a "superannuation plan" is often simply referred to as a "company pension plan." Investopedia, Superannuation, http://www.investopedia.com/terms/s/superannuation.asp.

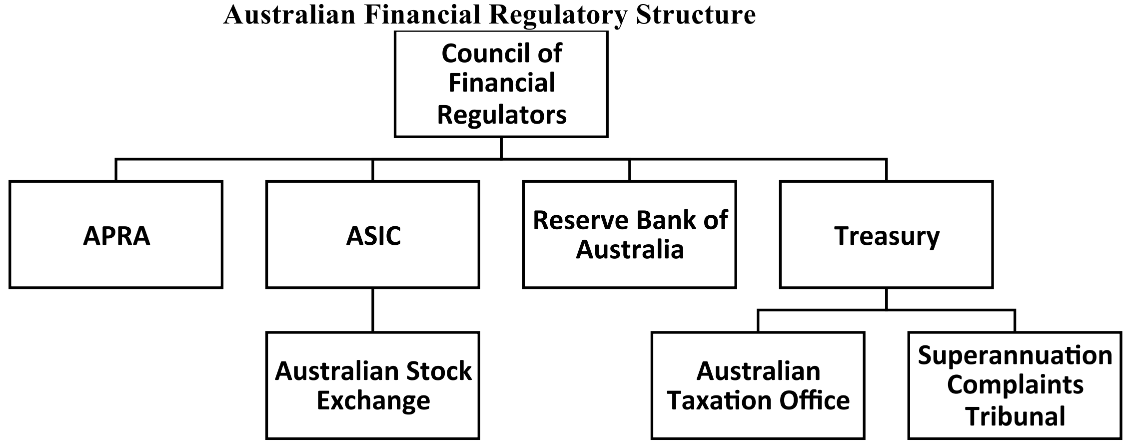
[19] Superannuation Guarantee (Administration) Act 1992, *supra* note 16, at §§16-17; Superannuation Guarantee Charge Act 1992, *supra* note 17, at §§5-6.

by July 1, 2019.[20] While APRA and ASIC regulate the entities offering superannuation plans and the products offered in those plans, two other government agencies play crucial roles in enforcing the superannuation rules — the Australian Taxation Office and the Superannuation Complaints Tribunal.

Prior to the financial crisis of 2008, Australia did not offer any form of deposit insurance similar to that offered by the FDIC.[21] It also did not offer any form of protection for customer claims against brokerage firms that become insolvent similar the protection to that provided by US Securities Investor Protection Corporation nor did it offer any protection for policyholders in the event that an insurance company became insolvent.

In order to coordinate the major regulators of financial services, the Australian Government established the Council of Financial Regulators, which consists of APRA, ASIC, the RBA, and the Treasury.[22] The Council was not created through legislation and has no regulatory powers independent from those possessed by its members.[23] Figure 1 illustrates the Australian regulatory structure for pensions and financial services.

Figure 1
Australian Financial Regulatory Structure



[20] Superannuation Guarantee (Administration) Act of 1992, *supra* note 16, §19(2) (as amended by the Superannuation Guarantee (Administration) Amendment Act of 2012 (2012) §3).

[21] *Id.* at 13. The Australian Government introduced the Financial Claims Scheme in October 2008 to provide deposit insurance and to protect general insurance policyholders in the event that the company that issued their policy becomes insolvent. APRA, DISCUSSION PAPER: FINANCIAL CLAIMS SCHEME FOR AUTHORIZED DEPOSIT-TAKING INSTITUTIONS 6 (January 2010), http://www.apra.gov.au/Policy/upload/DP-FCS-for-ADIs-Jan-2010.pdf; APRA, Financial Claims Scheme, Questions and Answers 1-2 and 4-5 (April 16, 2009), http://www.apra.gov.au/upload/FINANCIAL-CLAIMS-SCHEME-Q-and-A-16April09.pdf [hereinafter APRA FCS QUESTIONS AND ANSWERS]

[22] THE COUNCIL OF FINANCIAL REGULATORS' CHARTER (Jan. 13, 2004), http://www.rba.gov.au/fin-stability/reg-framework/cfr-charter.html

[23] The Council of Financial Regulators, ANNUAL REPORT 5 (2002), http://www.rba.gov.au/publications/annual-reports/cfr/2002.pdf

Australia is one of the few nations studied in this report that separates regulatory responsibilities from supervisory responsibilities. At the federal level in Australia, the Australian Treasury has responsibility for developing economic policy, which includes developing and issuing regulations for banks, insurance companies, and securities firms. Through the Council of Financial Regulators, the Australian Treasury works with the Reserve Bank of Australia, the Australian Prudential Regulatory Authority, and the Australian Securities and Investments Commission to develop regulations for financial services.

II. Reasons for the Consolidation

The Wallis Inquiry considered three possible regulatory structures: a single mega regulator model, a lead regulator model, and the twin peaks model.[24] The single mega regulatory model would regulate all financial services within a single agency.[25] The lead regulator model consisted of a single regulator that would be responsible for regulating financial conglomerates and would coordinate information gathering and regulation of such entities by the existing regulators.[26] Ultimately, the Wallis Inquiry recommended adoption of the twin peaks model rather than a single regulator model because of four concerns. The Wallis Inquiry was concerned that (1) a single regulator would be too powerful, (2) a single regulator would be too large to operate efficiently, (3) a single regulator would be premature given the existing structure of the Australian financial services sector, and (4) the prudential regulator, the market conduct regulator, and the Payments System Board within the Reserve Bank of Australia would operate best if allowed to use their own unique cultures.[27]

III. Australian Prudential Regulation Authority (APRA)

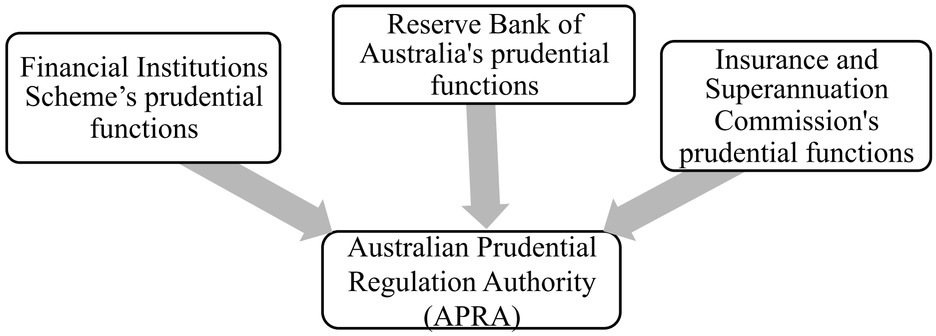
A. Agencies Consolidated to Create APRA

In 1997, the Wallis Inquiry recommended that the Australian government create a single prudential regulatory agency that would take over the existing prudential regulation functions of the Reserve Bank of Australia, the Financial Institutions Scheme, and the Insurance and Superannuation Commission.[28] The Australian Prudential Regulation Authority Act 1998 created APRA as a body corporate.[29]

---

[24] COMMONWEALTH OF AUSTRALIA, FINANCIAL SYSTEM INQUIRY FINAL REPORT 545-546 (1997) [hereinafter Wallis Inquiry]; Cooper, *supra* note 10, at 2-3.
[25] Wallis Inquiry, *supra* note 24, at 545; Cooper, *supra* note 10, at 3.
[26] Wallis Inquiry, *supra* note 24, at 545; Cooper, *supra* note 10, at 3.
[27] Wallis Inquiry, *supra* note 24, at 545; Cooper, *supra* note 10, at 4.
[28] Wallis Inquiry, *supra* note 24, at 19.
[29] Australian Prudential Regulation Authority Act 1998, Act. No. 50 of 1998 as amended (includes amendments up to Act. No. 54 of 1998), §13.

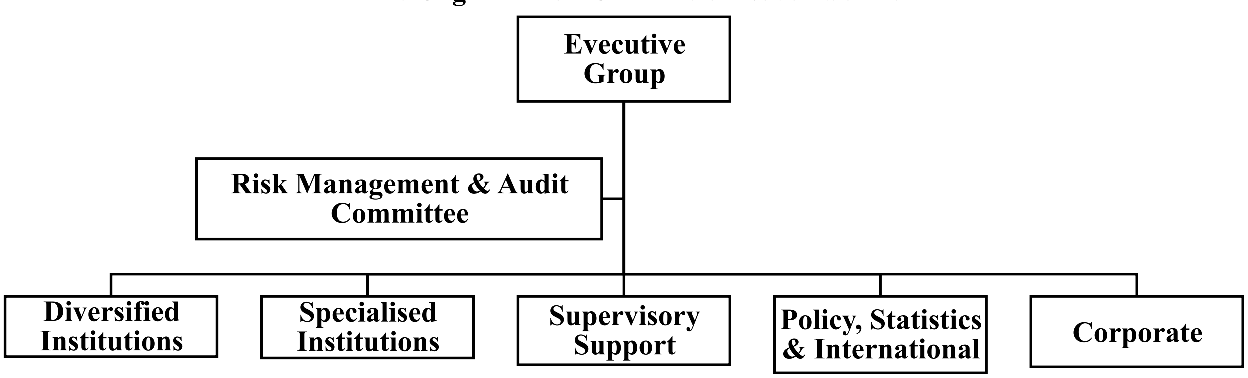
Figure 2
Consolidation to Create APRA



B. Governance of APRA

Originally, APRA was run by a chief executive officer and a nine member board.[30] Today APRA is run by an Executive Group composed of at least three members and no more than five members.[31] The Governor-General of Australia appoints the members and designates one of the members to serve as the Chair.[32] The Governor-General may also designate one member to serve as the Deputy Chair.[33] The members serve for the term specified at the time of their appointment and that term may not exceed five years.[34]

Figure 3
APRA's Organization Chart as of November 2014[35]



C. Funding of APRA

APRA is funding through levies on the financial services industry.[36] APRA collects these levies and pays

---

[30] Id., §§16-20, 27-31.
[31] Australian Prudential Regulation Authority Act 1998, Act. No. 50 of 1998 as amended (includes amendments up to Act. No. 62 of 2014) [hereinafter APRA Act], §16; APRA, About APRA, APRA's Governance, http://www.apra.gov.au/AboutAPRA/Pages/Governance.aspx.
[32] APRA Act, *supra* note 31, §§16, 18.
[33] *Id*., §18.
[34] *Id*., §20.
[35] APRA, Organisation Chart (Nov. 2014), http://www.apra.gov.au/AboutAPRA/WorkingAtAPRA/Documents/APRA-wide-organisational-chart-Nov-2014.pdf

them into the Australian government's Consolidated Revenue Fund (CRF).[37] APRA then receives a Special Appropriation from the Australian government in an amount equal to the net levy revenue minus an amount determined by the Australian Treasurer to be retained by the CRF.[38] The amounts retained by the CRF are to cover "the costs of activities of the Australian Taxation Office (ATO) for unclaimed monies, lost member functions and for the implementation of the Stronger Super – SuperStream reforms; the Australian Securities and Investments Commission (ASIC) for consumer protection and market integrity functions; and the Department of Human Services (DHS) for the administration of claims for early release of superannuation benefits on compassionate grounds."[39]

In 2014, APRA collected net levies and penalties equal to about AUS$257.1 million (about US$210.1 million), which it paid to the CRF.[40] In 2014, APRA received a Special Appropriation to cover its expenses of about AUS$109.5 million (about US$89.5 million), which represented approximately 42 percent of the net levies and penalties that it collected.[41]

The other sources of revenue for APRA are from rendering services, rental income, and other revenue. In 2014, these other sources equaled about AUS$4.9 million (about US$4.0 million).[42]

D. APRA's Areas of Responsibility

APRA manages' the prudential risks of authorized depository institutions (ADIs), insurance companies, and superannuation funds, which are a type of pension fund, by exercising its powers to authorize or license such firms, by monitoring and supervising the safety and soundness of such firms, and by taking steps to protect depositors, policyholders, or members in the event such firms get into financial difficulty, including taking control of such entities or closing down insolvent entities.[43] Australia‘s depository institutions include banks, credit unions, and building societies, which are similar to US savings and loans.

APRA does not regulate specialist mortgage originators and mortgage brokers, which are equivalent to the mortgage companies and mortgage brokers in the United States.[44] ASIC regulates such entities from a consumer protection perspective, not a prudential perspective. APRA, however, requires that any broker-originated loans assumed by regulated ADIs must comply with the ADIs' lending criteria and that the ADIs are responsible for monitoring and auditing such loans to verify that the broker-dealers applied such criteria when they made the loans.[45]

---

[36] APRA, ANNUAL REPORT 2014 113 (2014) [hereinafter APRA 2014 Annual Report].
[37] *Id*.
[38] APRA 2014 Annual Report at 113; APRA Act, *supra* note 31, §50.
[39] *Id*. at 113.
[40] APRA 2014 Annual Report, *supra* note 36, at 122; US Bd. of Governors of Fed. Res. Sys., Foreign Exchange Rates – H.10, Historical Rates for the Australian Dollar (Apr. 6, 2015) [hereinafter US-Australian Exchange Rates], http://www.federalreserve.gov/releases/h10/hist/dat00_al.htm, (Australian dollar-US dollar exchange rate as of Dec. 31, 2014).
[41] APRA 2014 Annual Report, *supra* note 36, at 122; US-Australian Exchange Rates, *supra* note 40.
[42] APRA 2014 Annual Report, *supra* note 36, at 122; US-Australian Exchange Rates, *supra* note 40.
[43] Cooper, *supra* note 10, at 5.
[44] APRA, APRA's Perspective on the Residential Mortgage Lending Market, Submission to the House of Representatives Standing Committee on Economics, Submission 34 (July 18, 2008) at 2 [hereinafter APRA'S PERSPECTIVE].
[45] David Lewis, *Surviving the Downturn: APRA's Role in Financial Crisis Management*, Remarks to the Brisbane Continuity Summit 5 (March 25, 2009).

APRA regulates a relatively small number of institutions. While Australia has a total of 70 banks, its banking sector is dominated by four large banks.[46] In Australia, these four banks are referred to as the "Four Pillars" because the Australian government considers them to be too big to merge with each one another.[47] Some Australian financial regulators believe that the Four Pillars policy helped protect Australia from the ravages of the financial crisis. Former Australian Reserve Bank Governor Ian Macfarlane noted, "Competition doesn't always come in price — it comes from cutting credit standards."[48] This comment reflects a mindset within some Australian regulators that it is preferable to sacrifice some competition in order to maintain the safety and soundness of banks that comes from using high credit standards.

Australia's banking sector has become slightly more concentrated in recent years. Since 2000, the number of the largest banks has shrunk in number from six to four, even though the overall number of banks operating in Australia has grown from 50 to 70 in 2014.[49] The portion of the total banking assets controlled by the largest banks has increased from 69.7 percent in September 2000 to 78.2 percent in December 2014.[50] During the same period, the number of building societies and credit unions has declined. The number of credit unions has declined from 213 to 81 between September 2000 and December 2014 and the number of building societies has declined from 18 to 8 during the same period.[51] The number of general insurers supervised by APRA has also declined from 161 entities in December 2000 to 115 insurers in December 2014.[52]

Like the prudential regulators in the United States, APRA conducts on-site visits and examinations to assess the financial stability of the entities under its supervision.[53] APRA uses PAIRS to rate commercial banks.[54] PAIRS stands for Probability and Impact Rating System.[55] It assesses the likelihood that a financial firm will be able to meet its obligations as they come due and the impact that a financial firm will have on the Australian financial system if it fails.[56]

APRA also administers the Financial Claims Scheme (FCS), which Wayne Swan activated in 2010 when he was Deputy Prime Minister and Treasurer of Australia.[57] The FCS is the Australian equivalent of both the US Federal Deposit Insurance Corporation programs and the state insurance guaranty association programs. The FCS provides protection for depositors and for insurance policyholders.[58] The FCS will

---

[46] APRA, STATISTICS: QUARTERLY AUTHORISED DEPOSIT-TAKING INSTITUTION PERFORMANCE DECEMBER 2014, 8 (March 3, 2015), http://www.apra.gov.au/adi/Publications/Documents/1503-QADIPS-December-2014.pdf [hereinafter APRA ADI STATISTICS DECEMBER 2014].

[47] John Durie and Richard Gluyas, *Four Pillars policy our shield against crisis,* THE AUSTRALIAN (March 3, 2009), http://www.theaustralian.com.au/business/news/four-pillars-our-shield/story-e6frg90f-1111119012308

[48] *Id.*

[49] APRA, Insight 15 (2001), http://www.apra.gov.au/Insight/Insight-1st-Quarter-2001.cfm [hereinafter APRA INSIGHT 2001]; APRA ADI STATISTICS DECEMBER 2014, *supra* note 46, at 8.

[50] APRA INSIGHT 2001, *supra* note 49, at 15; APRA ADI STATISTICS DECEMBER 2014, *supra* note 46, at 6.

[51] APRA INSIGHT 2001, *supra* note 49, at 31; APRA ADI STATISTICS DECEMBER 2014, *supra* note 46, at 8.

[52] APRA, SELECTED STATISTICS ON THE GENERAL INSURANCE INDUSTRY YEAR ENDING DECEMBER 2000 1 (2000), http://www.apra.gov.au/GI/Publications/Documents/General-Insurance-Selected-Statistics-December-2000.pdf; APRA, STATISTICS: QUARTERLY GENERAL INSURANCE PERFORMANCE STATISTICS DECEMBER 2014, 10 (March 17, 2015), http://www.apra.gov.au/GI/Publications/Documents/1502-QGIPS-December-2014.pdf. General insurance in Australia includes all types of insurance except life and health.

[53] APRA, Insight 6 (2009), http://www.apra.gov.au/Insight/Home.cfm [hereinafter APRA INSIGHT 2009].

[54] *Id.*

[55] *Id.*

[56] *Id. at 5-6.*

[57] AUSTRALIAN GOVERNMENT, FINANCIAL CLAIMS SCHEME: CONSULTATION PAPER v-vi (May 2011), http://archive.treasury.gov.au/documents/2025/PDF/CP_Financial_Claims_Scheme.pdf.

[58] *Id*. at v.

insure deposits for up to AUS$250,000 (about US$204,000) per account-holder at any authorized deposit-taking institution (bank, building society, or credit union).[59] To cover the amounts paid out under the FCS, the Australian Government will provide the funds but then seek to recover the funds that it pays out from the insolvent deposit-taking institution during its liquidation.[60] If the Australian Government is unable to recover all of the funds, it will impose a levy on the Australian banking sector to make up the shortfall.[61]

The FCS will also provide up to AUS$5,000 (about US$4,085) to policyholders or other claimants of a general insurer that has become insolvent.[62] In the case of claims against an insurer, the Australian Government would provide the initial funds to meet the claims and then attempt to recover the money from the insurer when the insurer is wound up.[63] If the Australian Government is unable to recover all of the funds, it will impose a levy on the Australian general insurance sector to make up the shortfall.[64]

IV. Australian Securities and Investment Commission (ASIC)

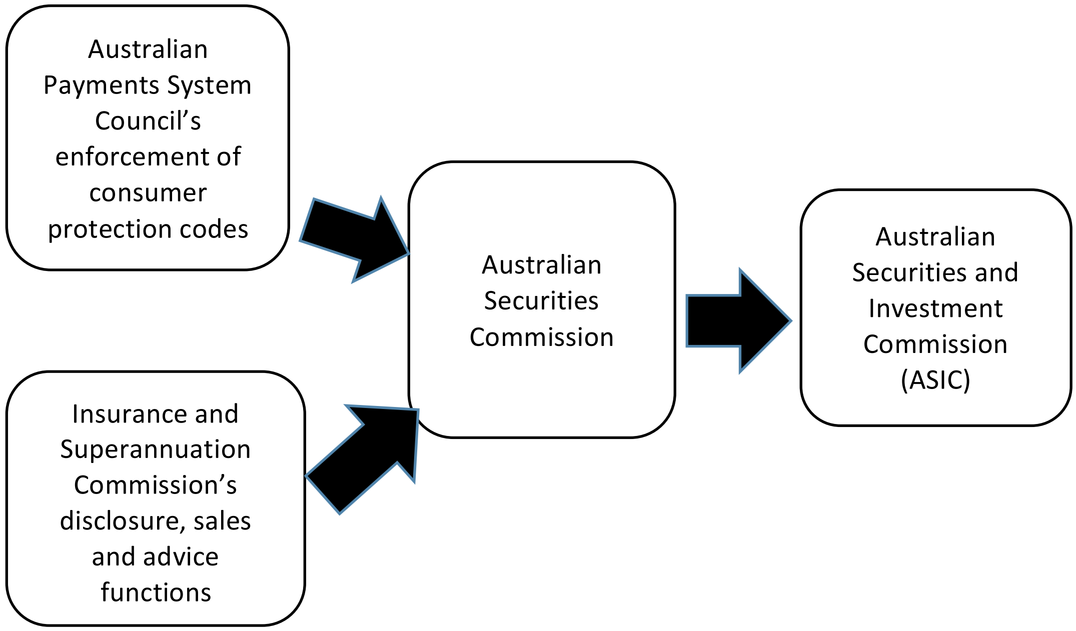
A. Agencies Consolidated to Create ASIC

In 1997, the Wallis Inquiry recommended that the Australian government consolidate the Australian Securities Commission, the part of the Insurance and Superannuation Commission that dealt with disclosure, sales and advice, and the enforcement of the consumer protection codes that the Australian Payments System Council chaired by the Reserve Bank of Australia (RBA) into a single market conduct regulator.[65] In 1998, the Australian government merged the part of the Insurance and Superannuation Commission that dealt with disclosure, sales and advice, and the enforcement of the consumer protection codes that the Australian Payments System Council in the Australian Securities Commission.[66] In addition, the Australian Securities Commission was renamed the Australian Securities and Investment Commission on July 1, 1998.

---

59 APRA, Financial Claims Scheme for Banks, Building Societies and Credit Unions (Dec. 2014) at 1, http://www.apra.gov.au/CrossIndustry/Documents/APRA-FCS-FAQ-ADI.pdf; US-Australian Exchange Rates, *supra* note 40.
60 *Id*. at 3.
61 *Id*.
62 APRA, Financial Claims Scheme for General Insurers (Dec. 2014) at 1, http://www.apra.gov.au/CrossIndustry/Documents/APRA-FCS-FAQ-GI.pdf; US-Australian Exchange Rates, *supra* note 40.
63 *Id*. at 2.
64 *Id*.
65 Wallis Inquiry at 19. The Wallis Inquiry wanted to call the new market conduct regulator the Corporations and Financial Services Commission. *Id.*
66

Figure 4
Consolidation to Create ASIC



When it was created, ASIC did not have exclusive control over the regulation of all aspects of consumer protection in the area of financial services. Until July 2010, the Australian states continued to regulate consumer credit under the Uniform Consumer Credit Code, which protected consumers who borrowed money.[67] In October 2008, the Council of Australian Governments (COAG) stated that the regulation of consumer credit should become the responsibility of the national government.[68]

The move to create a national, uniform system of consumer credit regulation began in 2005 with a report issued by the Australian Senate detailing the problems with the then existing regime. Several subsequent reports outlined problems with the lack of adequate licensing for brokers, poor disclosure requirements, differences in the level of consumer protection from one state to another, and deficiencies in the areas of financial advice and debt acquisition.[69] In 2008, the Australian Treasury issued the GREEN PAPER ON FINANCIAL SERVICES AND CREDIT REFORM: IMPROVING, SIMPLIFYING AND STANDARDISING FINANCIAL SERVICES AND CREDIT REGULATION.[70] This paper recommended that the national government assume responsibility for regulating mortgages, mortgage brokers, non-bank lending institutions, trustee corporations, margin lending, debentures, property spruikers (real estate investment promoters), and other credit products, like credit cards.[71]

In response, the Australian government enacted the National Consumer Protection Act 2009 (NCPA), which requires anyone offering credit to a consumer to be licensed by ASIC.[72] The NCPA includes the

---

[67] GAIL PEASON AND RICHARD BATTON, UNDERSTANDING CONSUMER CREDIT LAW (CCH Australia Limited, 2010).
[68] *Id*. at 3.
[69] *Id*. at 3-7.
[70] AUSTRALIAN GOVERNMENT, THE TREASURY, GREEN PAPER ON FINANCIAL SERVICES AND CREDIT REFORM: IMPROVING, SIMPLIFYING AND STANDARDISING FINANCIAL SERVICES AND CREDIT REGULATION (June 2008) [hereinafter, GREEN PAPER].
[71] *Id*.
[72] Pearson & Batton, *supra* note 67, at 12.

National Credit Code (NCC), which operates like the UCCC at the national level.[73] ASIC began regulating consumer credit under the NCPA and NCC as of July 1, 2010.[74]

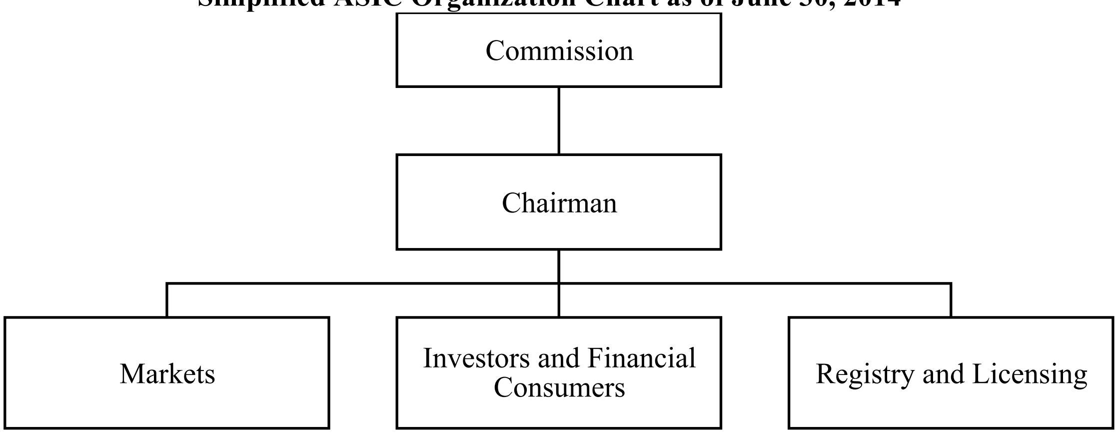
In addition, the Australian government passed the Corporations Legislation Amendment (Financial Modernisation) Act 2009, which gave ASIC the authority to regulate margin lending.[75] The act requires issuers and advisers of margin lending facilities hold an Australian Financial Services license (AFSL).[76]

B. Governance of ASIC

ASIC is governed by a commission comprised of at least three members and no more than eight members.[77] The Australian Governor-General appoints all of the members of the commission on the nomination of the Treasurer.[78] The members serve for terms of office of five years or less.[79] The Governor-General also appoints one member to serve as the Chair of the commission and may appoint another member to serve as the Deputy Chair.[80]

In addition, the Commission has three internal committees of boards that report to it.[81] These include a Risk Committee, a Property and Environmental Management Board, and a Technology Governance Board.[82]

Figure 5
Simplified ASIC Organization Chart as of June 30, 2014[83]



---

[73] *Id*.
[74] *Id*.
[75] ASIC Credit Reform Update – Issue 6 (Jan. 5, 2015), http://asic.gov.au/about-asic/corporate-publications/newsletters/asic-credit-reform-update/asic-credit-reform-update-list-of-issues/asic-credit-reform-update-issue-6/
[76] *Id*.
[77] Australian Securities and Investment Commission Act 2001, Act. No. 51 (2001), as amended [includes amendments up to Act. No. 83 (2014)], §9 [hereinafter ASIC Act].
[78] *Id*.
[79] *Id*., §108.
[80] *Id*., §10.
[81] ASIC, Ann. Rep. 2013-2014, 15-16 (2014), http://download.asic.gov.au/media/2227467/asic-annual-report-2013-14.pdf [hereinafter ASIC Ann. Report 2013-14].
[82] Id.
[83] *Id*.

C. Funding of ASIC

ASIC is funded primarily through appropriations set by the Australian parliament, not the fees that ASIC collects.[84] In 2013-2014, ASIC received AUS$347.0 million (about US$283.6 million) in appropriations.[85] It also is partially funded from other revenues, such as for services rendered or royalties.[86] In 2013-2014, ASIC received approximately AUS$5 million (about US$4.1 million) from other revenue sources.[87]

ASIC collects fees under the Corporations Act 2001, the National Consumer Credit Protection Act 2009, the Corporations (Fees) Act 2001, the Corporations (Review Fees) Act 2003, the National Consumer Credit Protection Act 2009, the Business Names Registration (Fees) Regulations 2010 and Superannuation Industry (Supervision) Act 1993.[88] ASIC must turn over all the funds collected from these fees to the Official Public Account. In 2013-2014, ASIC collected AUS$763 million in fees and charges.[89]

The 2014 report on ASIC by the Economics Reference Committee of the Australian Senate raised concerns that ASIC was a "weak timid, hesitant regulator, too ready and willing to accept uncritically the assurances of a large institution that there were no grounds for ASIC's concerns or intervention."[90] The committee concluded that ASIC lacked adequate funds to adequate undertake all of its responsibilities and it recommended that changes be made to allow ASIC to move to a "'user-pays' model" under which ASIC would be funded from the fees assessed on the firms it supervises rather than from government appropriations.[91]

D. ASIC's Areas of Responsibility

ASIC operates as Australia's financial services, market, and corporate regulator. It combines not only the consumer protection function of the banking, securities, and insurance regulators in the United States but it also encompasses many of the corporate law elements that are relegated to the states within the United States. For example, ASIC registers all companies in Australia, ensures that their directors are complying with their fiduciary duties, and regulates corporate disclosures, fundraising, mergers and acquisitions, and windings up.[92] ASIC also regulates all of Australia's financial markets, including the Australia Stock Exchange (ASX).[93] ASIC licenses and regulates financial services, including insurance, securities, derivatives, superannuation funds, and managed funds, to protect consumers against fraudulent and deceptive practices.[94] As part of receiving a license from ASIC, a financial services firm agrees to (1) operate in a manner to ensure that it provides its products and services "efficiently, honestly and fairly," (2) take steps to employ "adequately trained" and "competent" staff, and (3) to have sufficient resources to operate.[95] The third requirement, however, is waived for firms that are subject to prudential regulation by APRA in order to avoid conflicts and duplication between the regulatory requirement imposed by

---

[84] *Id*. at 22, 98.
[85] ASIC, Ann. Rep. 2013-2014, *supra* note 81, at 22; US-Australian Exchange Rates, *supra* note 40.
[86] ASIC, Ann. Rep. 2013-2014, *supra* note 81, at 22.
[87] ASIC, Ann. Rep. 2013-2014, *supra* note 81, at 22; US-Australian Exchange Rates, *supra* note 40.
[88] ASIC, Ann. Rep. 2013-2014, *supra* note 81, at 98.
[89] *Id*. at 22.
[90] Australian Senate ASIC Report, *supra* note 1, at xviii.
[91] *Id*. at xxxii.
[92] *Id.* at 7.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 10.

ASIC and APRA.[96] ASIC has a Consumer Advisory Panel to provide feedback on ASIC's regulations and performance and to provide advice on consumer protection issues.[97]

Unlike the SEC, ASIC does not generally rely on self-regulatory organizations to help it monitor and regulate financial services firms.[98] The Australian Stock Exchange through its ASX Market Supervision Pty. Limited, however, was responsible for supervision and enforcement of all market and trading rules in connection with ASX's securities and futures markets as well as its clearing and settlement facilities.[99] The Australian Stock Exchange's regulatory responsibilities were moved to ASIC.[100]

In 2014, the Economics Reference Committee of the Australian Senate assessed the performance of ASIC.[101] Its report noted that ASIC had far more responsibilities than its counterparts in other countries.[102] ASIC is responsible for registering corporations in addition to regulating the markets for banking, securities, and insurance products.[103] In the United Kingdom, Companies House registers and regulates corporations.[104] In the United States, state agencies register and regulate corporations. The report recommended that the Australian government move the corporate registry functions of ASIC to another agency to allow ASIC to focus on its financial services responsibilities.[105]

V. Reserve Bank of Australia (RBA)

The Reserve Bank of Australia is the nation's central bank. It is primarily responsible for monetary policy. While it does not serve as a direct supervisor of financial institutions, it does act as a systemic regulator.

A. Governance of the Reserve Bank of Australia

The Bank is governed by two boards – the Reserve Bank Board and the Payments System Board.[106] The Reserve Bank Board focuses on monetary policy and financial stability.[107] The Payments System Board focuses on issues related to the payments system policies.[108]

The Reserve Bank Board is comprised of the Governor, the Deputy Governor, the Secretary to the Department of the Treasury, and six other members appointed by the Treasurer of Australia.[109] At least five of the six members appointed by the Treasurer cannot be officials of the Reserve Bank of

---

[96] *Id.* at 10-11.
[97] *Id. at 8.*
[98] *Id.* at 10. The Financial Services Reform Act 2001 eliminated the regulatory role of SROs. *Id.* They can still set standards for their members but they are no longer part of the regulatory structure. *Id.*
[99] Australia Securities Exchange, 2009 ASX Market Supervision Annual Report 1 (2009), http://www.asx.com.au/supervision/pdf/asxms_annual_report_2009.pdf. Eric Johnston, *ASX Wants Compensation for Loss of Powers,* SIDNEY MORNING HERALD (Sept. 30, 2009), http://www.smh.com.au/business/asx-wants-compensation-for-loss-of-powers-20090930-gbrx.html
[100] Johnston, *supra* note 99.
[101] Australian Senate ASIC Report, *supra* note 1.
[102] *Id*. at 401.
[103] *Id*.
[104] *Id*.
[105] *Id*. at 416-417.
[106] Commonwealth of Australia, Reserve Bank Act 1959, §8A.
[107] *Id*
[108] *Id.*
[109] *Id*., §14.

Australia.[110] The Reserve Bank Board members appointed by the Treasurer and who are not officials of the Reserve Bank of Australia serve for five-year terms.[111] The Governor and the Deputy Governor may not be present or participate in any discussion by the Reserve Bank Board that pertains to their positions with the RBA.[112]

The Treasurer of Australia appoints both the Governor and the Deputy Governor of the Bank. They both serve for seven-year terms and may be reappointed at the discretion of the Treasurer.[113] The Governor of the Reserve Bank of Australia is responsible for managing the day-to-day affairs to the RBA.

The Reserve Bank of Australia has four committees: an Audit Committee, a Remuneration Committee, an Executive Committee, and a Risk Management Committee.[114] The Audit Committee is responsible for overseeing the RBA's statutory financial reporting obligation.[115] The Remuneration Committee is responsible for recommending the compensation to be provided to the Governor and Deputy Governor.[116] The Executive Committee assists the Governor with strategic or management decisions for the RBA.[117] The Risk Management Committee "is responsible for ensuring that non-policy risks are properly identified and managed across the RBA in accordance with the RBA's *Risk Management Policy*."[118]

The Audit Committee and the Remuneration Committee are comprised of members of the Reserve Bank Board. The Audit Committee contains "two non-executive members of the Reserve Bank Board and two external members."[119] The Remuneration Committee contains only non-executive members of the Reserve Bank Board.[120]

B. Funding of the Reserve Bank of Australia

Usually, the Reserve Bank of Australia completely funds its operations from two sources: underlying earnings and valuation gains or losses on its portfolio of assets.[121] The underlying earnings come from the interest earned on the RBA's assets.[122] When the Bank sells an asset, it recognizes the valuation gain or loss on that asset.[123]

In 2013, the Australian Government made a one-time grant of AUS$8.8 billion (about US$7.2 billion) to bolster the RBA's Reserve Fund.[124] The government did this in order to help the Bank raise the funds in

110 *Id*.
111 *Id*
112 *Id.,* §21A.
113 *Id.,* §24.
114 Reserve Bank of Australia, About the RBA, Structure, Organisational Structure, http://www.rba.gov.au/about-rba/structure/organisational.html.
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 Reserve Bank of Australia, ANN. REP. 2014, 75 (2014), http://www.rba.gov.au/publications/annual-reports/rba/2014/pdf/2014-report.pdf [hereinafter RBA Ann. Rep. 2014].
122 *Id*.
123 Id. at 76.
124 RBA Ann. Rep. 2014 at 75; Pat McGrath, Federal Government gives Reserve Bank of Australia $8.8 billion grant for 'challenges ahead', ABC News (Oct. 23, 2013), http://www.abc.net.au/news/2013-10-23/government-gives-rba-one-off-grant/5039848; US-Australian Exchange Rates, *supra* note 40.

the Reserve Fund to equal 15 percent of the RBA's assets at risk.[125] At the time, Australian Treasurer Joe Hockey stated: "Australia's financial system relies on the financial strength of the Reserve Bank and the credibility of its monetary policy and foreign exchange operations. . . . This injection of funds puts beyond any doubt the Reserve Bank's continued ability to perform its core monetary policy and foreign exchange functions, in an environment of heightened financial market volatility."[126]

C. Reserve Bank of Australia's Areas of Responsibility

The Reserve Bank Act 1959 requires the Reserve Bank of Australia to determine and implement monetary policy, promote financial stability, issue banknotes, provide banking services to government, manage Australia's foreign reserves, set payments system policy and operate the high-value payments system.[127] In terms of monetary policy, the Reserve Bank Act 1959 specifies that the Reserve Bank of Australia must select a policy that will best achieve three goals:

(a) the stability of the currency of Australia;
(b) the maintenance of full employment in Australia; and
(c) the economic prosperity and welfare of the people of Australia.[128]

In its 2014 Annual Report, the Reserve Bank of Australia stated that it was following a "flexible, medium-term inflation target," which would "keep consumer price inflation between 2 and 3 per cent, on average, over the business cycle."[129]

VI. Other Financial Regulators

Australia's Superannuation Industry (Supervision) Act of 1993 (SISA)[130] and its Superannuation Guarantee Charge Act (SGCA)[131] are the two main laws that regulate Australia's pension system, although there are many others. The SGCA requires employers to contribute a minimum percentage of an employee's salary into a superannuation fund, which can either be a defined benefit plan or a defined contribution plan.[132] This minimum contribution is being raised from 9 percent in 2012 to 12 percent beginning on July 1, 2019.[133] If the employer, however, chooses not to make such contributions, the

---

125 McGrath, *supra* note 124.
126 *Id*.
127 RBA Ann. Rep. 2014, *supra* note 121, at 5; Reserve Bank Act 1959, *supra* note 106, §§8, 10, 10B, 26, 34
128 Reserve Bank Act 1959, *supra* note 106, §10.
129 RBA Ann. Rep. 2014, *supra* note 121, at 5.
130 Superannuation Industry (Supervision) Act of 1993, Part 2A [hereinafter SISA]. SISA authorizes APRA to license and supervise superannuation funds.
131 Superannuation Guarantee Charge Act 1992, Act. No. 93 of 1992; Superannuation Guarantee (Administration) Act 1992, Act. No. 111 of 1992 (which was incorporated into the SGCA); Superannuation Guarantee Charge Amendment Act 2002, Act. No. 52 of 2002.
132 Superannuation Guarantee (Administration) Act 1992, *supra* note 131, §19. While a few defined benefit plans exist, almost all Australian employers have opted for payments into defined contribution plans. OECD, PENSIONS AT A GLANCE 2013 211 (2014) [hereinafter OECD Pensions 2013]. These defined contribution plans are set up as trusts, with half of the trustees appointed to represent the employer and half of the trustees appointed to represent the employees. Dan Scheiwe, *Why Australia's Pension System is Not a Good International Model* 9 (Pension Institute, Discussion Draft PI-9912, 1999).
133 Superannuation Guarantee (Administration) Act 1992, *supra* note 131, §19(2). The employer must make these payments for all of its employees, except for those that fall within certain parameters. Employers do not have to pay for employees who earn less than AUS$450 per month (about US$420 per month), who are over age 70, who are under 18, or work less than 30 hours a week. Superannuation Guarantee (Administration) Act 1992, §§27, 28. The Australian Dollar to US Dollar exchange rate on December 31, 2014 was AUS$1 = US$0.8173, which means that AUS$450 equals about US$367. US-Australian Exchange Rates, *supra* note 40.

Australian government will levy a superannuation guarantee charge (SGC) on the employer.[134] Employers subject to a SGC must also pay administration fees and interest on any arrears payment.[135]

The Australian Taxation Office administers the SGC.[136] The Australian Taxation Office will immediately transfer large SGC payments into the employees' superannuation funds but may retain small SGC payments in the ATO's Superannuation Holding Accounts Reserve (SHAR).[137]

The Superannuation (Resolution of Complaints) Act 1993 created the Superannuation Complaints Tribunal (SCT), which investigates most complaints involving regulated superannuation funds, annuities, and retirement savings accounts (RSAs).[138] The SCT has 20 members.[139] When a complaint is brought, three members will be selected to deal with it — first through conciliation and if that fails, then through a formal review process.[140] If the person bringing the complaint is unsatisfied with how the SCT has handled it, they may file a complaint with Commonwealth Ombudsman.[141] The Commonwealth Ombudsman investigates complaints about any of Australia's administrative agencies as well as performing audits and inspections of these agencies.[142]

VII. Advantages and Disadvantages of the Australian Twin Peaks Model

Australia's system has the following advantages:

(a) It avoids regulatory gaps as the regulators are responsible for the entire financial services sector.
(b) It allows regulators to determine which products or services are functionally similar, and to regulate them in the same manner to create a more level playing field.
(c) It holds regulators accountable because their jurisdictions are clearly demarcated and have fewer instances in which they overlap with one another.
(d) The relatively few regulators allow for interagency bodies to be more efficient and effective.
(e) It reduces regulatory competition. Regulatory competition sometimes fosters a race-to-the-bottom in terms of regulatory oversight with agencies competing to be the least restrictive in order to expand the number of firms that they regulate.
(f) The broad scope of the agencies reduces the likelihood that they will be captured by narrow segments of the financial services industry.

Australia's system has the following disadvantages:

(a) The rest of the world still primarily uses institutional regulation, which means that international norms reflect institutional regulatory boundaries.
(b) It concentrates a significant amount of regulatory authority into a small number of agencies.
(c) Conflicts may arise among the different regulators that cannot easily be resolved by the Council of Financial Regulators.

[134] SGCA, §5.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] Superannuation Complaints Tribunal, Overview, http://www.sct.gov.au/Page.aspx?pid=2; Superannuation Complaints Tribunal, What We Do, http://www.sct.gov.au/Page.aspx?pid=8.
[139] Superannuation Complaints Tribunal, Overview, *supra* note 138.
[140] *Id*.
[141] Superannuation Complaints Tribunal, Tribunal Charter, http://www.sct.gov.au/Page.aspx?pid=22; Commonwealth Ombudsman, http://www.ombudsman.gov.au/.
[142] Commonwealth Ombudsman, *supra* note 141.

(d) It eliminates regulatory competition. Regulatory competition may help avoid overly oppressive regulations and may foster more innovative types of regulation.

In November 2014, the Australian government issued its Financial System Inquiry: Final Report (FSI Final Report) on the performance of the Australian financial services regulatory structure. The report examined how Australia's twin peak regulatory structure had functioned since it was adopted in 1997. The aim of the report was to assess how well the system worked and to make recommendations for changes to "foster an efficient, competitive and flexible financial system, consistent with financial stability, prudence, public confidence and capacity to meet the needs of users."[143]

The FSI Final Report noted that the Australian twin peaks system had generally worked well and did not call for any drastic reforms of the country's financial services regulatory structure. It commented:

> Australia's financial system has performed well since the Wallis Inquiry. Australia has a competitive financial system with sophisticated capital markets and firms that are quick to adopt new technologies that reduce costs or provide improved products and services.
>
> Although Australia was not immune to the effects of the GFC [global financial crisis], the financial system and institutional framework held up well compared with many financial systems elsewhere in the world. In particular, Australia's regulatory frameworks proved robust during this period.[144]

The final report contained 44 recommendations but only about five of them called for changes to the regulatory structure while the remainder primarily focused on changes to specific regulations for financial entities or products.[145]

The FSI Final Report recommended that Australia create a new Financial Regulator Assessment Board to hold the Reserve Bank of Australia, APRA, and ASIC accountable for how well or poorly they fulfilled their regulatory mandates.[146] This board would provide the Australian government with annual reports that would assess "how the regulators have balanced the different components of their mandates as well as how they are allocating resources and responding to strategic challenges."[147]

The report indicated that the board did not need to be a new agency but might simply be a separate "secretariat" within the Treasury.[148] The report recommended that the Financial Regulator Assessment Board replace the Financial Services Advisory Council that was created when the Wallis reforms were adopted in 1997.[149] The Financial Services Advisory Council was composed of financial services market participants and would provide advice to the Australian government on changes to financial services regulation. The new Financial Regulator Assessment Board would be composed of five to seven part-time members with expertise in the financial services industry or regulatory matters but none of the members would be current employees of any of the financial regulators.[150]

---

[143] AUSTRALIAN GOVERNMENT, FINANCIAL SYSTEM INQUIRY: FINAL REPORT vii (Nov. 2014), http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf [hereinafter FSI Final Report].
[144] *Id*. at 4-5.
[145] *Id*. at xxii-xxviii.
[146] *Id*. at xxvi.
[147] *Id*. at 239.
[148] *Id*.
[149] *Id*.
[150] *Id*.

The Financial Regulator Assessment Board would not have the authority to issue orders to APRA, ASIC, or the Reserve Bank of Australia.[151] It also would not be allowed to comment on individual regulatory actions or enforcement cases.

The FSI Final Report also recommended that the Australian government provide clearer Statements of Expectations (SOEs) to each financial regulator detailing the strategic direction of each regulator and outlining the government's risk tolerance.[152] The report also recommended that the financial regulators in their annual reports or in their Statements of Intent should discuss outcome-focus performance indicators that demonstrate how well they are meeting their core regulatory objectives, their competition objectives, and their compliance cost objectives.[153]

In 2014, the Australian government introduced the Regulator Performance Framework, which attempts to eliminate unnecessary and inefficient regulations by establishing a mechanism for assessing the performance of regulatory agencies.[154] The creation of the Financial Regulator Assessment Board would implement the Regulator Performance Framework in the area of financial services regulation.[155]

The FSI Final Report also raised concerns about the funding provided to the financial regulators, particularly ASIC, because it found that insufficient funding and the uncertainty of funding levels from year-to-year hampered the performance of APRA and ASIC.[156] In addition, the budgets of APRA and ASIC have constrained their ability to hire the most qualified employees because they could not compete with the private sector's level of remuneration.[157] To address these problems, the report recommended that the Australian government adopt "a three-year funding model [for APRA and ASIC] based on periodic funding reviews, increase their capacity to pay competitive remuneration, boost flexibility in respect of staffing and funding, and require them to undertake periodic capability reviews."[158] The FSI Final Report also recommended that ASIC be funded from fees collected from the entities that it regulates just as APRA is.[159]

Finally, the FSI Final Report recommended that the financial regulators should be required to evaluate how their fulfillment of their core regulatory objectives are balanced against competition considerations in their annual reports.[160] The report noted: "While competition is generally adequate in the financial system at present, the high concentration and steadily increasing vertical integration in some sectors has the potential to limit the benefits of competition in the future. Licensing provisions and regulatory frameworks can impose significant barriers to the entry and growth of new players, especially those with business models that do not fit well within existing regulatory frameworks."[161] The report's recommendation was aimed at getting agencies to recognize the trade-offs between regulation and competition. While APRA currently is required to consider competition issues when making its decisions,

---

[151] *Id*.
[152] *Id*. at 240.
[153] *Id*.
[154] AUSTRALIAN GOVERNMENT, REGULATOR PERFORMANCE FRAMEWORK 2 (2014), https://www.cuttingredtape.gov.au/sites/default/files/documents/regulator_performance_framework.pdf.
[155] FSI Final Report, *supra* note 143, at 240.
[156] *Id*. at 246-249.
[157] *Id*. at 248.
[158] *Id*. at 246.
[159] *Id*. at 250-251.
[160] *Id*. at 254.
[161] *Id*.

ASIC is not.[162] The FSI Final Report also recommended that ASIC be required to consider the impact of its decisions on competition in the future.[163]

VIII. Relevance of Australia's Consolidation for the United States

Why should the United States care about how Australia regulates its financial services? One reason is because, as noted by the FSI Final Report, Australia weathered the recent financial crisis better than most nations, including the United States, without any significant bank failures or government bailouts.[164] Australia also did not lapse into a recession as a result of the 2008 financial crisis.[165] Part of the explanation of why Australia came out of the 2008 financial relatively unscathed is due to its financial regulatory structure. The actions taken by the Reserve Bank of Australia, APRA, and ASIC avoided the excesses in the financial services industry in the United States that led to the 2008 financial crisis.[166]

The fact that Australia has a federal system of government, like the United States, also makes its experience with consolidation useful for the United States. Prior to creating its twin peaks structure at the federal level, Australia spilt the regulation of financial services between the federal government and its states. While Australia did not consolidate the regulation of all financial services into federal government agencies when it moved to a twin peaks structure in 1997, it has placed more and more of the responsibility for regulating financial services in the hands of the federal agencies over time. As financial services become increasingly global products, such federal control over financial services might be warranted. Australia's gradual consolidation at the federal level probably would be politically more palatable than an attempt to make the federal government responsible for all financial services regulation in one fell swoop.

On the other hand, Australia's consolidation is not a perfect model for the United States. Australia started off with fewer national and state regulators than the United States currently has. The larger number of US regulators will make it harder to arrive at a consensus about what agencies to consolidate and how to consolidate them in the United States than it was for Australia. In addition, Australia has a substantially more concentrated banking sector than the United States has. Four banks in Australia control over 75 percent of the banking assets in that country. As a result, Australian banking regulators have shown a greater willingness to treat banks like public utilities that must be subject to relatively conservative controls on their attendant risks than US regulators who have tended to have a more laissez faire or free market attitude.

Finally, the Australian government and the Australian financial services firms are not focused on trying to make Australia's financial sector the dominate one in the world, the way that the United States and the United Kingdom were prior to the 2008 financial crisis. The competition between the United States and the United Kingdom contributed to their race-to-the-bottom in terms of regulatory standards. As a result, they allowed many financial products within their borders that Australia elected to prohibit within its borders. It is unlikely that the United States would be willing to enact regulations or implement a

---

[162] *Id*. at 255.

[163] *Id*. at 254.

[164] Elizabeth F. Brown, *A Comparison of the Handling of the Financial Crisis in the United States, United Kingdom, and Australia*, 55 VILLANOVA L. REV. 509 (2010).

[165] OECD, Stat Extracts, Quarterly National Accounts: Quarterly Growth Rates of Real GDP (2014), http://stats.oecd.org/index.aspx?queryid=350 (follow "Customize" hyperlink, select "Time & Frequency," select "Select date range," select "Quarterly" select "2004Q1" to "2014Q1")[hereinafter OECD, Stat Extracts, Quarterly Growth Rates]. One definition of a recession is when a country experiences two consecutive quarters of declining GDP. BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 493 (John Downes and Jordan Elliot Goodman eds., 5th ed. 1998).

[166] Brown, *supra* note 164, at 528-563.

regulatory structure if it would mean ceding its leadership in the area of financial services to other nations.

Nevertheless, on balance, Australia's experience with implementing a consolidated regulatory structure within a federal system offers some useful insights for the United States. Canada and Germany also have federal systems but neither has gone as far as Australia to reorganize their regulators around risks or objectives rather than institutions.

Canada

I. Background

Under its current structure, Canada divides its financial regulatory responsibility between the provincial government and the federal government.[167] The federal government employs a twin peaks model for regulating banking and insurance. The Office of the Superintendent of Financial Institutions (OSFI) is the prudential regulator while the Financial Consumer Agency of Canada (FCAC). Canada created this twin peaks structure by consolidating several of its financial regulators in two stages over a 15 year period. The Canadian government did not set out in 1987 to implement the reforms in this manner. Instead, it engaged in periodic reviews and adjusted its regulatory structure to address the issues that those reviews identified. The Canadian government created the OSFI in 1987. Like the United Kingdom's Financial Services Authority, the Canadian OSFI initially acted as both a prudential regulator and a market conduct regulator. In 2000, after extensive study, the Canadian government spun off the market conduct and consumer protection responsibilities from the OSFI to create the FCAC. The Canadian government concluded that a separate agency would better address consumer protection issues.

A number of other federal agencies also play a role in regulating financial services. The Bank of Canada is the nation's central bank and is responsible for monetary policy. The Department of Finance is the equivalent of the US Department of the Treasury and develops economic policies related to financial services. Finally, the Canada Deposit Insurance Corporation (CDIC) insures demand deposits like the US Federal Deposit Insurance Corporation.

Provincial government responsibilities include securities dealers, mutual fund and investment advisors, credit unions, and provincially incorporated trust, loan, and insurance companies.[168] Thus, 13 provincial regulatory authorities govern securities laws and regulations.[169] Unlike other countries, Canada does not have a securities regulatory authority at the federal government level.[170] Most provincial security commissions use a "passport system," under which they give reciprocity to the approvals granted by each other. In addition, they employ the Canadian Securities Administration to bridge communication for inter-providential regulatory matters.[171] Canada periodically has considered creating a national securities regulator.

In addition, the Financial Institutions Supervisory Committee is the umbrella for regulatory policy and supervision of financial institutions.[172] Though not an agency body, it serves as a committee of senior government representatives including representatives from the OSFI, the FCAC, the CDIC, the Department of Finance, and the Bank of Canada.[173] These organizations form the network of federal domestic regulation for financial services.[174] Even though the OSFI, the FCAC, the CDIC, and the Bank

---

[167] James Jackson, *Financial Market Supervision: Canada's Perspective* 12 (Cong. Research Service Report No. 7-5700, April 4, 2013).
[168] *Id*.
[169] *Id*.
[170] Adriane Fresh & Martin Neil Baily, *What does international experience tell us about regulatory consolidation?* 9 (Pew Financial Reform Project Briefing Paper No. 6, 2009).
[171] *Id*. at 7.
[172] Jackson, *supra* note 167, at 12-13.
[173] *Global Banking Regulations and Banks in Canada,* CANADA BANKERS ASSOCIATION (2013), http://www.cba.ca/en/media-room/50-backgrounders-on-banking-issues/667-global-banking-regulations-and-banks-in-canada.
[174] Bank of Canada, Backgrounders: Regulation of the Canadian Financial System (April 2012), http://www.bankofcanada.ca/wp-content/uploads/2010/11/regulation_canadian_financial.pdf

of Canada are independent agencies, they all report to the Minister of Finance, who reports to the Canadian Parliament.[175]

II. Reasons for the Consolidation

Up until the 1980s, Canada's financial system was organized, more or less, as a system known as "Four Pillars."[176] The "Four Pillars" referred to the four main types of financial institutions that operated within Canada — banks, trust companies, insurance companies, and investment dealers. These institutions were defined by their principal business activities and their jurisdiction (whether federal, provincial, or a combination).[177] Chartered banks and insurance companies were under the regulation of strict federal polices while provincial regulations governed trust companies and investment dealers.[178] The Four Pillar system was, in a sense, advantageous to customers because it required them to separate their investments and thereby offered a level of security because of diversified accounts.[179] On the other hand, the system was arguably conducive to an oligopolistic structure and the tight federal regulations "gave chartered banks an unfair market advantage."[180] The 1980 revisions to the Bank Act challenged the comfort of chartered banks as it allowed foreign banks to operate in Canada on an equal footing with domestic banks.[181] This change required Canadian banks to change how they operated in order to stay competitive.[182]

The turning of the tide for Canada's Four Pillar structure occurred in the early 1980s when Canada experienced two bank failures.[183] In March of 1985, Canada experienced its first banking crisis in over 62 years with the failure of Canadian Commercial Bank, a regional bank representing 0.6 percent of Canada's total banking assets.[184] A support group consisting of the federal government, the Alberta provincial government, six major chartered banks, and the CDIC provided funds to assist the Canadian Commercial Bank, which had high losses on its loans in the real estate and energy sectors.[185] The failure of Northland Bank, another Alberta regional bank followed the Canadian Commercial Bank.[186] Northland Bank encountered problems attracting and retaining deposits and the Bank of Canada responded by providing liquidity support.[187] The support, however, was withdrawn from both banks in September 1985, after the Inspector General of Banks deemed both banks unviable.[188]

---

[175] Jackson, *supra* note 167, at 13.
[176] John Lorinc, *Banks' Last Frontier: Insurance*, GLOBE AND MAIL, June 24, 2010.
[177] Michael D. Bordo, *et.al*., Why Didn't Canada Have a Banking Crisis in 2008 (or in 1930, or in 1907, or in. . .)? 22 (Nat'l Bureau of Economic Research Working Paper No. 17312, Sept. 2011); CHARLES FREEDMAN, THE CANADIAN BANKING SYSTEM 3 (1998), Freedman characterizes the early division as Five Pillars, or principal groups including: chartered banks, trust and loan companies, cooperative credit movement, life insurance companies, and securities dealers.
[178] Ashwini Srikantiah, Case Study, *The Toronto-Dominion Bank and Canada's "Little Bang" of 1987*, Rotman School of Management, University of Toronto (2012) at 2 [hereinafter Ashwini Srikantiah].
[179] *Id*. at 3.
[180] *Id*.
[181] *Id.*
[182] *Id.*
[183] Renee Haltom, *Why Was Canada Exempt from the Financial Crisis?* Econ Focus 24, (Fourth Quarter 2013).
[184] CHARLES ALBERT & ERIC GOODHART, THE CENTRAL BANK AND THE FINANCIAL SYSTEM 376 (1995).
[185] *Id*. at 376.
[186] *Id.* at 377.
[187] *Id.* at 377.
[188] *Id.* at 377.

Following the collapses, then Justice Willard Z. Estey of the Supreme Court of Canada chaired the commission created by the federal government to investigate the failures.[189] The Estey Commission, as it was called, released a report in August 1986.[190] In sum, the Estey Report concluded

> The government of the day somehow overlooked the evident need to make some adjustments to the [Bank] Act to accommodate the changing circumstances in banking and to study the inspection and regulation of banks in the light of these significant changes. In short, the adoption of a policy of expansion of the population of banks was not accompanied by a study of the complementary changes required in the supervisory system.[191]

The Estey Report concluded that the collapses of the Canadian Commercial Bank and the Northland Bank were due to serious misrepresentation of the banks' assets.[192] The external auditors that reviewed the banks' books overlooked irregularities, a so-called "wink and nod" method of regulation approval.[193] In turn, the Office of the Inspector General of Banks relied on the external auditors, forfeiting due diligence on their end.[194]

The Estey Commission turned a critical eye to the regulators and auditors and found that they lacked formal guidelines for auditing and reporting financial statements.[195] As a result, the Estey Commission concluded that specific principles should be developed for banks.[196] The Estey Report made the following recommendations: (1) bank supervision should be moved to Bank of Canada's responsibility,[197] (2) the Office of the Inspector General of Banks, and the Department of Insurance should be merged into one agency; and (3) the Bank of Canada, CDIC, Office of the Inspector General, and the Ministry of Finance should share information about the financial services industry.[198]

Prior to 1987, the Department of Insurance oversaw federally licensed life insurance, casualty insurance companies, trust and loan companies, and pension plans.[199] It also provided actuarial services to the government.[200] Prior to 1987, the Office of the Inspector General of Banks supervised banks.

---

189 Alix Granger, *Estey Commission*, CANADIAN ENCYCLOPEDIA, http://www.thecanadianencyclopedia.ca/en/article/estey-commission/; *Improving the Regulatory Framework,* TASK FORCE ON THE FUTURE OF THE CANADIAN FINANCIAL SERVICES SECTOR, IMPROVING THE REGULATORY FRAMEWORK 18 (Sept. 1998) [hereinafter Canadian FSS Task Force].

190 Kenneth Mwenda & Alex Fleming, *International developments in the organizational structure of financial services supervision*, 16 September 20, 2001 (paper presented at a seminar hosted by the World Bank Financial Sector); Office of the Superintendent of Financial Institutions, Our History, http://www.osfi-bsif.gc.ca/eng/osfi-bsif/pages/hst.aspx [hereinafter OSFI History].

191 Canadian FSS Task Force, *supra* note 189, at 18 (quoting Hon. Willard Z. Estey, Report of the Inquiry into the Collapse of the CCB and Northland Bank, August 1986).

192 BANKING SYSTEMS IN THE CRISIS: THE FACES OF LIBERAL CAPITALISM (Suzanne J. Konzelmann & Marc Fovargue-Davies, eds. 2013) at 169.

193 *Id*.

194 *Id*.

195 *Id*.

196 *Id*.

197 Mwenda & Fleming., *supra* note 190, at 16. The Bank declined this invitation because of what it called a conflict of interest between managing monetary policy and supervising banks. It also sought to avoid the political pressure involved with bank supervision.

198 *Id.* Currently the FISC and SAC serve as information sharing committees.

199 OSFI History, *supra* note 190.

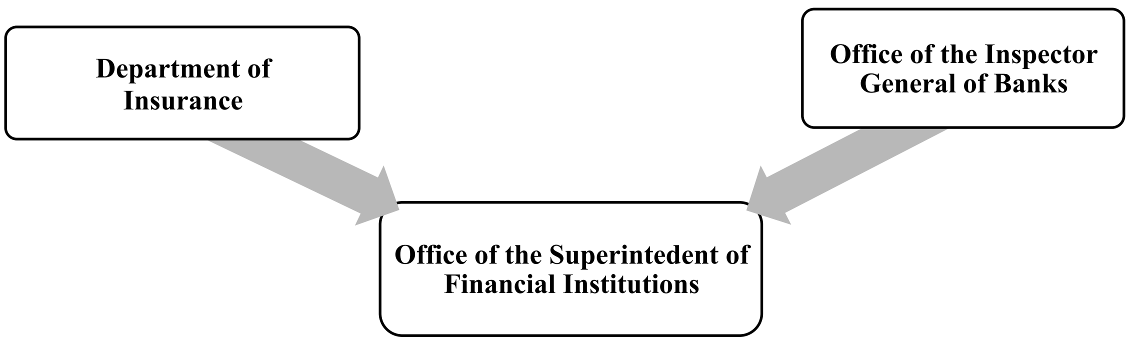
200 *Id*.

III. Office of the Superintendent of Financial Institutions (OSFI)

A. Agencies Consolidated to Create OSFI

The Canadian government enacted the Office of the Superintendent of Financial Institutions Act, which created the OSFI in 1987.[201] The Act merged the Department of Insurance and Office of the Inspector General of Banks into OSFI.[202] In so doing, it created a single regulatory agency responsible for the regulation and supervision of all federally chartered, licensed, or registered banks, insurance companies, trust and loan companies, cooperative credit associations, and fraternal benefit societies.[203] The establishment of OSFI involved transferring all staff of the Department of Insurance and all staff under the Inspector General of Banks into one agency.[204]

Figure 6
Consolidation to Create OSFI



B. Governance of OSFI

OSFI is headed by a Superintendent who is appointed by the Governor in Council.[205] Legislatively, OSFI is an autonomous agency, though it reports to the Minister of Finance.[206] The Superintendent serves a seven-year term.[207] The Superintendent works closely with the OSFI Advisory Board and makes recommendations on the agency's responsibilities and internal operations.[208] The OSFI Advisory Board includes between five to seven members who serve for three-year terms with the possibility of a second term.[209]

---

201 Office of the Superintendent of Financial Institutions Act, R.S.C. 1985, c. 18 (3rd Supp.) [Enacted as Part I to R.S., 1985, c. 18 (3rd Supp.), in force July 2, 1987] [hereinafter OSFI Act]; Canadian FSS Task Force, *supra* note 189, at 17. In addition to the Estey Report, the House and Senate both weighed in on the idea of financial regulation. The House "recommended the consolidation of the Office of the Inspector General of Banks, the Department of Insurance and CDIC into a single regulatory body that would perform the supervisory, regulatory and insurance functions in relation to banks, federal trust and loan companies, and federal insurance companies. The Senate Banking Committee. . . rejected the idea of one regulatory body and recommended the retention of the existing regulatory frame work in its entirety." Office of the Superintendent of Financial Institutions, About US, http://www.osfi-bsif.gc.ca/Eng/osfi-bsif/Pages/default.aspx [hereinafter OSFI website].
202 Mwenda & Fleming, *supra* note 190, at 15; OSFI History, *supra* note 190.
203 OSFI History, *supra* note 190.
204 Mwenda & Fleming, *supra* note 190, at 22.
205 BARBARA MILES, THE CANADIAN FINANCIAL SYSTEM 19 (2003).
206 Mwenda & Fleming, *supra* note 190, at 16.
207 Miles, *supra* note 205 at 19.
208 *Id.*
209 *Id.*

C. Funding of OSFI

The OSFI primarily is funded from the fees and assessments that it levies on the financial institutions that it supervises.[210] A smaller portion of its funding (0.7 percent) comes from appropriations from the Canadian Parliament for actuarial services that the OSFI provides to certain public sector pension and benefit plans.[211]

D. OSFI's Areas of Responsibility

To date, OSFI's regulatory and supervisory jurisdiction includes all banks, trust and loan companies, insurance companies, cooperative credit associations, fraternal benefit societies and private pension plans.[212] In its role as a regulator, OFSI provides oversight for covered financial institutions' accounting, auditing, and actuarial standards, as well as developing and interpreting legislation.[213] In its supervisory role, OSFI is responsible for assessing the health and efficiency of federally regulated financial institutions and pension plans by identifying harmful issues and assessing material risks of an institution.[214]

IV. Financial Consumer Agency of Canada (FCAC)

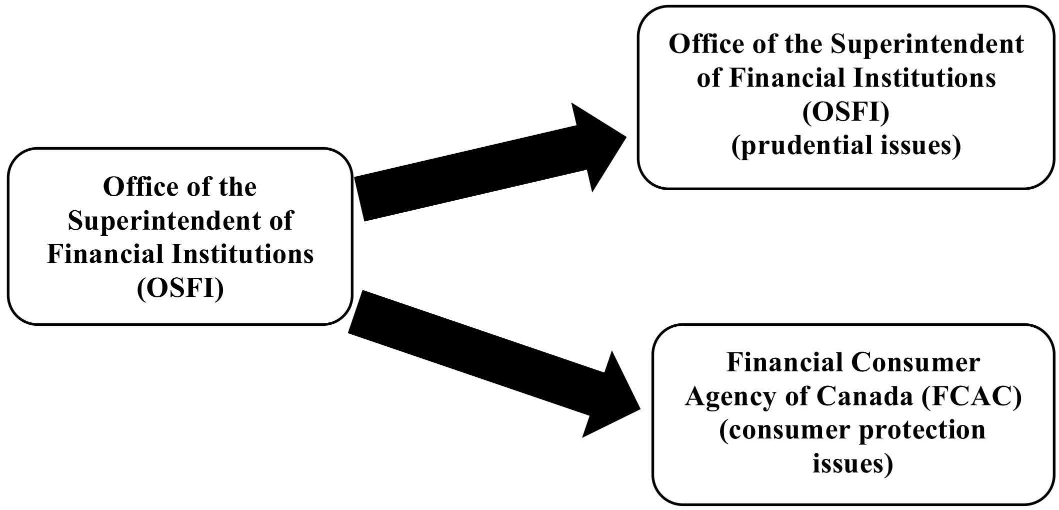
A. Creation of the FCAC

In 1998, the Task Force on the Future of the Canadian Financial Services Sector researched and assessed Canada's financial regulation and found wider gaps and disparities in consumer protection in Canada's financial markets than in comparable jurisdictions.[215] The Task Force recommended the appointment of a single regulator, a Financial Consumer Agency, to strengthen oversight of consumer protection measures and expand consumer education activities.[216] As a result, in October 2001, the Canadian Parliament enacted the Financial Consumer Agency Act to create the FCAC.[217] The Act implemented the Task Force's recommendation to move the OSFI's consumer protection responsibilities.[218]

---

[210] OSFI Act, *supra* note 201, §23; OSFI, ANNUAL REPORT 2012-13 1 (2013) [hereinafter OSFI 2012-13 Annual Report].
[211] OSFI Act, *supra* note 201, §23; OSFI 2012-13 Annual Report, *supra* note 210, at 7.
[212] OSFI website, *supra* note 201.
[213] *Id*.
[214] *Id*.
[215] Dept. of Finance, Reforming Canada's Financial Services Sector — A Framework for the Future (June 25, 1999), http://www.fin.gc.ca/finserv/docs/finserv1-eng.asp [hereinafter Canadian Dept. of Finance Framework]; Toni Williams, *Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services,* 29 L. & POL'Y 226, 239 (April 2007)
[216] Williams, *supra* note 215, at 239; Canadian Dept. of Finance Framework, *supra* note 215, at 54.
[217] Financial Consumer Agency of Canada Act, 2001 S.C., c 9 (2001), amended by 2013, c. 1, s. 2. (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/F-11.1.pdf; Financial Consumer Agency of Canada, About FCAC, FCAC's History, http://www.fcac-acfc.gc.ca/eng/about/history/Pages/home-accueil.aspx [hereinafter FCAC History].
[218] Canadian Dept. of Finance Framework, *supra* note 215, at 54.

Figure 7
Creation of FCAC



B. Governance of FCAC

The FCAC is headed by a Commissioner appointed by the Governor General of Canada.[219] The Commissioner serves for a five-year term.[220] The Commissioner of the FCAC serves as a member of the Financial Institutions Supervisory Committee.[221]

C. Funding of FCAC

FCAC is funded through appropriations from the Consolidated Revenue Fund and from fees and assessments levied in connection with its operations.[222] Most of its funding comes from fees and assessments on the financial services industry. For the 2013-2014 fiscal year, the FCAC received about Can$12.1 million (about US$10.9 million) in revenues from fees and assessments.[223]

D. FCAC's Areas of Responsibility

Currently, the FCAC operates under a dual mandate to (1) provide consumers with the information and the skills needed to make informed financial decisions, and (2) consolidate and strengthen oversight of consumer protection within the federal financial sector by monitoring the compliance of federally incorporated financial institutions with consumer protection laws.[224] While the FCAC aims to protect consumers, it has supervisory powers but only limited rulemaking powers.[225] Thus, it focuses on ensuring that firms comply with existing federal laws and regulations. It supplements these with voluntary codes of conduct.

---

[219] Financial Consumer Agency of Canada Act, *supra* note 217, §4.
[220] *Id.*
[221] FCAC History, *supra* note 217.
[222] Financial Consumer Agency of Canada Act, *supra* note 217, §13.
[223] FCAC, ANNUAL REPORT 2013-2014 63 (2014) (the fiscal year ends on March 31); US Bd. of Governors of Fed. Res. Sys., Foreign Exchange Rates – H.10, Historical Rates for the Canadian Dollar (Apr. 6, 2015) [hereinafter US-Canadian Exchange Rates] (on March 31, 2014, the exchange rate was US$1.00 = Can$1.1053).
[224] Anthony Dugan & Iain Ramsay, *Front-End Strategies for Improving Consumer Access to Justice*, in MIDDLE INCOME ACCESS TO JUSTICE 95,100 (Trebilcock et al. eds., 2012); Eric J. Pan, *Structural Reform of Financial Regulation,* 19 TRANSNAT'L L. & CONTEMP. PROBS. 796, 823 (2011).
[225] Williams, *supra* note 215, at 239.

V. Bank of Canada

The Bank of Canada is another vital participant in Canada's regulatory process. It was founded as a private corporation in 1934, but became a government entity four years later.[226] It describes its general role as "promot[ing] the economic and financial welfare of Canada."[227] The Bank of Canada is responsible for four core functions: (1) monetary policy, (2) designing and distributing bank notes, (3) promoting efficient operation of the financial system including serving as the lender of last resort, and (4) serving as the "fiscal agent" for the Government of Canada.[228] The Bank of Canada does not supervise banks.[229]

The Bank of Canada does act as a systemic regulator. It is responsible for "regulation of systemically important clearing and settlement systems and as lender of last resort for systemic financial stability."[230]

VI. Department of Finance

The Department of Finance operates as a regulator by providing policy advice on legislation that governs banks as well as providing oversight to the statutorily mandated legislative revision process.[231] Moreover it "establishes, on behalf of the Minister of Finance, the responsibilities and powers of the federal organizations that regulate and supervise banks," including OSFI.[232]

VII. Canadian Deposit Insurance Corporation (CDIC)

According to legislature, the CDIC is not a financial regulator or supervisor. [233] However, it manages risks of member banks and through its FISC and Senior Advisory Committee membership, it assists in finding and implementing solutions for failing banks.[234] It was created under the Financial Administration Act of 1967 to further stabilize Canada's financial sector.[235]

VIII. Provincial Financial Regulators

The Canadian provinces regulate non-bank financial institutions. The provincial governments authorize the incorporation of non-bank financial entities. The provincial governments also are responsible for the supervision of such entities, particularly in the area of consumer protection.

Non-bank financial entities include federally supervised insurers. An insurer must obtain a license to operate in every province in which it wants to do business. Provinces also license insurance agents and brokers. Some provinces also regulate the wording of insurance policies and premium rates.

---

[226] Miles, *supra* note 205, at 3.
[227] Bank of Canada Act at Preamble
[228] Bank of Canada, Core Functions, Financial Management, http://www.bankofcanada.ca/core-functions/funds-management/
[229] Mwenda & Fleming, *supra* note 190, at 16; Pan, *supra* note 224, at 826; Miles, *supra* note 205, at 18.
[230] See Bordo et al, *supra* note 177, at 23.
[231] OFFICE OF THE AUDITOR GENERAL OF CANADA, FALL 2010 REPORT OF THE AUDITOR GENERAL OF CANADA TO THE HOUSE OF COMMONS 6 (2010) [hereinafter OAG Fall 2010 Report]; Miles, *supra* note 205, at 19.
[232] OAG Fall 2010 Report, *supra* note 231, at 6.
[233] OAG Fall 2010 Report, *supra* note 231, at 7.
[234] *Id*. at 8.
[235] Miles, *supra* note 205, at 21.

A. Province of British Columbia

The Financial Institutions Commission regulates real estate agents and brokers, mortgage brokers, credit unions, trust companies, insurance companies, and pension plans. It also operates the Credit Union Deposit Insurance Corporation, which insures deposits in credit unions in British Columbia.

B. Province of Alberta

The Treasury and Finance Department regulates insurance companies, financial institutions, and pension plans. It has a Superintendent of Insurance and a Superintendent of Financial Institutions.

C. Province of Saskatchewan

The Financial and Consumer Affairs Authority (formerly known as the Financial Services Commission) regulates financial services within Saskatchewan, including the credit union system, insurance, pensions, securities, trust and loans, payday loans, and mortgage brokers.

D. Province of Manitoba

The Financial Institutions Regulation Branch within the Department of Finance regulates insurance companies and other financial institutions operating within Manitoba.

E. Province of Ontario

The Financial Services Commission of Ontario (FSCO) regulates the insurance companies, pension plans, loan and trust companies, credit unions, and mortgage brokers.

F. Province of Québec

The Financial Market Authority (Autorité des Marchés Financiers or AMF) regulates financial markets in Quebec. Since 2004, it has engaged in "integrated regulation" of the financial sector in the areas of insurance, securities, deposit institutions (other than banks), and the distribution of financial products and services.

G. Province of Nova Scotia

The Superintendent of Insurance within the Finance and Treasury Board regulates insurance within the province. The Nova Scotia Securities Commission regulates securities, including brokers and dealers, within the province.

H. Province of Prince Edward Island

The Department of Environment, Labour and Justice regulates financial services through its Consumer, Labour and Financial Services Division, which supervises securities, insurance, real estate, and pension plans.

I. Province of Newfoundland and Labrador

The Financial Services Regulation Division regulates insurance companies, securities firms, mortgage brokers, and real estate.

J. **Province of New Brunswick**

In 2013, New Brunswick created a new, independent agency to supervise financial services. The Financial and Consumer Services Commission regulates credit unions, co-operatives, trust companies, insurance, pensions, and securities.

IX. Advantages and Disadvantages of the Canadian Regulatory Structure

One of the major advantages of the Canadian structure is having agencies regulate based on a narrow range of goals or objectives. Agencies with multiple goals or objectives have difficulty prioritizing and balancing these goals or objectives, particularly when they are competing or in conflict with one another. In addition, it is difficult to hold an agency accountable when the agency is tasked with meeting multiple goals or objectives. In particular, it will be difficult to distinguish whether the agency's failure to achieve a goal resulted from the placing of more emphasis on other goals or just poor performance. The arrangement in Canada, where monetary policy is assigned to the central bank and prudential regulation to regulatory authorities, avoids the problem by providing clear accountability for each function.[236]

A second benefit of the Canadian structure is the way that it has fostered information sharing and cooperation among its financial regulators through its Financial Institutions Supervisory Committee and its Senior Advisory Committee. Bill Downe, CEO of BMO Financial Group, cited this cross-communication as a key feature of Canada's sound financial structure.[237] The Minister of Finance, the Governor of the Bank of Canada, the Superintendent of Financial Institutions, and the CEOs of banks and insurers had "early, open, and frequent dialogue" prior to the 2008 financial crisis.[238] These talks were not arbitrary. The Financial Institutions Supervisory Committee meets quarterly. During the recent financial crisis, however, it met more frequently and shared information on banks and coordinated the intervention for troubled banks.[239] The auditor general of Canada has concluded that the FISC arrangement has worked well for the exchange of information and as a forum for addressing a range of issues, from financial stability to international and domestic regulatory developments.

Similarly the Senior Advisory Committee also fosters communication among agencies.[240] Its meetings, which occur between three to four times per year, focus on exchanging information regarding policy issues and legislative proposals.[241]

A third benefit of the Canadian regulatory scheme is that it is forced to adapt on a regular basis because of the sunset clause embedded in the financial service laws that require those laws to be renewed every five years.[242] These renewals have spurred major reviews of the financial system and its regulation and helps keep the regulatory scheme current with financial-market developments.[243]

In addition, Canada relies more on principles and guidelines rather than rules, which give financial service firms more flexibility in how they comply with these requirements. For example, the OSFI

---

[236] John Chant, *Keeping the Genie in the Bottle: Grading the Regulation of Canadian Financial Institutions* 14 (School of Pub. Pol'y, Uni. of Calgary, Research Papers, March 2014)
[237] Bill Downe, *The Canadian Banking Model and Lessons Learned from the Global Financial Crisis,* POLICY OPTIONS, June 2010, at 66.
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] Id. at 15.
[243] *Id.*

superintendent issues guidelines that are predominately principles-based[244] rather than rules-based.[245] Unlike stringent rules, the principles-based guidelines can be changed quickly based on market conditions.[246]

A major weakness of the Canadian system is that it still is fragmented both along financial sectors and among the national government and the provincial governments.[247] Thus, like the United States, it does not have one agency that oversees the breadth of the financial services industry.

Canada has attempted to overcome the problems caused by this fragmentation by encouraging both coordination among national regulators and coordination between national regulators and provincial regulators. Unfortunately, these efforts have not always succeeded.[248]

These efforts are especially necessary for the securities and credit union industries, which are regulated by provinces. The differences of securities regulation among the provinces raises the compliance costs for issuers and dealers, which are passed along to investors.[249] For example, each province assesses fees for the issuance and trading of securities.[250]

X. Relevance of the Canadian Experience for the United States

Canada's experience with consolidating its regulators illustrates the difficulty of doing this when regulation is fragmented along sector lines and among national and sub-national governments. Canada's structure developed from episodic reviews of its financial regulatory structure. Rather than attempt a major reorganization, these reviews resulted in recommendations for reforms that target specific problems. The creation of the FCAC grew out of a review that concluded that consumers of financial products in Canada were not being adequately protected. While some elements of the Canadian structure function like the twin peaks structure in Australia, Canada has never attempted to fully implement a twin peaks structure to regulate the entire financial services industry.

Nevertheless, having one national prudential regulator for banking and insurance seems to have helped Canada limit the growth of the shadow banking sector and the potential problems that it can cause. Both Canada and the United States experienced deregulation in the 1980s but the Canadian efforts led

---

[244] Chant, *supra* note 236, at 16. John Chant illustrates the differences in principles-based and rules-based guidelines as follows: "The difference between principle-based and rules-based regulation can be illustrated by comparing OSFI's Guideline B-4: Securities Lending, with the US Federal Reserve's Regulation U (Part 221: Credit by banks and Persons Other than Brokers or Dealers for the Purpose of Purchasing or Carrying Margin Stock). Despite covering all securities lending, Guideline B4 consists of four pages with five sections, whereas Regulation U uses 23 pages for 32 sections and is supplemented by Regulation X "Borrowers of Securities Credit."
Guideline B4 advises financial institutions to "ensure that securities lending activities are conducted in a safe and prudent manner" and makes no mention of the purpose. Regulation U requires execution of a purpose statement (Form FR U1) for margin loans against stock except for loans extended under paragraph (c)(2) of the section, and has sections on "Amendment of purpose statement," "Special purpose loans to brokers and dealers," with 10 subsections together with interpretations on "Determination and effect of purpose of loan," "reliance on 'good faith' on statement of purpose of loans," and a response to a question about "Accepting a purpose statement through the mail without benefit of face-to-face interview."
[245] *Id.* at 15.
[246] *Id.*
[247] Pan, *supra* note 224, at 827; Ian Roberge, *Canada's Banking Experience Shows Concentration Can Improve Stability*, THE ECONOMIST, Mar. 13, 2011, at 5, http://www.economist.com/economics/by-invitation/guest-contributions/canadas_banking_experience_shows_concentration_can_impro.
[248] *Id.*
[249] Jackson, *supra* note 167, at 17.
[250] *Id.*

to bigger banks, while the American efforts led to shadow banking.[251] Thus, Canada's regulation was centralized and tightly confined by one regulator, OSFI, which then was able to "contain the development of an unregulated shadow banking system."[252] Fast forward to recent times, shadow banking was estimated to be roughly 40 percent of nominal Canadian GDP at the end of 2012, while in the United States, it was approximately 95 per cent of US GDP at the end of 2011.[253]

Canada, however, may not offer many lessons for the United States because of the significant differences in the institutions that make up its financial sector and those that operate within the United States. First, the Canadian banking system is much less competitive than its US counterpart.[254] There are about 7,200 commercial banks in the US compared with 24 in Canada[255] Thus, a common critique of comparison is that Canada's banking sector is oligopolistic and its relative stability hampers competition.[256] As a result, Canadian banking regulators have an easier time monitoring what is occurring in the banking sector because they have to deal with substantially fewer institutions than the US banking regulators must monitor.[257]

In addition, some commentators have noted that the relationship between the OSFI and the banks that it regulates is less adversarial than the relationship between US banking regulators and the banks that they regulate.[258] Again, the small number of Canadian banks might explain, in part, the different relationships that exist between the Canadian regulators and the banks that they regulate when compared to the United States situation. Studies have determined that human beings can only maintain close social relationships with about 150 people.[259] When one goes substantially over that number, other mechanisms, such as rules or formal procedures, are required to manage the relationship.

Other differences between the Canada and the United States also might prevent the United States from achieving the same results if it attempted to move to a regulatory structure like the hybrid-twin peaks model employed in Canada. Marie-Josée Kravis, a fellow at the Hudson Institute, has pointed to structural and social factors that differentiate the Canadian and American financial industries.[260] Kravis pointed to the fact that many US banking regulations stem from a desire to achieve certain social or economic goals rather than tasking regulators to focus solely on risk management.[261] She cited laws and programs aimed at increasing home ownership, such as the US Community Reinvestment Act and the US Federal Housing Authority's loans with down payments of as little as three percent.[262] Kravis attempted to claim that the multiple goals that distracted regulators from focusing on risk management

---

[251] Bordo et al, *supra* note 177, at 22.
[252] *Id.* at 30-31.
[253] Toni Gravelle, Timothy Grieder and Stéphane Lavoie, *Monitoring and Assessing Risks in Canada's Shadow Banking Sector*, BANK OF CANADA FIN. SYSTEM REVIEW 55, 56 (June 2013).
[254] Roberge, *supra* note 247, at 8.
[255] KPMG INT'L, EVOLVING BANK REGULATION IN THE AMERICAS 2013 2 (2013).
[256] John C. Courtney & Pietro S. Nivola, *Know Thy Neighbor: What Canada Can Tell Us About Financial Regulation,* April 23, 2009, http://www.brookings.edu/research/papers/2009/04/23-canada-nivola.
[257] STEPHEN ROBB, PAUL F. DELLA PANNA, & ALICIA M. ROBB, COMPARATIVE FAILURE EXPERIENCE IN THE US AND CANADIAN LIFE INSURANCE AND BANKING INDUSTRIES FROM 1980 TO 2010, 11 (2013).
[258] Barbara Schecter, *Canadian banks win praise rather than scorn from regulators in contrast to US,* FIN. POST, August 7, 2014, http://business.financialpost.com/2014/08/07/in-sharp-contrast-to-u-s-osfi-satisfied-with-living-wills-at-canadian-banks/.
[259] Drake Bennett, *The Dunbar Number, From the Guru of Social Networks*, BLOOMBERG BUS., Jan. 10, 2013, http://www.businessweek.com/articles/2013-01-10/the-dunbar-number-from-the-guru-of-social-networks.
[260] Marie-Josée Kravis, *Regulation Didn't Save Canada's Banks*, WALL ST. J., May 7, 2009, http://online.wsj.com/news/articles/SB124165325829393691
[261] *Id.*
[262] *Id.*

should bear more of the blame for the differences in how the United States and Canada fared in the 2008 financial crisis.

France

I. Background

Today, France employs a twin peaks regulatory structure for financial services. Unlike Australia, this structure was not achieved through a single set of reforms. Instead, it took two sets of reforms over a ten year period to achieve this structure.

Following the dotcom bubble bursting in 2000 and a recession in 2001-2002, the French government considered adopting a twin peaks model. In 2001, Michael Prada, who was head of the Stock Market Commission (Commission des Opérations de Bourse or COB), which regulated France's stock markets, was pushing for a twin peaks model with the COB as one peak and the Banking Commission of the Bank of France (Commission Bancaire) as the other peak.[263] He believed that a twin peaks solution was better than a single regulator because consumer and investor protection sometimes conflict with prudential regulation.[264] In addition, he felt that a single agency would be too large to manage and would get blamed for every minor financial problem, which would undermine its effectiveness.[265]

The Bank of France, however, objected to the adoption of a twin peaks model and strongly fought against losing its bank regulatory responsibilities.[266] The Bank of France had relinquished its authority over monetary policy to the European Central Bank when France adopted the euro on January 1, 1999. Thus, the French government could not use the prospect of making the Bank of France the sole entity in charge of monetary policy within France as a means of gaining the Bank of France's support for its proposed reforms as the UK government had been able to do with the Bank of England.

While France did not experience the types of scandals that the United States did with Enron, Worldcom, and Tyco, the French government believed that France needed a much stronger securities regulator to avoid the problems that it did experience in 2000-2002. As a result, France consolidated its securities regulators in 2003 to create the Financial Markets Authority (Autorité des Marchés Financiers or AMF).

The second set of reforms occurred as a result of the 2008 financial crisis. During the 2008 financial crisis, France gave about €15 billion to French banks to help keep them solvent. The funds pledged by the French government to recapitalize financial institutions in 2008 only represented 1.4 percent of the country's gross domestic product (GDP) in 2008, while the funds pledged by the United States government equaled 5.2 percent of the US GDP in 2008.[267] Nevertheless, France concluded that it needed stronger prudential supervision of its financial institutions and created the Prudential Supervisory Authority (Autorité de Contrôle Prudential) in 2010. The Prudential Supervisory Authority was not created as a separate legal entity but was attached to the Bank of France. This structure probably helped mollify the Bank of France, whose opposition in 2003 had prevented the creation of a twin peaks structure at that time.

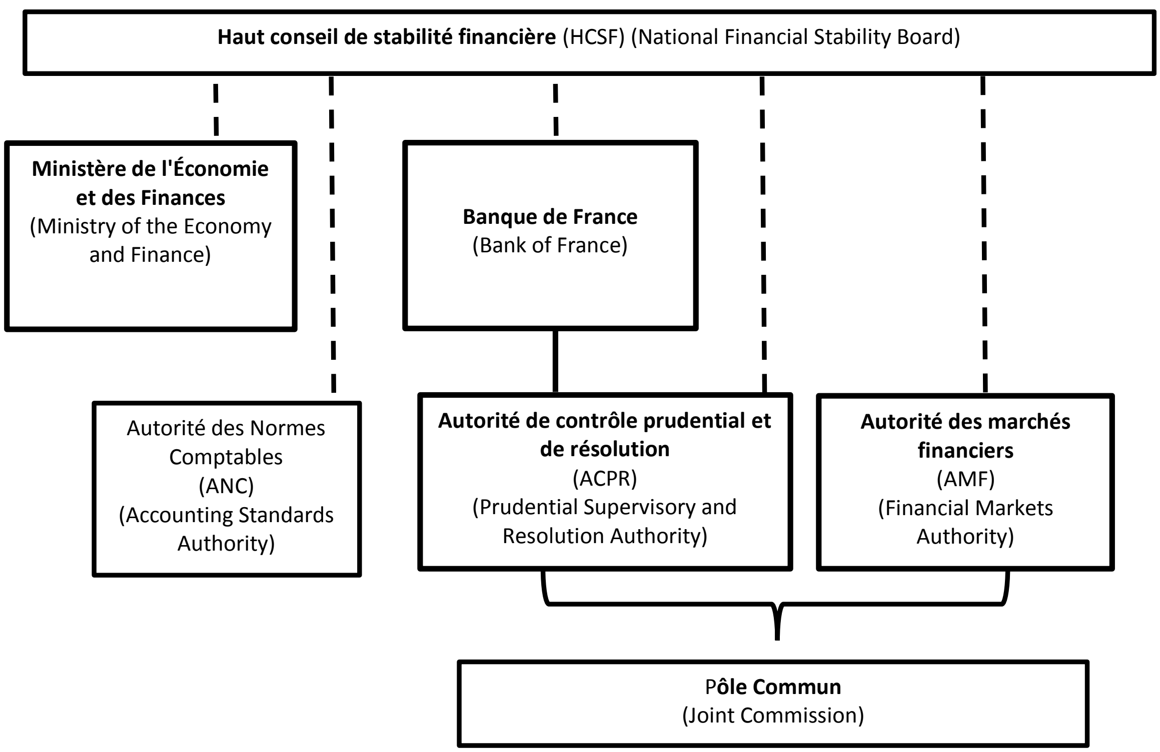
Act No. 2008-776 of August 4, 2008, also known as the Law for the Modernization of the Economy, allowed the reforms to the regulatory system to be undertaken using executive orders (ordinances and decrees) rather than through statutes enacted by the French Assembly. Ordinance No. 2010-76 of January 22, 2010 and Decree No. 2010-217 of March 3, 2010 authorized the creation of the Prudential Supervisory Authority by merging the banking and insurance licensing and supervisory agencies into a

[263] *A Survey of Global Equity Markets: Regulators' Arbitrage*, THE ECONOMIST, May 3, 2001.
[264] *Id*.
[265] *Id*.
[266] Pan, *supra* note 224, at 848-49.
[267] David Gauthier-Villars, *France Seeks Fee on Banks to Recoup Costs of Bailout*, WALL ST. J., Oct. 20, 2009.

new, independent regulator, as illustrated in Figure 8. The French parliament endorsed the executive orders creating the Prudential Supervisory Authority on October 22, 2010 under the provisions of the Banking and Financial Regulation Act No. 2010-1249. The provisions governing the Prudential Supervisory Authority were codified in the Monetary and Financial Code. In 2013, the Prudential Supervisory Authority was renamed the Prudential Supervisory and Resolution Authority (Autorité de Contrôle Prudential et de Résolution or ACPR).

Today, the three main government entities that are responsible for regulating financial services in France, are the Ministry of the Economy and Finance, the ACPR, which is within the Bank of France, and the Financial Markets Regulator (Autorité des Marchés Financiers or AMF). The Ministry of the Economy and Finance is responsible for the proposed legislation and regulation in the banking and insurance areas, participates in international negotiations, and helps implement the regulatory framework.

Figure 8
Current French Financial Regulatory Structure



II. Reasons for the Consolidation

One of the main reasons for the creation of the AMF by merging the COB, CMF and CDGF was to provide a more efficient and effective regulatory structure for France and to improve the France's financial profile at the international level.[268] Another important factor in the creation of the AMF was to safeguard investments in financial products, ensuring that investors receive material information and

[268] Financial Markets Authority, *Autorité des Marchés Financiers: The French Securities Regulator* (April 2006) at 4.

maintaining orderly financial markets.[269] The creation of the AMF also was to ensure the proper functioning of financial markets.[270]

The main reason for the set of reforms that created the ACPR was to ensure the preservation of the stability of the financial system and the protection of customers, policyholders, and investors.[271] The French government decided to merge the supervision of banking and insurance risks into a single authority, the ACPR, in order to enhance the stability of the financial sector and satisfy the needs of both consumers and companies that operate in the banking sector.[272]

III. Financial Markets Authority (Autorité des Marchés Financiers or AMF)

A. Agencies Consolidated to Create AMF

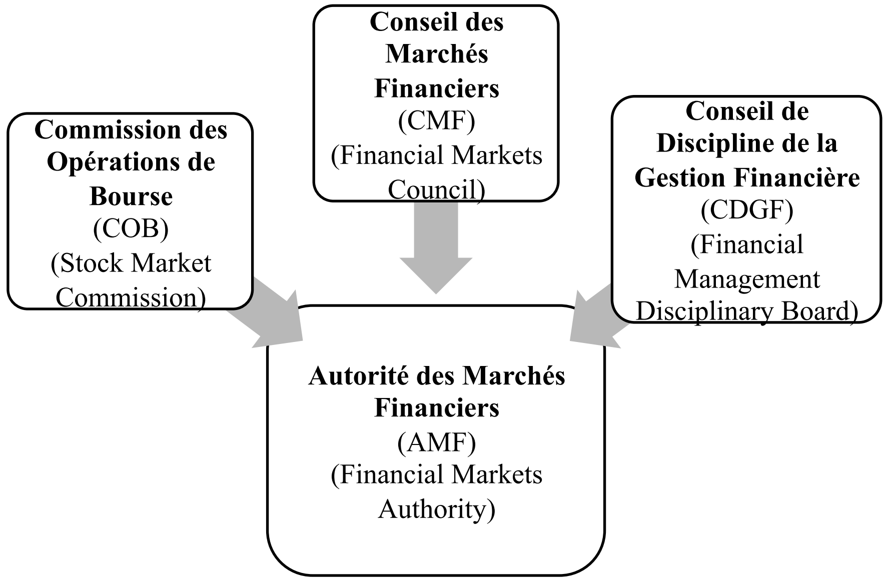
On August 1, 2003, the Financial Security Act (Loi de Sécurité Financière or LSF) was adopted in order to provide for the creation of a single stock market regulator.[273] Article 2 of the LSF amended the Monetary and Financial Code (Code Monétaire et Financier) by ordering the creation of the Financial Markets Authority as a public independent authority, which will ensure the protection of savings invested in financial instruments, adequate information for investors, and the proper functioning of markets in financial instruments.[274] The act also gave the AMF a mission to improve the regulation of these markets at the European and international levels.[275] The AMF was set up on November 24, 2003 by Mr. Francis Mer, Ministry of the Economy, Finance and Industry in accordance with the provisions of the LSF.[276]

The LSF unified the regulatory structure of the French financial markets by bringing together the powers previously exercised by the Financial Markets Council (Conseil des Marchés Financiers or CMF) that had existed since 1996, the Stock Market Commission (Commission des Operations de Bourse or COB) that had existed since 1967, and the Financial Management Disciplinary Board (Conseil de Discipline de la Gestion Financière or CDGF) that had existed since 1989.[277]

---

[269] *Id*. at 4.
[270] *Id*.
[271] Ordinance No 2010-76 of Jan. 21, 2010, Journal Officiel de la République Française [J.O.] [Official Gazette of France], January 2010 (Fr.) (law creating the Prudential Supervisory Authority) [hereinafter ACPR Law].
[272] ACP, 2010 ANN. REP. 15 (2011) [hereinafter ACP 2010 Ann. Rep.].
[273] Law 2003-706 of Aug. 1, 2003, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 2003, p. 13220 (Fr.), http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000428977 [hereinafter AMF Law] (law creating Financial Markets Authority in France).
[274] *Id*., Art. 2.
[275] *Id.*
[276] AMF, ANN. REP. 2003 5 (2003) (Fr.) [hereinafter AMF 2003 ANN. REP.].
[277] *Id.* at 5; AMF Law, *supra* note 273, Art. 46, 49.

Figure 9
Agencies Merged in 2003 to Create the AMF



B. Governance of AMF

Article L.621-2 of the Monetary and Financial Code states that the AMF is composed of a College, an Enforcement Committee, and, in some appropriate cases, specialized committees and consultative committees.[278] The College exercises the duties of the AMF.[279] The College is composed of sixteen members, including:

- A president appointed by decree;
- A state councilor appointed by the Vice-President of the state council;
- An advisor to the Supreme Court designated by the first president of the Supreme Court;
- A master councilor at the Court of Auditors appointed by the first president of the Court of Auditors;
- A representative of the Bank of France (Banque de France) appointed by the Governor of the Bank of France;
- The President of the National Accounting Council (Conseil National de la Comptabilité);
- Three members appointed, based on their financial and legal expertise and their experience in public offerings and investment of savings in financial instruments, respectively by the President of the Senate, the President of National Assembly and the President of the Economic and Social Council;
- Six members appointed, based on their financial and legal expertise as well as their experience in public offerings and investment of savings in financial instruments, by the Minister of the Economy; and
- A representative of employee shareholders appointed by the Minister of the Economy after consultation with trade unions and representing associations. [280]

---

[278] Monetary and Financial Code, Art. L621-2(I) (last modified by the Law 2010-704 of June 28, 2010) (Fr.), http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072026&dateTexte=20101101.

[279] *Id.*

[280] *Id.* Art. L621-2(II) (Fr.). Before the Minister of the Economy can appoint six members to the College, he must consult with organizations representing publicly traded industrial and commercial companies, investment

Furthermore, the AMF President has a single, five-year term of office.[281] Except for the representatives from the Bank of France and from the National Accounting Council, the other members would serve for five-year terms that may be renewed once.[282] The terms of the members from the College are staggered so that half of the members would be replaced or have their terms renewed every thirty months.[283]

The Enforcement Committee of the AMF is composed of twelve members, including:

- Two state councilors appointed by the Vice-President of the State Council;
- Two judges of the Supreme Court appointed by the first president of the Supreme Court;
- Six members appointed, based on their financial and legal expertise as well as their experience in public offerings and investment of savings in financial instruments, by the Minister of the Economy who would have to consult with organizations representing public companies, and management investment companies, providers of investment services, market operators, clearing houses, managers of settlement systems and central securities depositories before making his decision; and
- Two representatives of employees of companies or institutions providing investment services, asset management companies of undertakings for collective investment, business market, clearing houses, managers of settlement systems and central securities depositories. [284] These representatives should be designated by the Minister of the Economy after consulting with trade union representatives.[285]

The members of the Enforcement Committee serve five-years terms that may only be renewed once.[286] The members of the Enforcement Committee serve staggered terms so that half of the members' terms would end or be renewed every 30 months.[287]

C. Funding of AMF

The AMF is independently funded from the levies and contributions paid by the firms under its supervision.[288] It is not funded out of the general revenue. Its budget is not set by the French Parliament.

D. AMF's Responsibilities

The AMF is responsible for protecting investors and maintaining the stability of the financial markets. It supervises financial markets, listed companies, and financial intermediaries, such as collective investment products, investment firms, investment management companies, financial investment advisers.

---

management companies, investment providers, market operators, clearing houses, settlement systems, and central securities depositories. *Id*.

281 *Id.*

282 *Id.*

283 *Id.*

284 Monetary and Financial Code, Art. L621-2(IV) (Fr.).

285 *Id*.

286 *Id*.

287 *Id*.

288 INT'L MONETARY FUND, FRANCE: FINANCIAL SECTOR ASSESSMENT PROGRAM —DETAILED ASSESSMENT OF OBSERVANCE OF IOSCO OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION 34 (IMF Country Report No. 13/182, 2013), https://www.imf.org/external/pubs/ft/scr/2013/cr13182.pdf.

IV. Prudential Supervisory and Resolution Authority (Autorité de Contrôle Prudentiel et de Résolution or ACPR)

A. Agencies Consolidated to Create ACPR

Until 2009, the Committee of Credit Institutions and Investment Firms (Comité des Établissements de Crédit et des Entreprises d'Investissement or CECEI) licensed credit institutions and investment firms.[289] Until 2009, the Banking Commission (Commission Bancaire or CB) oversaw credit institutions and investment firms and took disciplinary actions in case of violations.[290] These two entities (CECEI and CB) supervised the French banking sector and were operated under the Bank of France.

On August 4, 2008, the Economic Modernization Act (Loi Dite de Modernisation de L'Économie) paved the way for a change in the French banking supervision.[291] The Economic Modernization Act authorized the government to take the necessary steps to reconcile the approval and enforcement authorities of the banking and insurance sectors, while redefining their duties, powers and operation in order to ensure financial stability.[292]

The Inspectorate General of Finances (Inspection Générale des Finances or IGF) recommended a merger of the licensing and supervisory authorities for the banking and insurance sectors while having two separate authorities, so that one would oversee securities markets, like the AMF, and the other would deal with prudential supervision of regulated entities.[293] The French Finance Minister revised these recommendations and provided a draft, after consultation with other authorities and professionals of the Prudential Supervisory Authority's general organization on July 27, 2009.[294] The Council of Ministers adopted Ordinance No. 2010-76, which implemented the Finance Minister's recommendations, on January 20, 2010.[295]

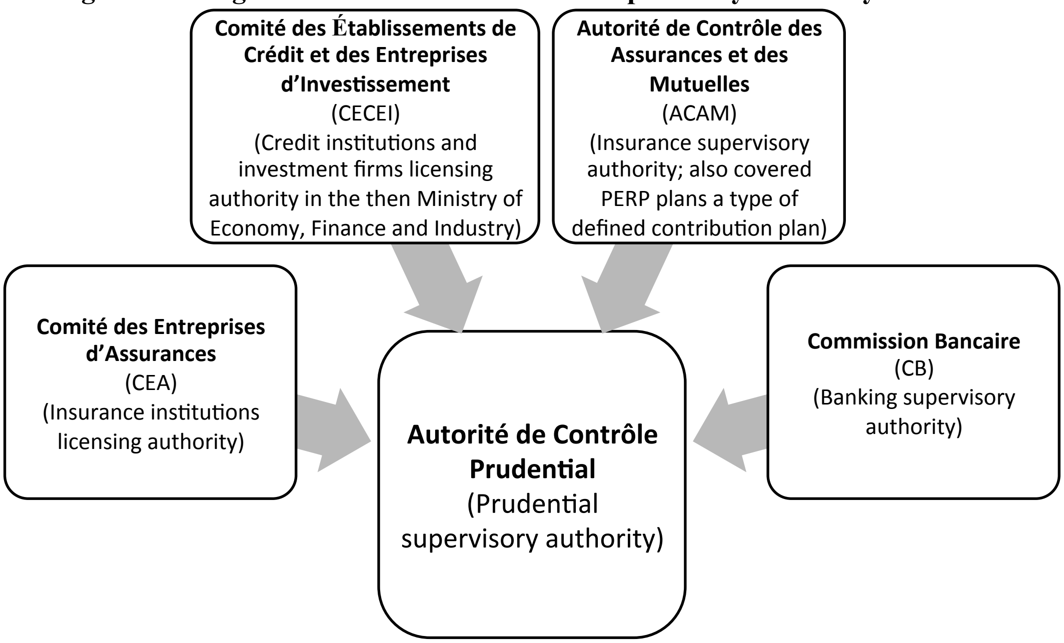
On March 3rd 2010, Decree No. 2010-217, made by Ordinance No. 2010-76, and provided several aspects of the Prudential Supervisory Authority's organization, its enforcement exercise and procedures. The Prudential Supervisory Authority resulted from the merger of the CECEI, the CB, the ACAM and the CEA.[296]

On July 26, 2013, Law No. 2013-672 on the Separation and Regulation of Banking Activities (Loi de Séparation et de Régulation des Activités Bancaires) extended the Prudential Supervisory Authority's powers in terms of financial crisis management. It also renamed the Prudential Supervisory Authority to the Prudential Supervisory and Resolution Authority (Autorité de Contrôle Prudentiel et de Résolution or ACPR).[297]

---

289 Commission Bancaire, FACT SHEET No. 132 in replacement of Fact Sheet No. 120, Banque de France Communication Department, 2 (December 2004) (Fr.).
290 *Id.*
291 ACP, 2010 ANN. REP., *supra* note 272, at 14.
292 *Id.*
293 *Id.*
294 *Id.*
295 *Id.*
296 *Id.*
297 Law No. 2013-672 of July 26, 2013, Journal Officiel de la République Française [J.O.] [Official Gazette of France], (July 26, 2013) p. 12530, Art. 24 (Fr.).

Figure 10
Agencies Merged to Create the Prudential Supervisory Authority in 2010



B. Governance of ACPR

The ACPR is comprised of four main bodies, which include:

- The Supervisory College (Collège de Supervision),[298]
- The Resolution College (Collège de Résolution),[299]
- The Sanctions Committee (Commission des sanctions),[300] and
- The General Secretariat (Secrétariat Général).[301]

The Supervisory College functions as the decision-making body for ACPR. It is composed of 19 members and is chaired by the Governor of the Bank of France.[302] The nineteen members of the Supervisory College include (a) the Governor of the Bank of France or the Deputy Governor who will represent the President of France, (b) the President of the Financial Markets Authority or his representative, (c) one member appointed by the President of the National Assembly, (d) one member appointed by the President of the Senate, (e) the President of the Accounting Standards Authority or his representative, (f) a state councilor proposed by the Deputy Chairman of the State Council, (g) an advisor to the Court of Cassation proposed by the First President of the Court of Cassation, (h) a Senior Member of the Court of Auditors proposed by the First President of the Court of Auditors, (i) a vice president of ACPR with insurance experience, (j) two other members chosen based on their expertise in the protection of clients or quantitative techniques and actuarial or other useful knowledge, (k) four members chosen for their insurance skills, mutuality, foresight or reinsurance, and (l) four members chosen because of their

---

[298] Prudential Supervisory and Resolution Authority, Ann. Rep. 2013, 17 (2013) (Fr.), https://acpr.banque-france.fr/fileadmin/user_upload/acp/publications/rapports-annuels/201409-ACPR-2013-Annual-Report-full-text.pdf. [hereinafter, ACPR, ANN. REP. 2013].
[299] *Id.*
[300] *Id.*
[301] *Id.* at 20.
[302] *Id.* at 17.

expertise in banking, transmission and electronic cash management, payment or investment services.[303] The Minister of the Economy appoints the state councilor, the advisor to the Court of Cassation, the Senior Member of the Court of Auditors, the two other members who were chosen based on their expertise in the protection of clients or quantitative techniques and actuarial or other useful knowledge, the four members chosen for their insurance skills, mutuality, foresight or reinsurance, and the four members chosen because of their expertise in banking, transmission and electronic cash management, payment or investment services.[304] After consulting with the finance committees in the National Assembly and the Senate, the Minister of the Economy and the Minister of Social Affairs and Health jointly appoint the vice president of ACPR with insurance experience.[305] These appointed members will serve five-year terms that may only be renewed once.[306]

The Supervisory College will meet in a plenary session to discuss general issues pertaining to the banking and insurance sectors but will meet in restricted sessions to deal with issues that have a material impact on banking or insurance or that deal with financial conglomerates.[307] The Supervisory College has established several committees to address particular issues. These committees include an Audit Committee, a Consultative Committee on Prudential Affairs, a Consultative Committee on Anti-Money Laundering and Counter-Terrorist Financing, a Consultative Committee on Business Practices, and a Scientific Consultative Committee.[308]

The Resolution College is chaired by the Governor of the Bank of France and has six members.[309] The members of the Resolution College include the Governor of the Bank of France or his representative, the Director General of the Treasury or his representative, the Chairman of the AMF or his representative, the Deputy Governor appointed by the Governor of the Bank of France or his representative, the Chairman of the Commercial, Financial and Economic Chamber of the Court of Cassation or his representative, and the Chairman of the Management Board of the Deposit Insurance and Resolution Fund or his representative. From a prevention perspective, banks must provide resolution plans prepared in advance, allowing them to quickly restructure in case of difficulty in order to preserve critical activities for the financial economy. It also has different resolution powers.

The Sanctions Committee undertakes disciplinary actions in the event of breaches of the legislative and regulatory provisions regarding the organization rules.[310]

C. Funding of ACPR

The ACPR operates within the Bank of France as an independent administrative authority and has control its own budget.[311] The Bank of France collects contributions from the institutions supervised by the ACPR to cover ACPR's supervising costs and transfers these funds to ACPR. The Bank of France may also provide additional funds to the ACPR to enable it to cover its budget.[312]

---

[303] Monetary and Financial Code, Art. L612-5 (last modified by the Law 2013-672 of July 26, 2013) (Fr.), http://www.legifrance.gouv.fr/affichCode.do;jsessionid=DD18191CCA3A087CFE6E8D809B23F155.tpdjo15v_3?idSectionTA=LEGISCTA000021724252&cidTexte=LEGITEXT000006072026&dateTexte=20150201.
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] ACPR, ANN. REP. 2013, *supra* note 298, at 17.
[308] *Id.* at 21-24.
[309] *Id.* at 20.
[310] *Id.*
[311] ACPR, ANN. REP. 2013, *supra* note 298, at 25.
[312] *Id.*

D. ACPR's Responsibilities

The ACPR is responsible for the licensing and prudential supervision of banking and insurance entities. Thus, in the areas of banking and insurance, the ACPR acts as both the market conduct regulator and the prudential regulator.

The ACPR's regulatory objectives include: (1) maintaining financial stability through the prudential regulation of banks and insurance firms, (2) protecting banking consumers and insurance policyholders, and (3) representing French interests during international negotiations on financial regulation.[313] In addition, under Law No. 2013-672, the ACPR has expanded resolution powers to enable it to avoid or limit public bail-outs of financial institutions.

Figure 11
ACPR Supervisory Role[314]

Banking sector (Payment services and investment services)	**Insurance sector**
-Credit institutions -Investment firms other than portfolio management companies -Members of the regulated markets -Members of clearing houses -Payment institutions -Financial holding companies and mixed financial holding companies -Money changers	-Companies providing direct insurance -Companies that engage in the business of reinsurance and that have their headquarters in France -Mutual insurance companies -Provident institutions -Group insurance companies and missed group insurance companies -Universal guarantee fund for rental risk -Securitization vehicles

In the area of securities regulation, France has a more traditional twin peaks model. The AMF along with the ACPR regulate securities firms. The ACPR acts as the prudential regulator while the AMF acts as the market conduct regulator. The National Auditors' Oversight Board (Haut Conseil du Commissariat aux Comptes or H3C) handles auditing issues that arise.

The ACPR and the AMF coordinate their efforts on consumer protection issues that cover the full range of financial services (banking, securities, insurance, etc.) through the Joint Commission (Pôle Commun). The Joint Commission provides the ACPR and the AMF with a forum for exchanging information, alert each other of problems, and taking joint actions.

V. Bank of France

A. Law No. 98-357 of 1998

The Law No. 98-357 of 1998 provided for the participation of the Bank of France in the European System of Central Banks (ESCB).[315] Indeed, this law amended the Law No. 93-980 of August 4, 1993 relating to

[313] Monetary and Financial Code, *supra* note 303, Art. L612-1 (Fr.).
[314] ACP, 2010 ANN. REP. *supra* note 272, at 17.
[315] Law No. 98-357 of May 12, 1998, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 1998, p.7168 (Fr.) (Law providing for the participation of the Bank of France in the European System of Central Banks).

the Bank of France status and its supervision of credit institutions by stating that the Bank of France would be part of the ESCB and would perform the missions assigned by the European Union.[316]

Under the conditions established by the ESCB, the Bank of France has been authorized to manage the French state foreign reserves in gold and currencies and to register them as assets on the balance sheet of the Bank of France, according to the specified modalities agreed with the French State.[317] The Bank of France has also been allowed to participate in international monetary arrangements with the agreement of the French Minister of the Economy.[318] Moreover, Law No. 98-357 stated that the Bank of France would ensure the proper functioning and security of payment systems, as part of the ESCB mission regarding the enhancement of the smooth operation of payment systems.[319]

Finally, Law No. 98-357 amended Article 7 of Law No. 93-980 to allow the Monetary Policy Council to set the terms under which the Bank of France could borrowing and lending of securities, bonds, receivables and other guarantees, in accordance with the guidelines and instructions of the European Central Bank.[320]

B. Governance of the Bank of France

The Bank of France is directed by a Governor, who is assisted by two Deputy Governors.[321] The Governor chairs the General Board and prepares and implements its decisions.[322] The Governor and the Deputy Governors are appointed by the Council of Ministers for six-year terms that may be renewed once.[323] In addition, the Governor holds the presidency of the ACPR, the Banking Mediation Committee, the Observatory of Payment Card Security, and the Regulated Savings Observatory.[324] He is also member of the National Financial Stability Council (Haut Conseil de Stabilité Financière), created by Law No. 2013-672, in which he has the sole responsibility to propose preventive measures in order to address systemic risks.[325]

The Bank of France's Executive Committee forms the core of the Bank of France's operations.[326] This Executive Committee is chaired by the Governor and includes the Directors General, the Deputy Secretary General for Strategy, and the Legal Affairs Director.[327] In addition, the Executive Committee examines strategic issues related to internal management.[328]

Two bodies of the Bank of France play a crucial role on the conduct of investment policies and market operations: the Assets-Liabilities Committee and the Risk Committee.[329] Chaired by the Governor, the Assets-Liabilities Committee advises the Bank of France on its investment strategy for its portfolios (in

---

[316] *Id.* §1, Art. 1.
[317] *Id.* §1, Art. 2.
[318] *Id.*
[319] *Id.* Art. 105.
[320] *Id.* §1, Art. 5.
[321] BANK OF FRANCE, ANN. REPORT 2013, 69 (2013) (Fr.), https://www.banque-france.fr/fileadmin/user_upload/banque_de_france/publications/AR-2013.pdf.
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] Law No. 2013-672, *supra* note 297, Art. 24.
[326] BANK OF FRANCE, ANN. REP. 2013, *supra* note 321, at 69.
[327] *Id.*
[328] *Id.*
[329] *Id.*

euros and other currencies).[330] The Assets-Liabilities Committee assesses the volume of investments as well as the allocation of their assets.[331] Concerning the Risk Committee, it is chaired by the Deputy Governor and it defines the risk monitoring applicable to market transactions for all of the Bank of France's portfolios.[332] The Risk Committee updates the list of issuers, countries and authorized instruments, approves methodologies for measuring risk and performance of market activities.[333] The Risk Committee also enforces the supervision limitations reports with regards to its scope of intervention.[334]

The Bank of France includes a network that has 96 departmental branches (including 22 seats in regional management), to which are attached 21 economic centers and 7 indebtedness treatment centers.[335] Services related to the management of currency circulation are provided in 63 of these establishments as well as in three specialized centers.[336] The Bank of France's network organization is based on two main levels. The first level is the regional, with a regional director for each region and a branch manager.[337] The regional director coordinates and supervises the activities of the various branches in the region.[338] The regional director manages human resources and budgetary mean, as well as the supervision of its assigned region.[339] He is assisted by several centers of expertise and a specific structure of supervision for operations and procedures, which is the regional service for supervision and risk management.[340] The second level of the Bank of France's network is the department level, which represents the operational level.[341] Each department deals with the implementation of objectives assigned to the Bank of France's network.[342]

The Bank of France supervisory bodies include a General Council, an Audit Committee, and a Compensation Committee.[343] The General Council includes the Governor and two Deputy Governors, two members appointed by the President of the Senate, two members appointed by the President of the National Assembly, two members appointed by the Council of Ministers based on the recommendation of the Minister of the Economy, the ACPR Vice President, and an elected employees' representative.[344] The Audit Committee was created on October 22, 2004.[345] The Chairman of the Audit Committee is appointed by the General Council based on recommendations by the Governor. The Secretariat of the Audit Committee is provided by the French Comptroller General.[346] Regarding the Compensation Committee, it was created by the Bank of France's General Council on March 12, 2010.[347] The Compensation Committee consists of two members from the General Council appointed by the Governor. Its mission is to review the remuneration of the Bank of France's top leadership.[348]

---

330 *Id*.
331 *Id*.
332 *Id*. at 72.
333 *Id*.
334 *Id*.
335 *Id*.
336 *Id*.
337 *Id*.
338 *Id*.
339 *Id*.
340 *Id*.
341 BANK OF FRANCE, ANN. REP. 2013, *supra* note 321, at 72.
342 *Id*.
343 *Id*. at 74-76.
344 *Id*. at 76.
345 *Id*. at 77.
346 *Id*.
347 *Id*. at 78.
348 *Id*.

Finally, the Bank of France's internal audit has jurisdiction over all units, processes and activities of the Bank of France.[349] Its missions are conducted by the general inspectorate at both the headquarters and the administrative centers within the different regions.[350]

C. Funding of the Bank of France

The Overseas Department Note-Issuing Bank (Instituts d'Émission des Départements d'Outre-mer or IEDOM) ensures the management of the currency in circulation in the five overseas departments and the overseas committees of Saint-Pierre-et-Miquelon, Saint-Barthélemy, and Saint-Martin.[351] The IEDOM receives a non-interest bearing advance (which reached €4.2 billion (about US$5.1 billion) at the end of 2013) in return for the notes it provides.[352] The amount of the advance is a fraction of the fiduciary circulation returning to France, calculated from July 1, 2007, in accordance with the distribution rules that prevail within the Eurosystem.[353] This advance is eliminated in the combined financial statements of the Bank of France and the IEDOM.[354] The stock of euro banknotes allocated to the Bank of France, net of the amount of free advance granted to the IEDOM constitutes the net monetary resource for the Bank of France.[355]

D. The responsibilities of the Bank of France

The Bank of France prepares decisions on the Eurosystem monetary policy by collecting statistical data and performing forecasts and economic analyses.[356] The Bank of France provides the publication of a monthly business survey and a forecast of French GDP.[357] In addition, the Bank of France participates in the Monetary Policy Committee of the Eurosystem by, among other things, conducting business forecasts and inflation for France.[358] These forecasts are included in the implementation of the euro zone forecasts.[359]

Furthermore, the Bank of France establishes the French balance of payments and its international investment position.[360] The balance of payments covers the economic and financial transactions of the French economy with the rest of the world in terms of trade of goods and services, income received or paid, investments by foreign companies in France and French investments overseas, cross-border loans and borrowings, as well as changes in foreign exchange reserves.[361] The external position reflects France's external debts and its foreign assets.[362]

---

349 *Id*.
350 *Id*.
351 *Id*. at 98.
352 BANK OF FRANCE, ANN. REP. 2013, *supra* note 321, at 98; US Bd. of Governors of Fed. Res. Sys., Foreign Exchange Rates – H.10, Historical Rates for the Euro (Apr. 6, 2015) [hereinafter US-Euro Exchange Rates], http://www.federalreserve.gov/releases/h10/hist/dat00_eu.htm (the exchange rate on Dec. 31, 2014 was €1.00 = US$ 1.2101).
353 *Id*.
354 *Id*.
355 *Id*.
356 BANK OF FRANCE, ANN. REP 2013, *supra* note 321, at 56.
357 *Id*.
358 *Id*.
359 *Id*.
360 *Id*.
361 *Id*.
362 *Id*.

The Bank of France conducts economic research, which involves the preparation of monetary policy decisions of the international meetings, such as the G-20, G-7, the Bank of International Settlements, and the International Monetary Fund.[363] The Bank of France performs market operations for its own account and on behalf of the European Central Bank, as part of the management of foreign exchange reserves and services offered to institutional clients.[364] The Bank of France implements the Eurosystem monetary policy within France and conducts market analysis with focus on issues related to bank refinancing.[365]

Another responsibility of the Bank of France is the banknote production.[366] In fact, it operates two plants in Puy-de-Dôme, dedicated entirely to the production of banknotes.[367] One is a paper mill at Vic-le-Compte, and the other is a printing works at Chamalieres, both in the Auvergne region.[368] The Bank of France is the leading manufacturer of euro banknotes, including all stakeholders (public and private).[369] The Bank of France has an important role of ensuring the transmission and quality of the currency in circulation throughout the country.[370]

Regarding the security of payment instruments and the supervision of market infrastructures, the Bank of France focused on the implementation of the European Market Infrastructure Regulation (EMIR) for the OTC derivatives and on central counterparties and trade repositories in 2013.[371]

The legislature has given authority to the Bank of France to manage multiple databases regarding the prevention of over-indebtedness and the improvement of the security of payments instruments.[372] The ACPR supervises the business practices of entities under its supervision in order to protect customers.[373] These business practices include "advertising, pre-contractual information, the duty to advise or warn, and the execution and settlement of contracts."[374]

The French State has assigned the Bank of France the task of dealing with household debts.[375] Indeed, the units of the Bank of France network ensure the secretariat of the debt commissions, which are college administrative bodies whose role is to develop and propose solutions to major financial difficulties faced by individuals.[376] The management of the French State account is ruled by an agreement signed on July 25, 2011 between the Ministers of the Economy and the Budget as well as the Bank of France.[377]

VI. National Financial Stability Council (Haut Conseil de Stabilité Financière or HCSF)

As part of the 2010 reforms, France also created the Council on Systemic Risk and Financial Regulation (Conseil de Régulation Financière et du Risque Systémique or Corefris) in response to the 2008 financial crisis. Law No. 2013-672 renamed Corefris as the National Financial Stability Council (Haut Conseil de

---

[363] *Id*. at 57.
[364] *Id*. at 59.
[365] *Id*.
[366] *Id*. at 60.
[367] *Id*.
[368] *Id*.
[369] *Id*.
[370] *Id*. at 61.
[371] *Id*. at 64.
[372] *Id*. at 54.
[373] *Id*.
[374] *Id*.
[375] *Id*. at 55.
[376] *Id*.
[377] *Id*.

Stabilité Financière or HCSF).[378] This body was designed to manage interagency cooperation and coordination to handle systemic risks.[379]

Law No. 2013-672 expanded the powers of the HCSF.[380] The HCSF can implement legally binding macroprudential measures as well as measures to maintain financial stability.[381] The HCSF also can recommend a capital surcharge on banks during financial crises.[382] The financial stability measures, however, require the Governor of the Bank of France to issue a proposal authorizing their implementation before they can take effect.[383] The HCSF is composed of Minister of the Economy and Finance (who chairs it), the Governor of the Bank of France, Vice-President of ACPR, the President of the AMF, the President of the Accounting Standards Authority (Autorité des Normes Comptables or ANC), and three independent board members.[384]

VII. Other Financial Regulators

France has not consolidated all of the agencies that regulate some aspect of the financial services industry into the ACPR or the AMF. The other independent agencies that regulate some aspect of financial services include:

- Deposit Guarantee Fund and Resolution Authority (Fonds de Garantie des Dépôts et de Résolution or FGDR).
- Organization for the Registration of Insurance Intermediaries (Organisme pour le Registre des Intermédiaires en Assurance, Banque et Finance or ORIAS).
- National Auditors' Oversight Board (Haut Conseil du Commissariat aux Comptes or H3C).
- Accounting Standards Authority (Autorité des Normes Comptables or ANC).
- Energy Regulatory Commission (Commission de Régulation de l'Energie or CRE).
- Directorate General for Competition, Consumers and Fraud Prevention (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes or DGCCRF).
- Authority for Regulation of Professional Adverstisers (Autorité de Régulation Professionnelle de la Publicité or ARPP). ARPP is a self-regulatory organization that works with the AMF to regulate the advertising for financial products and services.
- Competition Authority (Autorité de la Concurrence). This agency oversees competition regulations in the areas of antitrust and merger control. It was created by the Law on the Modernization of the Economy in 2008. This law merged the competition regulatory authorities of the DGCCRF and the Competition Council (Conseil de la Concurrence).

The LSF established the Advisory Committee on Legislation and Financial Regulation (Comité Consultatif de la Législation et de la Réglementation Financière or CCLRF) and the Advisory Committee on the Financial Sector (Comite Consultatif du Secteur Financier or CCSF).[385] The CCLRF advises the Minister of the Economy on bills and orders and all other draft regulations related to the insurance sector, the banking sector, or investment firms, at the exception of the legislations concerning the AMF.[386] The CCSF deals with issues related to the relationship between credit institutions, finance companies, money

---

378 Law No. 2013-672, *supra* note 297, Art. 30.
379 *Id*. Art. 2, 30.
380 *Id*.
381 *Id*.
382 *Id*.
383 *Id*.
384 *Id*.
385 AMF Law, *supra* note 270.
386 *Id*.

institutions, electronic payments institutions, investment firms, and insurance businesses, on the one hand, and their respective clients, on the other hand.[387]

The Insurance, Mutual Societies and Pension Funds Supervisory Committee (Commission de Contrôle des Assurances, des Mutuelles et des Institutions de Prévoyance or CCAMIP) was the previous name of the Insurance and Mutual Societies Supervisory Authority (Autorité de Contrôle des Assurances et des Mutuelles or ACAM), which was created by the LSF..[388] The ACAM came from the merger of the Insurance Supervisory Committee (Commission de Contrôle des Assurances or CCA) and the Mutual Societies and Pension Funds Supervisory Committee (Commission de Contrôle des Mutuelles et des Institutions de Prévoyance or CCMIP).[389] The ACAM operated as a public and independent authority and oversaw the activities of the French insurance sector.[390] Basically, the ACAM ensured compliance by the organizations and groups under its control and also ensured that they were able to respect commitments to policyholders or members.[391] The CECEI, CB, and ACAM were merged to create the Committee on Insurance Companies (Comité des Entreprises d'Assurances or CEA) and eventually became the Autorité de Contrôle Prudentiel or ACP (Prudential Supervisory Authority) in 2010.[392]

VIII. Advantages and Disadvantages of the French Regulatory Structure

Given that France completed its most recent set of reforms less than five years ago, it is perhaps too early to judge whether the reorganization has succeeded or not. The assessments of the 2003 consolidation that created the AMF generally have been positive.

According to the 2003 AMF Annual Report, the AMF proved to be a clearer and more effective regulator than its predecessor agencies.[393] It had a more secure sanction procedure as well as stronger resources than those agencies. Moreover, the report noted that, by unifying the supervision of insurance companies, mutual funds, and pension funds into a new independent public authority, the LSF restructured the prudential regulation of the financial sector.[394] Finally, the report commented that this consolidation simplified the architecture of powers between regulatory authorities.[395]

According to the 2004 IMF Financial System Stability Assessment report on France, the new framework would require a close coordination between domestic regulators and foreign authorities in order to ensure the effectiveness of the regulatory framework that it provided.[396] The IMF report concluded that France's 2003 reforms of its banking structure enhanced its effectiveness and importance at the international level.[397] Furthermore, the IMF report did not find that the 2003 reforms had negatively affected the degree of competition in the market, with the exception of some localities.[398]

---

[387] Amendments to Article L.614 edified by Ordinance No 2013-544 of June 27, 2013, Art. 5, Monetary and Financial Code], 1 (2014); Commission Bancaire, *supra* note 289, at 2.
[388] AMF Law, *supra* note 270.
[389] *Id.*
[390] AMF Law, *supra* note 270; ACAM, 2005 ANN. REP. 11 (2005).
[391] *Id.*
[392] ACP 2010 ANN. REP., *supra* note 272, at 106; ACAM, 2009 ANN. REP. 10 (2009).
[393] Autorité des Marchés Financiers, *supra* note 268, at 5.
[394] *Id.*
[395] *Id.*
[396] INT'L MONETARY FUND, FRANCE: FINANCIAL SYSTEM STABILITY ASSESSMENT, 11 (IMF Country Report No. 04/344, 2004).
[397] *Id.* at 25.
[398] *Id.* at 20.

The IMF report noted that France had created a modified twin peaks structure for banking regulation but that this structure did not extend to insurance. The IMF commented that the twin peaks structure would help regulatory authorities to focus effectively on customer protection and prudential issues in order to better assess stability and regulation enforcement concerns.[399]

The IMF report did not prove to be correct in all its evaluations of the 2003 reforms. For example, The report suggested that the French banking structure would not require further consolidation in order to avoid concerns dealing with "too big to fail" financial firms.[400] Given that France felt compelled to undertake additional regulatory consolidation in the wake of the 2008 financial crisis, this assessment by the IMF proved incorrect.

The initial assessments of the more recent reforms are generally positive. In some cases, however, these assessments may be biased as they are by the agencies that have undergone the reforms. For example, the Bank of France's 2013 Annual Report noted that the efforts of the Bank of France had contributed significantly to financial stability.[401] Indeed, within the Eurosystem, the Bank of France has participated fully in the decision-making and implementation of the ECB actions aimed at ending the recession in the euro zone while limiting macrofinancial imbalances.[402]

Moreover, the Bank of France and the ACPR participated in international projects undertaken to reduce the risks of financial instability by developing a harmonized regulatory framework that is conducive to a better understanding of the risks of financial stability.[403] The Bank of France, together with the ACPR, was involved in the preparatory work for the establishment of the banking union and the effective implementation of the Single Supervisory Mechanism.[404] In addition, the Bank of France participated in the implementation of the new macroprudential policy framework that focuses on the international, European, and national levels.[405]

The Bank of France also contributed to the macroprudential research network in 2013.[406] This research network, composed of economists of the ESCB, attempted to develop a framework and tools for macroprudential supervision in the European Union.[407] This network was concerned with the relations between financial stability and performances of the economy, of prevention systems and indicators of systemic risk and an assessment of contagion risks.[408]

IX. Relevance of the French Consolidation for the United States

Comparing and contrasting the regulatory structures in France and the United States provides some insight into the relevance of the French experience for the United States. Figure 12 below provides an overview of both countries regulatory structures.

---

[399] *Id.*at 42.
[400] *Id.*
[401] BANK OF FRANCE, ANN. REP. 2013, *supra* note 321, at 63.
[402] *Id.*
[403] *Id.*
[404] *Id.*
[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.*

Figure 12
Comparison of French and US Regulatory Structures[409]

France	United States
-Single bank supervisory authority -Central Bank is not a supervisory authority -Multiple financial supervisory authorities in the financial sector - France tighten overall restriction on bank activities after the global financial crisis[410] - France increased official supervisory powers after the global financial crisis[411] -France increased private monitoring after the global financial crisis[412]	-Multiple bank supervisory authorities -Central bank is among multiple supervisors - Multiple financial supervisory authorities in the financial sector -United States tighten overall restriction on bank activities after the global financial crisis[413] -United States decreased official supervisory powers after the global financial crisis[414] -United States increased private monitoring powers after the global financial crisis[415]

As indicated in Figure 12, the regulatory regimes in France and the US differ in terms of the structure and the scope of supervisory powers. The French regulatory structure appears to have been effective in terms of crisis management and bank resolution because it was one of the least affected EU nations during the global financial crisis.[416]

As in other nations that have adopted a twin peaks structure, France has found that this structure provides significant benefits. This regulatory model delivers greater accountability for regulatory agencies than the prior institutional or functional structure because the goals and missions of the regulatory agencies are narrowly defined and clearly distinguishable.[417] This model also reduces reputation and contamination risks and avoids the issues of confounding the different values of the two areas of regulation and supervision.[418]

Finally, France completed its consolidation process in two phases that enabled its financial structure to adjust to the financial climate that prevailed over time. Its experience might prove useful for the United States as it illustrates one way to move to a twin peaks model without attempting to institute the reforms all at once.

---

409 James R. Barth, Gerard Caprio, Jr., and Ross Levine, *Bank Regulation and Supervision in 180 Countries from 1999 to 2011*, NBER Working Paper No. 18733, 49 (January 2013).
410 Barth, Caprio & Levine, *supra* note 409, at 61.
411 *Id*. at 62.
412 *Id*.
413 *Id*. at 61.
414 *Id*. at 62.
415 *Id*. at 66.
416 Divya Padmanabhan, *Regulation of Financial Services in France*, Project submission towards the fulfilment of project work in the subject of Management of Financial Services, National Law University of Jodhpur, 14 (2013).
417 David T Llewellyn, *Institutional Structure of Financial Regulation and Supervision: The basic issues*, Aligning Supervisory Structures with Country Needs, World Bank Seminar, 28 (June 2006).
418 *Id.*

Germany

I. Background

When the German Bundestag or parliament created the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht or BaFin) on May 1, 2002, Germany moved from a regulatory system with multiple financial regulators to a hybrid single regulator model. BaFin did not act as a pure single regulator for financial services because the Bundesbank, the German central bank, retained some supervisory authority over the nation's banking sector. In addition, the German Ministry of Finance oversees BaFin's operations.

During the 2008 financial crisis, Germany created the Financial Markets Stabilization Agency (Bundesanstalt für Finanzmarktstabilisierung or FMSA), to rescue the German banks that ran into financial difficulty. While the FMSA was originally intended as a temporary agency, the German government changed its mind and has made it a permanent part of the nation's financial regulatory landscape. The FMSA administers the Financial Market Stabilization Fund (Finanzmarktstabilisierungsfonds or SoFFIn) and, beginning in 2011, the Restructuring Fund (Restrukturierungsfonds).

Germany also has a number of other agencies or entities that play a role in financial regulation. Unlike the United States, which only has one deposit insurance agency, the Federal Deposit Insurance Corporation, Germany has six different entities that offer deposit insurance. The German states also operate financial regulatory agencies that supervise the stock exchanges and certain insurance activities.

In the wake of the 2008 financial crisis, the German government considered reorganizing how the country regulates financial services. One proposal under consideration was to merge BaFin's functions into the Bundesbank, which would then operate a true single regulator for financial services. The current German government has elected not to pursue this reform proposal.

II. Reasons for Consolidation

The biggest reason for the consolidation in 2002 was the change in the financial markets. Institutions were beginning to offer multiple types of products to their clients and the separate supervisory agencies were no longer appropriate.[419] In addition, there was a desire to increase the strength of the regulatory voice in the international community and to provide more effective and efficient communication.[420] The BaFin Mission Statement outlines multiple principles it values to guide its activities. BaFin's ability to act as one voice increases its presence in the European market and provides for a more stable financial system throughout Europe.[421] In addition, the consolidation allows for BaFin to act better on both a micro and macro level to respond and prevent future economic crises than its predecessor agencies could.[422] BaFin also strives to increase transparency and clarity in financial markets to make them more reliable.[423]

---

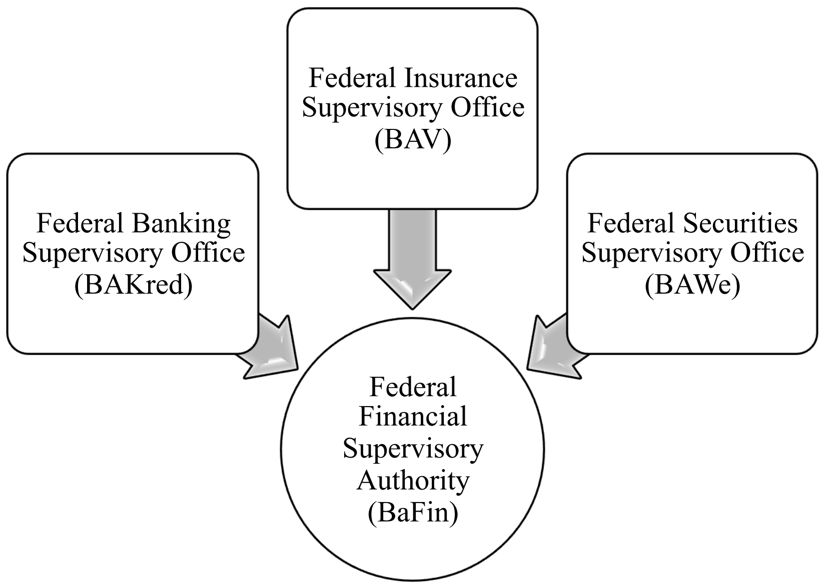
[419] BUNDESANSTALT FUR FINANZDIENSTLEISTUNGSAUFSICHT [BaFin], ANN. REP. 176 (2002) [hereinafter BaFin 2002 Ann. Rep.].
[420] *Id*. at 9.
[421] *Mission Statement*, BAFIN, http://www.bafin.de/EN/BaFin/Organisation/MissionStatement/missionstatement_artikel.html.
[422] *Id.*
[423] *Id.*

III. Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) – Federal Financial Supervisory Authority

A. Agencies Consolidated to Create BaFin

Germany's Federal Financial Supervisory Authority (BaFin) was the result of a consolidation of the Federal Banking Supervisory Office, Federal Insurance Supervisory, and the Federal Securities Supervisory Office.[424] BaFin began on May 4, 2002 after the German parliament passed the Bill on Integrated Financial Services Supervision.[425] The Bill passed through the legislative process within six weeks, which was much quicker than expected.[426]

Figure 13
Agencies Merged to Create BaFin



The former Federal Securities Supervisory Office (BAWe) worked alongside each of the sixteen states (Bundesländer), the Deutsche Bundesbank, and the Federal Banking Supervisory Office (BAKred).[427] BAKred and BAWe shared responsibilities for institutions that provided both banking and securities services.[428] BAKred was responsible for the supervision of the economic wellbeing of the institution, while BAWe monitored securities transactions and compliance.[429] In addition, both agencies worked together to produce joint announcements and guidelines.[430] Cooperation extended to the state level exchange supervisory agencies through the Working Committee of the states on securities and exchange-related Issues (Landerarbeiskreis Borsenwesen).[431]

---

[424] BUNDESANSTALT FUR FINANZDIENSTLEISTUNGSAUFSICHT [BaFin] [Act Establishing the Federal Financial Supervisory Authority], Apr. 22, 2002, FEDERAL LAW GAZETTE [FinDAG] at 1310, §1 (Ger.).
[425] *Id.*
[426] *Id.*
[427] BUNDESAUFSICHTSAMT FUR DEN WERTPAPIERHANDEL [BAWe], ANN. REP. 30 (2000).
[428] *Id.*
[429] *Id.* at 31.
[430] *Id.*
[431] *Id.*

B. Governance of BaFin

In 2008, BaFin's organization changed.[432] Four Chief Executive Directors were added to work with the President to form the Executive Board.[433] Each director oversees one of the four existing directorates (Banking Supervision, Insurance Supervision, Securities Supervision/Asset Management, and Regulatory Services/Human Resources). This prevents the power over BaFin from being centralized in one individual.

BaFin is organized into four major directorates: Regulatory Services and Human Resources, Banking Supervision, Insurance Supervision, and Securities Supervision.[434] In addition to these directorates, there are eight bodies that assist BaFin with advice and support. These include the BaFin Administrative Council, Advisory Board, Consumer Advisory Council, Financial Stability Commission, Insurance Advisory Council, Securities Council, Advisory Council, and Objections Committee. The 17 member BaFin Administrative Council determines the budget, oversees the management of the agency, and provides backing for supervision.[435] The Articles of Association requires that members of the Administrative Council to meet certain minimum standards to ensure they are capable of carrying out their job.[436]

C. Funding of BaFin

BaFin is funded from fees and assessments on the firms that it regulates. The Administrative Council is responsible for the creation of the budget.[437] Before the enactment of the Structural Reform of Federal Fee Laws in August 2013, FinDAG created the outline for how BaFin was to be self-sustaining.

There are three main areas in which BaFin receives its funding: fees, separate reimbursements, and contributions.[438] BaFin is permitted to charge fees for its official acts, subject to regulation by the Federal Ministry.[439] In addition, BaFin will be reimbursed separately for actions relating to banking, such as audits, defined in the Banking Act.[440] If fees or reimbursements do not cover costs, BaFin may allocate costs on a pro-rata basis to financial service institutions, asset management companies, investment stock corporations, payment institutions, insurance undertakings, credit institutions, and additional types of companies that are determined by the Federal Ministry.[441]

BaFin is fully funded from its own operations and is not a part of the federal budget.[442] The main source of revenue for BaFin is the fees it charges for its official acts.[443] According to the 2013 Annual Report, BaFin's actual expenses increased by €25.4 million (about US$35.0 million) from the previous year

---

432 *See BaFin is Ten Years Old: From Lightning Birth to Maturity*, BAFIN Q., 2nd Q. 2012, at 4.
433 *Id.*
434 *Articles of Association of the Federal Financial Supervisory Authority*, §1 [hereinafter BaFin Articles], *available at* http://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Satzung/satzung_bafin_en.html.
435 *BaFin Bodies: Administrative Council*, BAFIN, http://www.bafin.de/EN/BaFin/Organisation/BaFinBodies/AdministrativeCouncil/administrativecouncil_node.html .
436 BaFin Articles, *supra* note 434, §3.
437 Kenneth K Mwenda, *Legal Aspects of Unified Financial Services Supervision in Germany*, 4 GERMAN L. J. 1009, 1023 (2003).
438 *Legal Bases: Financing*, BAFIN, http://www.bafin.de/EN/BaFin/Organisation/Financing/financing_node.htm.
439 *See* FINDAG *supra* note, 424 at §14.
440 *Id.* at §15.
441 *Id.* at §16.
442 BAFIN, 2013 ANN. REP. 192 (2013) [hereinafter BAFIN 2013 ANN. REP.].
443 *See* BaFin Act, *supra* note 424, §14.

totaling €190.7 million (about US$262.8 million).[444] Almost forty six percent of expenditures were related to banking and financial services.[445]

D. BaFin's Responsibilities

BaFin's responsibilities derived from the statutes that previously governed the BAKred, BAWe, and BAV. Only the form of the agency changed.

The Securities Supervision Directorate is governed by the Securities Trading Act (Wertpapierhandelsgesetz – WpHG), Securities Acquisition and Takeover Act (Wertpapiererwerbs-und Ubernahmegesetz – WpUG), Securities Prospectus Act (Wertpapierprospektgesetz- WpPG), and the Prospectus Ace (Wertpapier-Verkaufsprospektgesetz – VerkProspG).[446]. BaFin does not have full supervisory powers, because the states continue to supervise individual stock exchanges.[447]

The Insurance Supervision Directorate is governed by the Insurance Supervision Act (Versicherungsaufsichtsgesetz – VAG).[448] BaFin is responsible for the supervision of public insurance undertakings that are "of material economic significance" and engage in business that cross the borders of the states within Germany.[449] The states within Germany are in charge of supervising public insurance undertaking that are of less economic significance and operate within the borders of the state.[450] In addition to private insurance, BaFin also supervises pensions.[451] BaFin has the authority to approve all business requirements in order for an insurer to have a registered office in Germany as well as the ongoing supervision of their business practices.[452]

The Banking Supervision Directorate is governed by the Banking Act (Kreditwesengesetz – KWG).[453] The Bundesbank has always played a large role in the supervision of banks, and it continues to work alongside BaFin.

IV. Deustche Bundesbank – Central Bank of the Federal Republic of Germany

While it appears on its face that BaFin is a fully integrated regulatory authority, the Bundesbank plays a large role in the supervision of day-to-day operations of German banks. BaFin works closely with the German Bundesbank to supervise German banks.[454] BaFin and the Bundesbank have created Supervision Guidelines to address the division of responsibilities between the two agencies in order to limit overlap and increase transparency. These are in addition to the responsibilities outlined in Section 7 of the

---

[444] See BAFIN 2013 ANN. REP., *supra* note 442, at 193; US-Euro Exchange Rates, *supra* note 352, (US$-Euro exchange rate was €1.00 = US$ 1.3779 on Dec. 31, 2013).
[445] *Id*.
[446] *Functions: Securities Supervision/Asset Management*, BAFIN, http://www.bafin.de/EN/BaFin/FunctionsHistory/SecuritiesSupervisionAssetManagement/securitiessupervisionassetmanagement_node.html .
[447] *Id*.
[448] *Functions: Insurance Supervision*, BAFIN, http://www.bafin.de/EN/BaFin/FunctionsHistory/InsuranceSupervision/insurancesupervision_node.html.
[449] *Id*.
[450] *Id*.
[451] VERSICHERUNGSAUFSICHTSGESETZ [VAG] [Act on the Supervision of Insurance Undertakings], Mar. 26, 2007, BUNDESGESETZBLATT [BGBl] at 378 §8 (Ger.).
[452] See *Functions: Insurance Supervision, supra* note 448.
[453] *Functions: Banking Supervision*, BAFIN, http://www.bafin.de/EN/BaFin/FunctionsHistory/BankingSupervision/bankingsupervision_node.html.
[454] *See* BaFin 2002 Ann. Rep., *supra* note 419, at 178.

Banking Act.[455] The Bundesbank is responsible for ongoing monitoring of banks and will produce a risk profile that includes its findings.[456] BaFin uses the risk profile to make its assessments of whether the institutions have adequate capital and policies relevant to the risks.[457] In addition, BaFin sets the supervisory guidelines and strategy to be implemented.[458]

With the implementation of the euro, the Bundesbank lost its power to control monetary policy and now simply acts to maintain stability in the euro area.[459] The Bundesbank plays a key role in bank supervision and also works to implement the European Central Bank's guidelines to avoid another financial crisis.[460]

V. Other Federal Financial Regulators

As mentioned above, Germany has multiple agencies that provide deposit insurance through the Private Association of German Banks. These include:

- Deposit Protection Fund
- Depositor Compensation Scheme of the Association of German Public Sector Banks
- Deposit-Protection Fund of the Association of German Public Sector Banks
- German Savings Banks Association
- Association of German Cooperative Banks
- German Private Commercial Banks Compensation Scheme for Investors

Various types of social insurance, such as health insurance, are regulated by the Federal Insurance Office.[461]

VI. State Financial Regulators

Supervision of individual stock exchanges is the responsibility of the stock exchange supervisory authorities of the states within Germany. Currently nine of the sixteen states operate their own securities exchanges. Each of the nine has established its own Trading Supervisory Office.[462] As noted above, the states within Germany are in charge of supervising public insurance undertakings that are of less economic significance than those regulated by BaFin and that operate within the borders of the state.[463]

---

[455] *Functions: Banking Supervision: Cooperation between BaFin and Deutsche Bundesbank: Supervision Guidelines*, BAFIN, http://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Richtlinie/rl_130521_aufsichtsrichtlinie_en_ba.html?nn=2692654.
[456] KREDITWESENGESETZ [KWG] [Banking Act], July 2009, FEDERAL LAW GAZETTE [Bundesgesetzblatt] at 1522 §7 (Ger.).
[457] *Id.*
[458] *Id.*
[459] *Tasks and Organization*, DEUTSCHE BUNDESBANK, http://www.bundesbank.de/Redaktion/EN/Standardartikel/Bundesbank/Tasks_and_organisation/tasks.html .
[460] *Id.*
[461] See *Functions: Insurance Supervision, supra* note 448.
[462] Jens-Hinrich Binder, *Financial Markets Regulation in Germany A New Institutional Framework*, 5 Y.B. INT'L FIN. & ECON. L. 401, 409 (2000).
[463] VERSICHERUNGSAUFSICHTSGESETZ, *supra* note 451, §8 (Ger.).

VII. Advantages and Disadvantages of the German Structure

BaFin's consolidation allowed the agency to combine the talents and skills of the employees of the previously separate agencies to allow for more efficient regulation of companies offering cross-sectorial products to their clients.[464]

In addition, the consolation allows Germany to have a stronger voice in the international community.[465] It works closely with foreign agencies to share important information about the stability of their domestic markets as well as potential concerns that need to be addressed. For example, in 2007 the SEC and BaFin signed a memorandum of understanding to outline their cooperation efforts.[466]

One disadvantage is that BaFin is split between two locations. It seems impracticable to have complete integration of supervisory tasks and cross communication when staffs are separated.[467]

VIII. Relevance of the German Experience for the United States

Germany's regulatory structure reflects the influence that its membership in the euro has had on its domestic regulators. With the creation of the euro, the Bundesbank lost the majority of its control over monetary policy and is left to implement the requirements of the European Central Bank. In order to maintain its status within Germany, the Bundesbank continues to share supervisory responsibilities for banks with BaFin. Since the Federal Reserve would continue to control monetary policy in the United States, it would not need to have a role in the day-to-day supervision of banks in order to maintain its relevance.

Furthermore, BaFin's internal structure is perhaps not ideal. BaFin simply combined the three previous agencies into one. While they all interact with each other, they are still separated into their own directorate. Thus, internally BaFin retains an institutional regulatory structure.

---

[464] See Mwenda, *supra* note 437 at 1020.
[465] See Mwenda*, supra* note 437 at 1020.
[466] Angelo Lercara, *SEC and BaFin Sign Regulatory Cooperation Arrangemen*t, 8 J. INV. COMPLIANCE 51, 51 (2007).
[467] See Binder, *supra* note 462 at 423.

Japan

I. Background

Although Japan has consolidated all of its supervision and regulation of financial services into a single agency, the Financial Services Agency (JFSA), the Japanese government created this agency through a spin-off, rather than a consolidation. The Japanese Ministry of Finance controlled the supervision and regulation of financial services in Japan prior to 1998. The Japanese government removed the supervision and regulation of financial services from the Ministry of Finance because of concerns that the political nature of the Ministry of Finance had led the Ministry of Finance to become a corrupt and incompetent financial regulator.

The JFSA has been the primary regulator for financial services since 2000 and is part of the Cabinet Office, an agency within the Cabinet of Japan.[468] The JFSA was established as part of a financial reform that occurred in the late 1990s because of a perceived need to improve the inspection and supervisory functions for financial services.[469] The regulation of financial services had been in the hands of the Ministry of Finance until then.[470]

The key entities who make up the framework for financial services regulation in Japan are the Bank of Japan (BoJ), the Ministry of Finance (JMoF), the Financial Services Agency, and the Deposit Insurance Corporation of Japan (DICJ). This framework has been in place since the late 1990s.

II. Reasons for the Restructuring

The present framework was established as part of the financial reform in the late 1990s called the Japanese Big Bang.[471] The impetus for this reform came about because of rising concerns over the corruption and incompetence of the Ministry of Finance.[472] The Ministry of Finance had failed to effectively inspect financial institutions and the insolvencies of certain major financial institutions provided concrete evidence of this failure.[473] These insolvencies included the *jusen* companies, two credit cooperatives, the Hyogo Bank, and the Kizu and Cosmo Credit Unions.[474] The motivation for the reform was heavily political because the reform was motivated by a desire to reduce the power of the JMoF.[475]

---

[468] JAPAN FINANCIAL SERVICES AGENCY, FINANCIAL SERVICES AGENCY 2 (Feb. 2015), http://www.fsa.go.jp/en/about/pamphlet.pdf [hereinafter JFSA Pamphlet].

[469] INT'L MONETARY FUND, JAPAN: FINANCIAL SECTOR STABILITY ASSESSMENT UPDATE 63 (IMF Country Report No. 12/210, 2012), https://www.imf.org/external/pubs/ft/scr/2012/cr12210.pdf [hereinafter IMF FSSA Update].

[470] JFSA Pamphlet, *supra* note 468, at 2.

[471] Eric C. Browne and Sunwoong Kim, *Japan: Prosperity, Dominant Party System, and Delayed Liberalization*, THE POLITICAL ECONOMY OF INTERNATIONAL FINANCIAL CRISIS: INTEREST GROUPS, IDEOLOGIES, AND INSTITUTIONS (Shale Asher Horowitz & Uk Heo, eds., 2001) at 140; Takeo Hoshi & Takatoshi Ito, *Financial Regulations in Japan: A Fifth Year Review,* J. FIN. STABILITY 2 (February 2003).

[472] Browne & Kim, supra note 471, at 140.

[473] Hoshi & Ito, *supra* note 471, at 2.

[474] Hoshi & Ito, *supra* note 471, at 2. *Jusen* companies are companies formed to provide home mortgages and so act somewhat like traditional savings and loans in the United States. Akihiro Kanaya and David Woo, *The Japanese Banking Crisis of the 1990s: Sources and Lessons* 24 (IMF Working Paper WP/00/07, 2001), http://www.imf.org/external/pubs/ft/wp/2000/wp0007.pdf. Many *jusen* companies failed between 1992 and 1996. Hoshi & Ito at 2. In 1994, the Tokyo Kyowa Credit Cooperative and the Anzen Credit Cooperative went bankrupt. Kanaya & Woo at 24. The Hyogo Bank was a regional bank that became insolvent in 1995. *Id*. at 25. Kizu and Cosmo Credit Unions also became insolvent in 1995. *Id*.

[475] Hoshi & Ito, *supra* note 471, at 2.

The Japanese Big Bang set out to liberalize the financial markets, while at the same time promoting enhance financial stability.[476] To this end, the Japanese government enacted the Bank of Japan Act, which made the Bank of Japan independent from the Ministry of Finance and put it in control of monetary policy, and the creation of the Financial Supervisory Agency, the predecessor to today's Financial Services Agency.[477]

III. Japanese Financial Services Agency (JFSA)

A. Creation of the JFSA

The current Japanese Financial Services Agency (JFSA) was created in 2000 out of the Financial Supervisory Agency, which had only come into existence in 1998. The JFSA plays a key role in preserving financial stability and crisis management in close cooperation with the Japanese Ministry of Finance and the Bank of Japan.

1. Financial Supervisory Agency (JFSA I)

To create the JFSA I, the Japanese Diet enacted the Establishing Law of the Financial Services Agency, Law No. 101 of 1997, in April 1998.[478] This law allowed the Japanese government spin-off the Banking Bureau and the Insurance Bureau from the JMoF to create the JFSA I.[479] It also moved the Securities Exchange Surveillance Commission (SESC) from the JMoF to become part of the JFSA I.[480] It did not immediately move the Financial Planning Bureau.[481] Instead, the Financial Planning Bureau remained within the JMoF until the Japanese reorganized the JFSA I in 2000 to create the JFSA.[482]

To create the Financial Supervisory Agency, the Japanese government did more than merely spin-off the supervisory functions from the JMoF. It also gave the JFSA I powers and supervisory authority that had previously been held by other government agencies.[483] It gave the JFSA I the power to supervise agricultural cooperatives jointly with the Ministry of Agriculture, Forestry, and Fisheries (MAFF).[484] Previously, the MAFF had exclusive control over those cooperatives.[485] It also gave the JFSA I the power to supervise labor cooperatives jointly with the Ministry of Labor.[486] Prior to 1998, the Ministry of Labor had exclusive jurisdiction over those cooperatives.[487] Thus, after the 1998 reforms, the JFSA I oversaw more financial firms that the JMoF had when it was the financial supervisor.

At the same time that Japan created the JFSA I, it also created the Financial Reconstruction Commission (FRC) and adopted laws to allow the Japanese FRC to provide funds to struggling financial institutions

---

476 Browne & Kim, *supra* note 471, at 140-141.
477 Browne & Kim, *supra* note 471, at 140-141; Hoshi & Ito, *supra* note 471, at 2-4.
478 Mamiko Yokoi-Arai and Tetsuo Morishita, *Evolving supervisory and regulatory approaches of Japan in the post-crisis era*, INSTITUTIONAL STRUCTURE OF FINANCIAL REGULATION 168 (Robin Hui Huang & Dirk Schoenmaker, eds.)(2014).
479 Hoshi & Ito, *supra* note 471, at 11.
480 SECURITIES EXCHANGE SURVEILLANCE COMMISSION, SECURITIES EXCHANGE SURVEILLANCE COMMISSION BROCHURE 2 (March 2015), http://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf.
481 Hoshi & Ito, *supra* note 471, at 3.
482 *Id.*
483 *Id.*
484 *Id.*
485 *Id.*
486 *Id.*
487 *Id.* at 11.

and to establish resolution mechanisms for closing down failing institutions.[488] Between 1998 and 2000, the JFSA I operated as an agency under the jurisdiction of the FRC within the Prime Minister's Office.[489]

2. Financial Services Agency (JFSA)

The second incarnation of the JFSA occurred on July 2000, when the Financial System Planning Bureau of the Ministry of Finance merged with the JFSA I and the JFSA I was renamed the Financial Services Agency.[490] Takeo Hoski and Takatoshi Ito have noted that the merger of the planning functions into JFSA made the agency a "more cautious" regulator as the JFSA proved less willing to undertake bank closures than the JFSA I had been.[491] They speculated that this increased caution may have arisen because the inspection and enforcement parts of the JFSA did not want to embarrass the planning bureau by closing down a significant number of financial institutions, which might be perceived as resulting from the planning bureau's failure to set appropriate rules and regulations.[492]

B. Governance of the JFSA

The JFSA is headed by a Minister of State for Financial Services who is supported by a State Minister and a Parliamentary Vice-Minister.[493] The JFSA is largely divided into: the Planning and Coordination Bureau, Inspection Bureau, and the Supervisory Bureau.[494] The Planning and Coordination Bureau is headed by a Vice Commissioner for Policy Coordination, a Deputy Director-General of the Planning and Coordination Bureau, and a Deputy Commissioner of the Planning and Coordination Bureau.[495]

Also under the JFSA is the Securities and Exchange Surveillance Commission and the Certified Public Accountants and Auditing Oversight Board (CPAAOB).[496] The SESC consists of a chairperson and two commissioners appointed by the Prime Minister.[497] The CPAAOB consists of a chairperson and nine commissioners appointed by the Prime Minister.[498]

C. Funding of the JFSA

The JFSA must obtain the approval of the Minister for Financial Services and the Ministry of Finance for its annual budget.[499] It must also obtain the approval of the Japanese Diet for its annual budget.[500] As a result, the JFSA does not control its funding levels. In 2012, the IMF suggested that the budget approval process could potentially the independence of the JFSA because it could be subject to budgetary cuts for political reasons.[501]

---

488 MAMIKO YOKOI-ARAI, FINANCIAL STABILITY ISSUES: THE CASE OF EAST ASIA 108-109 (2002).
489 JFSA Pamphlet, *supra* note 468, at 2.
490 Hoshi & Ito, *supra* note 471, at 4.
491 *Id*.
492 *Id*.
493 JFSA Pamphlet, *supra* note 468, at 8.
494 *Id*.
495 *Id*.
496 *Id*.
497 *Id*. at 13.
498 *Id*. at 14.
499 IMF FSSA Update, *supra* note 469, at 83.
500 *Id*.
501 *Id*. at 83, 85.

D. Responsibilities of the JFSA

The JFSA overseas banks, insurance companies, securities firms, and other financial institutions.[502] The primary policy objectives of the JFSA are the "establishment of a stable financial system," the "protection of users and improvement of user convenience," and the "establishment of fair and transparent financial markets."[503]

As noted above, the JFSA uses its three bureaus, the SESC, and the CPAAOB to fulfill these objectives. The Planning and Coordination Bureau has two primary functions: the coordinating the JFSA's affairs and formulating and promulgating policies, rules, and regulations for financial services, including advising the Japanese government on legislation governing financial services.[504] The Inspection Bureau conducts on-site inspections of financial institutions to examine compliance with the existing regulations and to assess the firm's risk management.[505] The Supervisory Bureau monitors financial institutions for safety and soundness.[506] The Supervisory Bureau is organized based on institutional type with divisions for major banks, regional banks, insurance, and securities firms.[507]

The Securities and Exchange Surveillance Commission's primary purpose is to ensure the "integrity of capital markets and to protect investors."[508] The SESC fulfills many of the same roles as the SEC and the CFTC in the United States. It supervises securities markets participants and investigates alleged misconduct, such as insider trading.[509] The SESC, however, cannot directly bring enforcement actions but must instead make a recommendation to the Prime Minister and the Commissioner of the JFSA that disciplinary action should be taken or, in the case of criminal violations, file a complaint with the public prosecutors.[510]

The CPAAOB operates independently from the JFSA.[511] The CPAAOB examines reports prepared by the Japanese Institute of Certified Public Accountants (JICPA).[512] It also has the power to conduct on-site inspections of the JICPA and the audit firms.[513] Like the SESC, the CPAAOB cannot directly bring enforcement actions. If it believes a violation has occurred, it must submit a recommendation to the Commissioner of the JFSA that administrative action should be taken.[514]

IV. Japanese Ministry of Finance (JMoF)

Since the spin-off of the supervisory authority over financial services into the JFSA, the Ministry of Finance has had a limited role in the regulation of financial services. Now it primarily is responsible for

[502] JFSA Pamphlet, *supra* note 468, at 3.
[503] JFSA Pamphlet, *supra* note 468, at 6; Law on the Establishment of the Financial Services Agency, Art. 3.
[504] JFSA Pamphlet, *supra* note 468, at 10.
[505] *Id*. at 11.
[506] *Id*. at 12.
[507] *Id*. at 9.
[508] *Id*. at 13.
[509] *Id*.
[510] *Id*.
[511] *Id*. at 14.
[512] *Id*.
[513] *Id*.
[514] *Id*.

managing the government's budget and maintaining the stability of the currency markets.[515] The JMoF still becomes involved in financial stability in the event of a crisis.[516]

V. Bank of Japan (BoJ)

The Bank of Japan "carries out monetary policy and is responsible for financial stability through (1) analysis and assessment of financial system stability, (2) coordination with microprudential activity of on-site examinations and off-site monitoring, (3) implementation of measures to ensure the stability of the financial system (including the lender of last resort), and (4) operation and oversight of payment and settlement systems."[517]

In 2012, the IMF concluded that the BoJ's semi-annual report assessing the macroprudential risks to the Japanese financial system was broad and well researched.[518] Nevertheless, the IMF articulated several ways that Japan could improve its macroprudential supervision. These included conducting stress tests of financial institutions and conducting surveys of market participants' perceptions of systemic risk.[519] The IMF also recommended that Japan create a financial stability committee because, unlike the United States, Japan did not have such a committee to coordinate the efforts of its financial regulators to assess and address systemic risk.[520]

VI. Other Financial Regulators

The Deposit Insurance Corporation of Japan (DICJ) is a quasi-autonomous governmental organization established in 1971. It provides for the payments of deposit insurance claims in case of a bank failure. Its wholly owned subsidiary, the Resolution and Collection Corporation, handles the management and disposal of assets purchased from failed financial institutions.[521]

VII. Advantages and Disadvantages of the Japanese Structure

As an integrated regulator, the JFSA is responsible for the entire spectrum of financial services. As a result, it does not contain any of the regulatory gaps that may be found in the US system. In addition, it has the breadth of expertise to analyze all aspects of a financial conglomerate on both a consolidated basis and on a functional basis. No US regulator has a similar breadth. Moreover, since Japan did not have a diversity of financial regulators prior to the creation of the JFSA, the creation of the JFSA did not reduce regulatory diversity or eliminate regulatory competition.

As noted above, the IMF has raised concerns that Japan could do more to enhance how it addresses systemic risks. Specifically, the IMF suggested that Japan needed a financial stability council, like those that operate in France, the United Kingdom, and the United States. Such a council would have far fewer members that the US Financial Stability Oversight Council as it would likely be comprised of just four entities: the JFSA, the BoJ, the JMoF, and the DICJ. Having such a small group would probably make it easier for such a council to reach a consensus regarding what actions should be taken in crisis. Small committees or councils, however, are not guaranteed to the work quickly or arrive at a consensus, as the

---

515 Cheng Hoon Lim, Rishi Ramchand, Hong Wang & Xiaoyong Wu, *Institutional Arrangements for Macroprudential Policy in Asia*, 17 (IMF Working Paper, July 2013).
516 *Id*.
517 *Id*.
518 IMF FSSA Update, *supra* note 499, at 19.
519 *Id*.
520 *Id*. at 19-20.
521 Lim, et. al., *supra* note 515, at 17.

experience of the United Kingdom with its tripartite committee prior to the 2008 financial crisis has illustrated.

The Japanese structure may not be ideal. It concentrates a significant amount of supervisory and regulatory power in a small number of agencies. This may lead to overregulation in certain instances. Conversely, the internal structure of JFSA may prove disadvantageous as it might encourage regulatory capture of institutionally organized divisions, as appears to have happened in the case of the UK Financial Services Authority in the run up to the 2008 financial crisis. Again, the combining of both regulation and supervision in the JFSA may have made it a more cautious enforcer of the rules and regulations because aggressive enforcement would lead to more institutions being closed and might raise questions about how effective the regulations promulgated by the JFSA really are.

VIII. Relevance of the Japanese Experience for the United States

The Japanese experience is more of a spin-off rather than a consolidation. As a result, it does not provide useful insights into how to merge existing US agencies that the other case studies provide. It does, however, highlight the possible dangers of allowing financial regulation to be overly politicized. The primary reason for separating the JFSA from the Ministry of Finance was to reduce the influence that politics had on the regulation of financial services.

United Kingdom

I. Background

Under the current, modified twin peaks structure, which came into being in 2013, the UK Parliament is responsible for creating the legislative framework for financial regulation and holds the UK Government and the regulators to account for how that regulatory framework operations. The Chancellor of the Exchequer and HM Treasury are responsible for overseeing the regulatory framework. The Bank of England is responsible for protecting and maintaining the financial stability of the system. It is tasked with addressing systemic risks and macroprudential issues.

In addition, three new entities were created in 2013. Two of these new entities – the Prudential Regulatory Authority (PRA) and the Financial Policy Committee (FPC) – are associated with the Bank of England. The third entity was created out of the market conduct portions of the former single regulator, the UK Financial Services Authority. The UK Financial Services Authority was converted into the Financial Conduct Authority (UK FCA) and retained its market conduct and consumer protection powers while spinning off most of its prudential powers to the PRA.

The PRA is a subsidiary of the Bank of England and it is responsible for addressing microprudential issues posed by deposit-taking institutions, insurers, and some investment firms. The prudential portions of the UK FSA were transferred to the PRA.

The FCA is responsible for addressing market conduct issues raised by deposit-taking institutions, insurers, and some investment firms. The FCA is also responsible for the prudential regulation and market conduct regulation of financial firms that are not classified as deposit-takers, insurers, or investment firms regulated by the PRA.

The PRA and the FCA are required to coordinate their activities and cooperate with one another, including on company examinations and investigations. The PRA, however, can veto a decision by the FCA if the PRA believes that it will result in the disorderly failure of a financial institution or lead to wider instability.

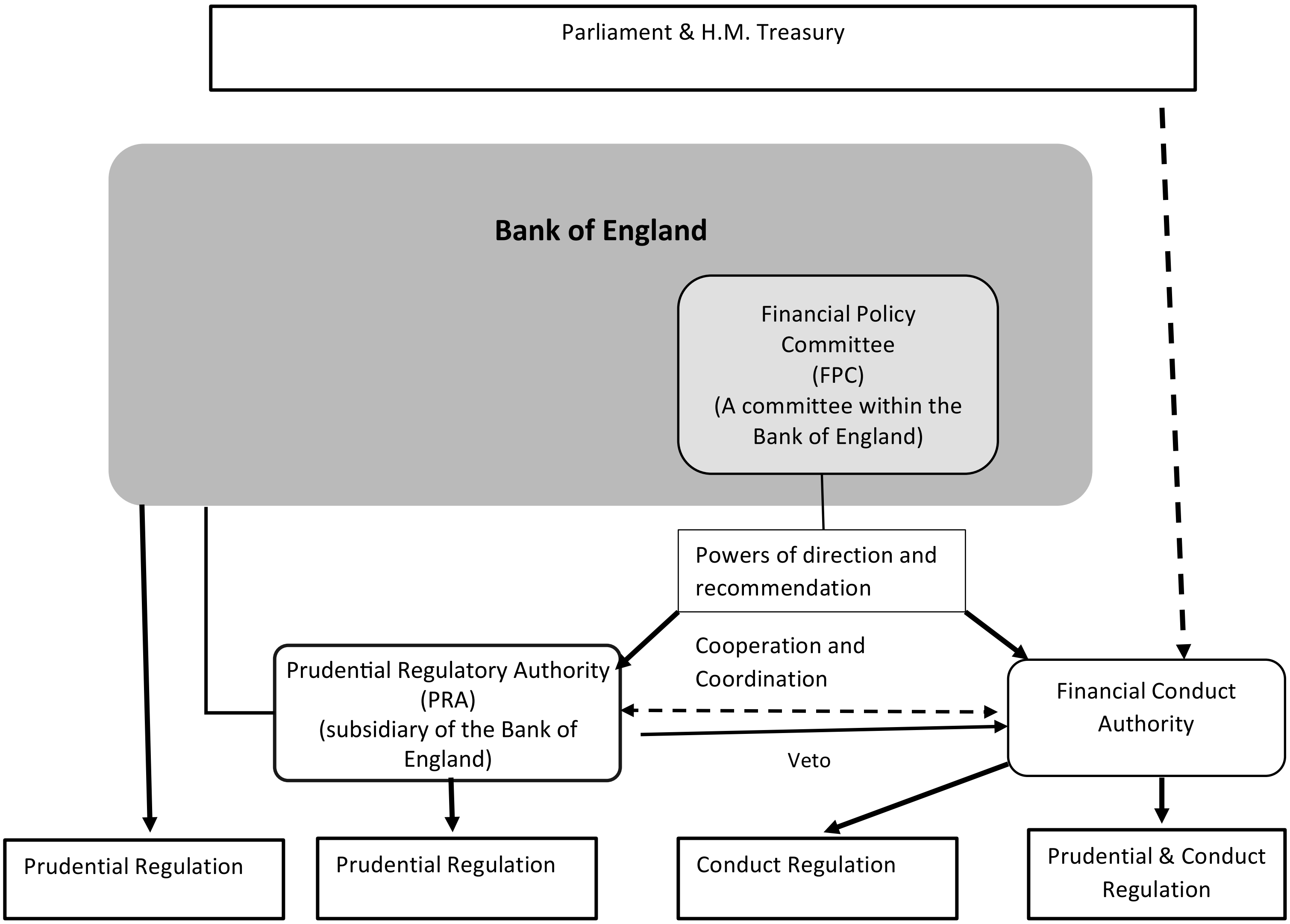
The FPC is the committee within the Bank of England that is specifically tasked with identifying and responding to systemic risks. It is comprised of eleven voting members: the Governor of the Bank of England, who serves as Chair, two Deputy Governors of the Bank of England, the Deputy Governor of the Bank of England for Prudential Regulation & Chief Executive of the PRA, two Bank executive directors, the Chief Executive of the FCA, and four external members. In addition, the FPC has one non-voting member who represents the Treasury. The FPC has the authority to recommend to or direct the PRA and the FCA to take certain actions to protect or maintain financial stability. The FPC is required to meet at least quarterly. The FPC must publish records of its meetings as well as twice-yearly financial stability reports.

The United Kingdom moved to this modified twin peaks structure on April 1, 2013.[522] Even with this structure, some financial services regulation, such as those pertaining to pensions, are not regulated by the PRA, the Bank of England, or the FCA.[523]

---

[522] Financial Services Act, 2012, ch. 21 (UK); H.M. Treasury and Greg Clark M.P., Financial Services Bill Receives Royal Assent (Dec. 19, 2012), https://www.gov.uk/government/news/financial-services-bill-receives-royal-assent [hereinafter H.M. Treasury Press Release] (act to take effect on April 1, 2013).
[523] Pensions are regulated by the Pension Regulator and by the UK Department for Work and Pensions. Pensions Act 2004, ch. 35, Part 1, §1 (2004) (UK). The Pension Regulator took over the functions of the Occupational

Figure 14
UK financial regulatory structure as of April 1, 2013[524]



II. Reasons for the Initial Consolidation and Subsequent Reorganization

The United Kingdom has experimented with financial regulatory consolidation since 1997. On October 27, 1986, under Prime Minister Margaret Thatcher, the United Kingdom significantly deregulated the London Stock Exchange in an event referred to as the "Big Bang." These reforms allowed banks, brokers, and jobbers to merge, allowed trading to move off the floor of the stock exchange, and removed

---

Pensions Review Authority that the Pensions Act 1995 had created to regulate workplace pensions. Pensions Act 1995, ch. 26, §1 (1995) (UK). In addition, the Pension Protection Fund (PPF) protects defined benefit plan participants in the event that a plan became insolvent by ensuring that they receive at least a portion of their promised benefits. Pensions Act 2004, ch. 35, Part 2, §108. Thus, the PPF acts in ways that are similar to the US Pension Benefit Guaranty Corporation. Djuna Thurley, *Pensions Protection Fund*, H.C. Library S.N. 3917, July 25, 2012, at 4-5, 30, http://www.parliament.uk/briefing-papers/SN03917.pdf.

[524] Financial Services Authority, Journey to the FCA 11 (2012): Andrew Bailey, *The Prudential Regulatory Authority*, Bank of England Q. Bull., 2012 Q4, at 2.

restrictions on membership in the London Stock Exchange in order to encourage investments by global financial firms in London. A series of financial scandals followed this deregulation in the late 1980s and 1990s. These included the collapse of BCCI, the collapse of Barings Bank, and the mis-selling of personal pensions.[525]

In 1997, the Labour Government and Chancellor Gordon Brown used the backlash against these scandals to push through an ambitious restructuring of the UK's financial regulatory structure. This program was more radical than the reforms that the Labour Party had campaigned on during the election. In developing its regulatory reform, the UK government closely examined Australia's twin peaks model. Michael Taylor of the London-based Centre for the Study of Financial Innovation had advocated that the United Kingdom adopt a twin peaks model in 1995. The twin peaks model was rejected in favor of a single regulator on the grounds that (1) it is not always easy to clearly delineate between prudential and market conduct regulations and (2) getting two agencies with vastly different regulatory objectives to cooperate might prove difficult.

Instead, of creating a twin peaks structure in the late 1990s, the United Kingdom opted for a single financial regulator. Creating a new financial regulatory structure with the Financial Services Authority as a single regulator involved three major steps.

First, the Bank of England's mission was narrowed to focus solely on monetary policy. Chancellor Brown transferred operational responsibility for monetary policy to the Bank of England in 1997 and this was formalized with the creation of the Monetary Policy Committee in the Bank of England Act 1998. Prior to 1997, HM Treasury had a say in monetary policy and the setting of interest rates, which meant that short term political considerations sometimes influenced interest rate decisions.

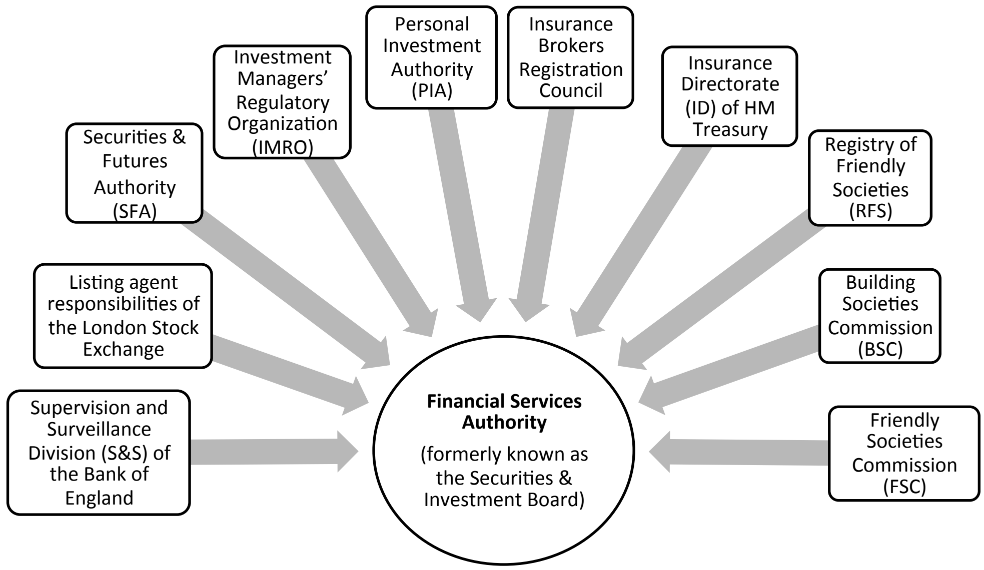
Second, the UK government renamed the Securities and Investment Board (SIB) as the Financial Services Authority (UK FSA) and merged the existing financial self-regulatory organizations into the FSA, as illustrated in Figure 15. In addition, it transferred the Bank of England's regulatory and supervisory powers over banks to the FSA. The Bank of England Act 1998 authorized the transfer of the Bank of England's powers while the Financial Services and Markets Act 2000 approved the other changes needed to create the FSA. The UK FSA had four objectives: (1) to maintain market confidence; (2) to protect consumers; (3) to promote public understanding of financial markets; and (4) to reduce financial crime.

While the UK FSA became the financial regulator, it was not a government agency. The UK FSA was an independent, non-governmental body that was organized as a company limited by guarantee and financed by fees from the financial services industry. A company limited by guarantee is similar to a non-profit corporation in the United States as neither entity has share capital or shareholders but instead have members that control them. As a company limited by guarantee, the UK FSA had to register at Companies House and follow all of the other legal requirements for such corporations. It also meant that the Chairman of the UK FSA had more latitude in how the organization was structured internally and run, than the heads of most independent federal agencies have. For example, the UK FSA underwent at least three major, and a few minor, internal reorganizations between 1998 and 2013. Most of these were done solely on the authority of the Chairman of the UK FSA.

---

[525] The personal pension mis-selling scandal occurred between 1988 and 1994. The Financial Services Act 1986 allowed workers to opt out of their employer's pension scheme and to invest in personal pensions. During the pension mis-selling scandal, individuals who would have been better off remaining in their employer's pension scheme were convinced to opt out and invest in a personal pension instead. The scandal also included the mis-selling of free standing alternative voluntary contributions (FSAVC) schemes to individuals who would have done better to have contributed to their employer's alternative voluntary contributions (AVC) plans. The UK FSA was created to prevent such frauds from occurring in the future and to prosecute anyone who attempted to commit such frauds.

Figure 15
Agencies and Functions Merged to Create FSA

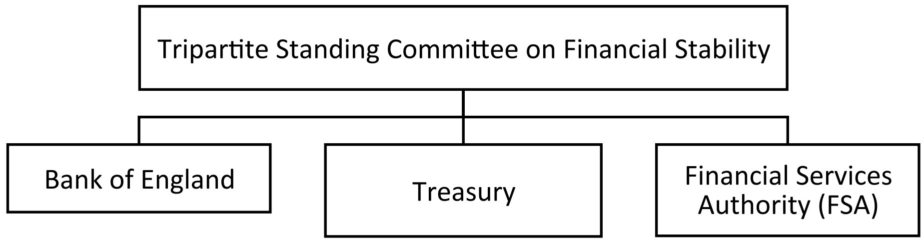


In addition, while the UK FSA was referred to as a single regulator, it did not, in fact, regulate all aspects of financial services. For example, the Pensions Regulator, the Pensions Protection Fund, and the Fraud Protection Fund regulated pensions and were outside of the UK FSA. The Financial Services Compensation Scheme (FSCS) also operated outside of the UK FSA. The FSCS is the functional equivalent of the Federal Deposit Insurance Corporation, the Securities Protection Investor Protection Corporation, and the state insurance guarantee funds in the United States combined into a single entity.

The creation of the UK FSA also did not alter HM Treasury's responsibility for the general regulatory structure for financial services and the laws governing it. Under the new arrangement, HM Treasury would continue to be accountable to Parliament for serious disruptions to the financial system and for the financial sector's resilience to such disruptions.

Third, the UK government recognized that a need to coordinate the activities of the FSA, the Bank of England, and the Treasury in order to promote financial stability. So it formed the Tripartite Standing Committee on Financial Stability comprised of representatives of all three agencies, as illustrated in Figure 16. In addition, certain actions, such as the bailout of a financial institution, required the unanimous consent of all three members of the Tripartite Standing Committee.

Figure 16
UK Regulatory Structure from 1998 to January of 2013[526]



Prior to the 2008 financial crisis, many financial industry officials and commentators lauded the UK FSA as one of two potential models for the future of financial regulation. The other contender frequently mentioned was the twin peaks model. Unfortunately, the 2008 financial crisis revealed significant problems with how the Tripartite Standing Committee members, particularly the FSA, handled their responsibilities. Beginning with the run on Northern Rock in 2007, the UK experienced a number of major bank failures or near failures that led its government to nationalize Northern Rock, Bradford & Bingley, Royal Bank of Scotland, Lloyds TSB, and HBOS.[527]

Following the crisis, the Conservative-Liberal Democrat coalition government that came to power in 2010 concluded that the UK FSA failed to adequately perform its prudential regulatory responsibilities.[528] Thus, it resolved to move away from a single regulator model to a twin peaks model, in which prudential regulation would be transferred back to the Bank of England.[529] This plan mirrored the one that the Conservative Party had proposed in their Policy White Paper entitled "From Crisis to Confidence: Plan for Sound Banking" that they issued in July 2009. The UK Parliament enacted the Financial Services Act 2012 to authorize this reorganization.

Under the Financial Services Act 2012, the UK FSA was renamed the Financial Conduct Authority.[530] The FCA is responsible for market conduct regulations for all financial services and for prudential regulation of firms not regulated by the new Prudential Regulatory Authority, which is a subsidiary of the

---

[526] UK Financial Stability MOU and H.M. Treasury, A New Approach to Financial Regulation: A Blueprint for Reform (June 2011), http://www.hm-treasury.gov.uk/d/consult_finreg__new_approach_blueprint.pdf

[527] The run on Northern Rock was the first run on a UK bank in over 140 years. Northern Rock started as a building society, the UK equivalent of a US savings and loan, but had expanded greatly in the decade prior to the crisis. In an internal review, the UK FSA concluded that its prudential regulation failed due to a number of factors, including, among other things, (1) inadequate procedures, which only required a review of the Northern Rock once every 36 months, (2) the lack of sufficient staff to monitor the bank's operations, and (3) the failure to properly assess the implications of Northern Rock's rapid expansion strategy. See Financial Services Authority Internal Audit Division (March 2008). The Supervision of Northern Rock: A Lessons Learned Review. The Bank of England was also criticized for failing to provide liquidity when requested in August 2007 because some thought that the liquidity might have at least averted the run on the bank. The Bank of England had objected to the request because, among other things, it was concerned about the moral hazard implications of providing such aid. See Llewellyn, David T. (2008). *The Northern Rock Crisis: A Multi-dimensional Problem Waiting to Happen*, 16 J. FIN. REG. & COMPLIANCE 35-58; Milne, Alistair & Geoffrey Wood (2008). Shattered on the Rock? British Financial Stability from 1866 to 2007 (Bank of Finland: Helsinki, Finland).

[528] H.M. GOVERNMENT, THE COALITION: OUR PROGRAMME FOR GOVERNMENT 9 (2010).

[529] *Id*.

[530] Financial Services Act, *supra* note 522, ch. 21, §6.

Bank of England.[531] On April 1, 2013, the Prudential Regulatory Authority within the Bank of England took over the UK FSA's prudential supervisory functions.[532] The PRA supervises insurance firms, depository institutions, and related activities.[533] Because the FCA does not solely engage in market conduct regulation but retains some prudential regulatory powers, the United Kingdom's new regulatory structure is not a pure twin peaks structure as exists in Australia.

III. Bank of England

A. Governance of the Bank of England

The 1998 Bank of England Act, as amended by the 2009 Banking Act and the 2012 Financial Services Act, sets forth the governance structure for the Bank of England.[534] The Crown appoints the members of the Court of Directors, who manage the affairs of the Bank of England, except for monetary policy.[535] The Court of Directors acts as the Bank's board of directors. The Court of Directors is comprised of the Governor, the Deputy Governor for Financial Stability, the Deputy Governor for Monetary Policy, the Deputy Governor for Prudential Regulation, and not more than nine non-executive directors.[536]

The Governor of the Bank of England is appointed for a term of eight years and the Deputy Governors are appointed for terms of five years.[537] A person cannot be appointed more than once as Governor.[538] A person may be appointed twice as a Deputy Governor.[539] Non-executive directors may be appointed for terms of four years or less.[540] The Governor manages the day-to-day affairs of the Bank of England.

The Court of Directors has several subcommittees, including, among others, an Oversight Subcommittee, a Financial Policy Committee, an Audit & Risk Committee, a Remuneration Committee, a Nominations Committee, and an Equity & Diversity Committee.[541]

The 1998 Bank of England Act requires that the Financial Policy Committee be comprised of the Governor of the Bank of England, the Deputy Governors of the Bank, the Chief Executive of the FCA, one member appointed by the Governor of the Bank after consultation with the Chancellor of the Exchequer, four members appointed by the Chancellor of the Exchequer, and a representative of HM Treasury.[542] The Financial Policy Committee is responsible for setting macroprudential policies that will address systemic risks.

The Monetary Policy Committee is not a subcommittee of the Court of Directors. It is comprised of the Governor of the Bank, the Deputy Governor for Financial Stability, the Deputy Governor for Monetary Policy, two members appointed by the Governor of the Bank after consultation with the Chancellor of the Exchequer, and four members appointed by the Chancellor of the Exchequer.[543] Concerning the two

---

531 *Id*.
532 Financial Services Act, *supra* note 522, ch. 21, §6; H.M. Treasury Press Release, *supra* note 522.
533 The Financial Services and Markets Act 2000 (PRA-regulated Activities) Order 2013, S.I. 2013/556, §2.
534 1998 Bank of England Act, Ch. 11, http://www.bankofengland.co.uk/about/Documents/legislation/1998act.pdf.
535 *Id*. §§1(2), 2.
536 *Id*. §1(2).
537 *Id*., Schedule 1, 1.(1), (2).
538 *Id*., Schedule 1, 1.(3).
539 *Id*.
540 *Id*., Schedule 1, 2.
541 1998 Bank of England Act, *supra* note 534, §§3A, 9B, 13; Bank of England, About the Bank, People & Governance, Court Committees, http://www.bankofengland.co.uk/about/Pages/people/members_court.aspx.
542 1998 Bank of England Act, *supra* note 534, §9B.
543 1998 Bank of England Act, *supra* note 534, §13(2).

members appointed by the Governor of the Bank after consulting with the Chancellor of the Exchequer, one of them must have "executive responsibility within the Bank for monetary policy analysis" and the other must have "executive responsibility within the Bank for monetary policy operations."[544]

Parliament holds the Bank of England accountable through hearings before the Treasury Committee of the House of Commons to appoint new members to the Bank's Monetary Policy Committee and Fiscal Policy Committee and through regular hearings on the Bank's Inflation Report and Financial Stability Report with Monetary Policy Committee and Financial Policy Committee.[545] The Treasury Committee publishes a report detailing its assessment of the qualifications of new appointee to either the Monetary Policy Committee or the Financial Policy Committee.[546] The House of Lords Economic Affairs Committee also periodically holds hearings with Bank of England officials concerning monetary policy and financial policy.[547]

B. Funding of the Bank of England

Different parts of the Bank of England are funded from different sources. For accounting and funding purposes, the Bank of England is divided into the Banking Department and the Issue Department.[548] The Banking Department is responsible for policy functions and banking and lending functions.[549] The Issue Department is responsible for issuing banknotes.[550]

The Banking Department is funded from several sources. The Cash Ratio Deposit (CRD) scheme funds the policy functions of the Bank, such as monetary policy and financial stability.[551] The CRD scheme requires banks and building societies to make an interest-free deposit at the Bank based on a set percentage of their deposit base.[552] The Bank of England invests these funds in interest yielding assets, which generate income used to cover the costs of the Bank's policy functions.[553] HM Treasury sets the CRD requirements through a Statutory Instrument every five years.[554] The last time this was done was in May 2013.[555]

The banking and lending operations for the Bank's own account and for the Funding for Lending Scheme are managed with the aim of breaking even.[556] If the Bank, however, realizes any gains or losses from these activities, these will be recognized in the Bank's capital.[557]

If the CRD income and the other functions break even, then any profit that the Bank has, would arise from its return on the assets, in which it invested its capital and reserves.[558] Such assets are usually

---

544 *Id*.
545 Bank of England, About the Bank, The Bank's relationship with Parliament, http://www.bankofengland.co.uk/about/Pages/parliament/default.aspx.
546 *Id*.
547 *Id*.
548 BANK OF ENGLAND, ANN. REP. 2014, 43 (2014), http://www.bankofengland.co.uk/publications/Documents/annualreport/2014/boereport.pdf
549 *Id*.
550 *Id*.
551 *Id*. at 44.
552 *Id*.
553 *Id*.
554 *Id*.
555 *Id*.
556 *Id*.
557 *Id*.
558 *Id*.

gilts.[559] The Bank of England Act 1998 requires the Bank of England to split any post-tax profit 50-50 with HM Treasury, unless otherwise agreed.[560]

The Issue Department is funded from the interest earned on the assets that it buys to back the notes in circulation.[561] Any net profit or loss of the Issue Department is classified as seignorage.[562] Any profit is paid to HM Treasury via the National Loans Fund.[563] Conversely, HM Treasury makes up any losses by paying an amount equal to the loss to the Bank of England via the National Loans Fund.[564]

While the PRA is a subsidiary of the Bank of England, it is a separate legal entity with its own accounts.[565] It is funded through fees collected from the entities that it supervises.[566] Its budget must be approved by the Bank of England's Court of Directors.[567]

C. Bank of England's Areas of Responsibility

The 1998 Bank of England Act put the Bank of England in charge of the United Kingdom's monetary policy. Prior to 1998, the Treasury shared responsibility for setting monetary policy with the Bank of England.

The Financial Services Act 2012 amended the 1998 Bank of England Act to add a "Financial Stability Objective" to the responsibilities of the Bank of England.[568] The Bank of England now must "protect and enhance the stability of the financial system of the United Kingdom."[569] It is required to work with the PRA, the FCA, and the Treasury to fulfill this objective.[570]

The Court of Directors determines the Bank of England's financial stability strategy but it must consult with the Bank's Financial Policy Committee and with the Treasury before finalizing the policy or changing it.[571] The Court of Directors must review the Bank's financial stability strategy at least once every three years.[572]

The most significant change to the Bank of England's responsibilities was the creation of the Financial Policy Committee, which was first proposed in 2011 and came into being in 2013. The Financial Policy Committee is responsible for macroprudential regulation, by which is meant "regulation of stability and resilience of the financial system as a whole."[573] The Treasury may make recommendations to the Financial Policy Committee regarding matters that it deems relevant to the committee's objective to

---

[559] *Id.*
[560] *Id.*
[561] *Id.*
[562] *Id.*
[563] *Id.*
[564] *Id.*
[565] *Id.*
[566] *Id.*
[567] *Id.*
[568] 1998 Bank of England Act, *supra* note 534, §2A.
[569] *Id.* §2A(1).
[570] *Id.* §2A(2).
[571] *Id.* §9A.
[572] *Id.*
[573] HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: BUILDING A STRONGER SYSTEM 4 (Feb. 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81411/consult_newfinancial_regulation170211.pdf.

control systemic risks.[574] The Financial Policy Committee may order the PRA or the FCA to take certain actions when it deems those actions necessary to address macroprudential issues.[575] If they receive a direction from the Financial Policy Committee, the PRA or the FCA must comply with it within a reasonable amount of time.[576]

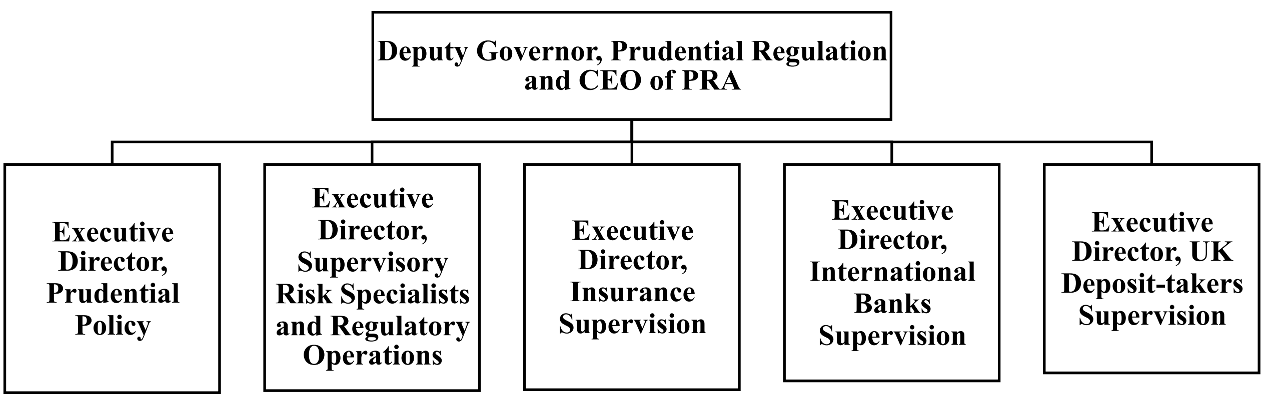
IV. Prudential Regulatory Authority (PRA)

A. Governance of PRA

The PRA Board serves as its governing body.[577] The Governor of the Bank of England chairs the PRA Board.[578] The other members of the PRA Board are the Deputy Governor for Financial Stability, the Deputy Governor for Prudential Regulation.[579] A majority of the PRA Board must be non-executive members, which means that they cannot be employees of the Bank of England or the PRA.[580] The Bank of England's Court of Directors with the approval of the Treasury appoints members to the PRA Board.[581]

The Deputy Governor of the Bank of England for Prudential Regulation also serves as the Chief Executive Officer for PRA.[582] PRA has five Executive Directors, who head divisions based primarily on institutional categories.[583] There are three institutional divisions and two policy divisions. The institutional divisions are for Insurance Supervision, International Banks Supervision, and UK Deposit-Takers Supervision.[584] The policy divisions are for Prudential Policy and Supervisory Risk Specialists and Regulatory Operations.[585] Figure 17 illustrates the internal organizational structure of PRA.

Figure 17
PRA Organizational Structure



[574] *Id*. §9E.
[575] *Id*. §9H.
[576] *Id*. §9I.
[577] PRA, ANN. REP. 2014, 7 (2014).
[578] *Id*.
[579] *Id*.
[580] *Id*.
[581] *Id*.
[582] *Id*. at 16.
[583] *Id*. at 16-17.
[584] *Id*. at 17.
[585] *Id*. at 16.

Parliament holds the PRA board accountable by holding periodic hearings before the Treasury Committee.[586]

In addition, PRA has a PRA Practitioner Panel composed of members of the banks, insurance companies, and investment firms supervised by the PRA.[587] The purpose of this panel is to represent the interests of the PRA-regulated entities before the PRA.[588]

B. Funding of PRA

While the PRA is a subsidiary of the Bank of England, it is a separate legal entity with its own accounts.[589] It is funded through fees collected from the entities that it supervises.[590] Its budget must be approved by the Bank of England's Court of Directors.[591]

C. PRA's Areas of Responsibility

The primary of objective of the PRA is to ensure the safety and soundness of the institutions that it supervises.[592] It is to pursue this objective by "seeking to ensure that the business of PRA-authorised persons is carried on in a way which avoids any adverse effect on the stability of the UK financial system" and by "seeking to minimise the adverse effect that the failure of a PRA-authorised person could be expected to have on the stability of the UK financial system."[593]

The PRA regulates deposit-takers (e.g., banks, building societies), insurance companies, and investment firms for safety and soundness. The PRA can choose to regulate investment firms if the investment firms meet two criteria:

1. The firm has, or has applied for, permission to deal in investments as principal; and
2. the firm has, or would have if it were authorised, a minimum capital of €730,000, or is a broadly analogous European Economic Area (EEA) passporting firm or non-EEA firm.[594]

Any firms meeting those requirements are "Eligible Investment Firms" that PRA may consider designating as firms requiring its supervision.[595]

PRA may designate an Eligible Investment Firm as requiring its supervision "if the PRA 'considers that it is desirable that the activity of dealing in investments as principal, when carried on by [the Eligible Investment Firm], should be a PRA-regulated activity' (article 3(1)(c)). In taking designation decisions the PRA is to have regard to its statutory objectives and the matters set out in article 3(4) of the PRA-regulated Activities Order, which are:

(a) the assets of the Eligible Investment Firm; and
(b) where the Eligible Investment Firm is a member of a group:

---

586 Bank of England, About the Bank, The Bank's relationship with Parliament, *supra* note 545.
587 Financial Services and Market Act 2000, as amended by the Financial Services Act 2012, §2B.
588 *Id*.
589 BANK OF ENGLAND, ANN. REP. 2014, *supra* note 548, at 44.
590 *Id.*
591 *Id.*
592 Financial Services and Market Act 2000, as amended by the Financial Services Act 2012, §2M.
593 *Id*.
594 PRA, STATEMENT OF POLICY DESIGNATION OF INVESTMENT FIRMS FOR PRUDENTIAL SUPERVISION BY THE PRUDENTIAL REGULATION AUTHORITY 3 (March 2013).
595 *Id*.

(i) the assets of other Eligible Investment Firms within the group;
(ii) whether any other members of the Eligible Investment Firm's group have been designated; and
(iii) whether the Eligible Investment Firm's activities have, or might have, a material impact on the ability of the PRA to advance any of its objectives in relation to PRA-authorised persons in its group."[596]

PRA must consider three factors when determining whether to designate an Eligible Investment Firm as needing its supervision:

- whether the firm's balance sheet exceeds an average of £15 billion total gross assets over four quarters, as reported on regulatory returns; and/or
- whether the sum of the balance sheets of all Eligible Investment Firms in a group exceeds an average of £15 billion total gross assets over four quarters; and/or
- where the firm is part of a PRA group, whether the firm's revenues, balance sheet and risk-taking is significant relative to the group's revenues, balance sheet and risk-taking.[597]

As of December 2014, PRA had only designated nine investment firms as subject to its supervision. These firms are Barclays Capital Securities Limited, Citigroup Global Markets Limited, Credit Suisse Securities (Europe) Ltd, Goldman Sachs International, Merrill Lynch International, Mitsubishi UFJ Securities International plc, Morgan Stanley & Co. International Plc, Morgan Stanley Securities Ltd, and Nomura International Plc.[598]

V. Financial Conduct Authority

A. Governance of FCA

The FCA Board is the FCA's governing body. It is composed of the Chairman of the FCA and the Chief Executive of the FCA, who are appointed by the Treasury, the Bank of England Deputy Governor for Prudential Regulation, two non-executive directors appointed jointly by the Secretary of State for Business, Innovation and Skills and the Treasury, and three executive directors and four non-executive directors appointed by the Treasury.[599] The Chairman of the FCA is appointed to a five-year term while all other directors on the Board are appointed for three-year terms.[600] The FCA Board is responsible for setting the strategic objectives for the FCA.

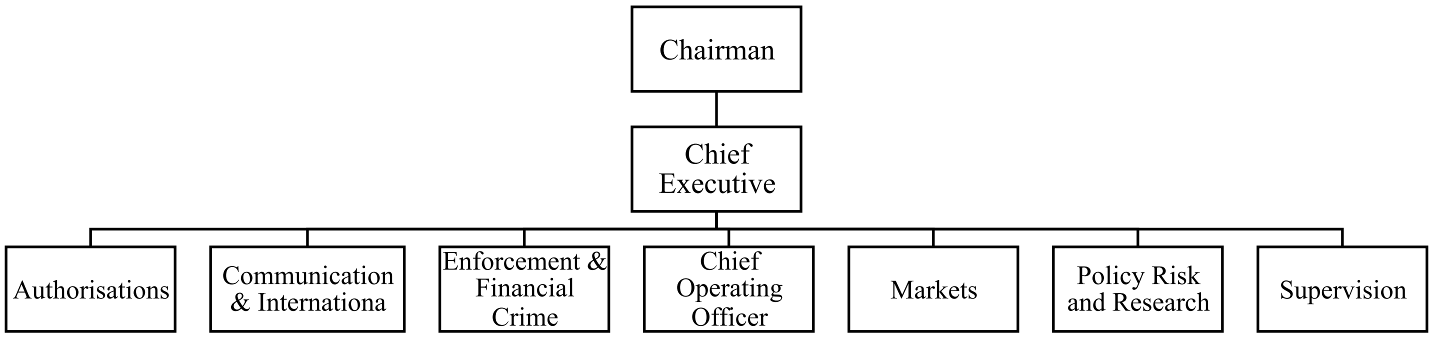
The Chief Executive of the FCA is responsible for implementing the strategic objectives set by the Board and for managing the day-to-day operations of the FCA.

Internally, the FCA is organized by objective. Figure 18 lists the objectives, for which each department is responsible.

---

[596] *Id*.
[597] *Id*. at 3-4.
[598] PRA, List of Designated Firms Compiled by the Bank of England as of 31 December 2014.
[599] FCA, ANN. REP. 2013/14, 70 (2014), http://www.fca.org.uk/static/documents/corporate/annual-report-13-14.pdf
[600] *Id*. at 71.

Figure 18
FCA Organization Chart[601]



B. Funding of FCA

The FCA is not funded by appropriations from the UK government.[602] Instead, it primarily funds its operations from fees assessed on the entities that it regulates.[603] The FCA raised £435.4 million (about US$726.0 million in fees during fiscal year 2013-2014.[604]

Some of the FCA's funds come from application fees, income from publications and fees charged to other regulators for operational services provided.[605] The FCA also earns interest on deposits that it has placed with various counter-parties.[606] Any penalties that the FCA levies and collects are paid to the Exchequer after the FCA deducts any expenses for bringing the enforcement action.[607]

The FCA also collects fees on behalf of other financial services regulators, including the PRA, the Financial Services Compensation Scheme (FSCS), the Financial Ombudsman Service, the Money Advice Service (MAS,; and the Financial Reporting Council (FRC).[608] The FCA does not recognize these fees as income on its financial statements. Instead, it pays the money collect to the relevant agency in accordance with the Service Level Agreement that it has with the agency.[609]

C. FCA's Areas of Responsibility

The FCA provides consumer protection and market conduct regulation for the financial services industry, which includes over 50,000 firms.[610] It also sets the prudential standards for firm not supervised by the PRA.[611]

---

[601] FCA, Organisation Chart, https://www.fca.org.uk/static/fca/documents/fca-organisational-chart.pdf.
[602] FCA, ANN. REP. 2013/14, *supra* note 599, at 64.
[603] *Id*.
[604] FCA, ANN. REP. 2013/14, *supra* note 599, at 64; US Bd. of Governors of Fed. Res. Sys., Foreign Exchange Rates – H.10, Historical Rates for the UK Pound (Apr. 6, 2015) [hereinafter US-UK Pound Exchange Rates], http://www.federalreserve.gov/releases/h10/hist/dat00_uk.htm (on March 31, 2014, £1.00 = US$1.6675).
[605] FCA, ANN. REP. 2013/14, *supra* note 599, at 64.
[606] *Id*.
[607] *Id*.
[608] *Id*. at 65.
[609] *Id*.
[610] *Id*. at 64.
[611] *Id*.

The Financial Services and Markets Act 2000 set as the FCA's strategic objective that the FCA must seek to ensure that the financial markets function well.[612] It also gave the FCA three operational objectives – one for consumer protection, one for integrity, and one for competition.[613]

The consumer protection objective requires the FCA to ensure "an appropriate degree of protection for consumers."[614] In order to do this, the FCA must take into account several factors:

(a) the differing degrees of risk involved in different kinds of investment or other transaction;
(b) the differing degrees of experience and expertise that different consumers may have;
(c) the needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose;
(d) the general principle that consumers should take responsibility for their decisions;
(e) the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate having regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question;
(f) the differing expectations that consumers may have in relation to different kinds of investment or other transaction;
(g) any information which the consumer financial education body has provided to the FCA in the exercise of the consumer financial education function; and
(h) any information which the scheme operator of the ombudsman scheme.[615]

The integrity objective requires the FCA to protect and enhance the integrity of the UK financial system.[616] The Financial Services and Markets Act 2000 defines the "integrity" of the financial system as including:

(a) its soundness, stability and resilience,
(b) its not being used for a purpose connected with financial crime,
(c) its not being affected by behaviour that amounts to market abuse,
(d) the orderly operation of the financial markets, and
(e) the transparency of the price formation process in those markets.[617]

Finally, the competition objective requires the FCA to promote competition in regulated financial markets and competition for services provided through recognized investment exchanges in ways that will be in the interests of consumers.[618]

VI. HM Treasury

The Treasury is responsible for setting economic and financial policies, including policies governing the financial services sector. It works with the Bank of England, the PRA, and the FCA to develop policies to govern financial services.[619]

---

[612] Financial Services and Market Act 2000, as amended by the Financial Services Act 2012, §§1B, 1F.
[613] *Id.*, §1B.
[614] *Id.*, §1C.
[615] *Id.*
[616] *Id.*, §1D.
[617] *Id.*
[618] *Id.*, §1E.

The Treasury also has the power to order independent inquiries into the efficiency and effectiveness of the PRA and the FCA.[620] It can also order an independent inquiry in the case of a failure of a financial services firm.[621] It must receive copies of any directions issued by the Bank of England's Financial Policy Committee to the PRA or the FCA.[622]

The Treasury represents the United Kingdom in international negotiations that involve political issues on financial matters both at the European Union level and at the international level.[623] The FCA represents the United Kingdom at the ESMA.[624] The PRA represents the United Kingdom on the EIOPA and the European Banking Board.[625] The Bank of England represents the United Kingdom on the European Systemic Risk Board.[626]

VII. Other Financial Regulators

As in the United States, the UK financial regulators supervise the financial products and the institutions that offer such products, while another set of agencies regulate the pension plans. Thus, UK pension plans must comply with an additional layer of regulation that is similar in some respects to the additional layer of regulation on pension plans in the United States.

The Pensions Regulator was created by the Pensions Act 2004.[627] The objectives of the Pensions Regulator are:

> (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,
> (b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
> (c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2), and
> (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.[628]

The Pension Regulator supervises workplace pensions while the UK FCA regulates personal pensions and annuities.[629]

---

619 HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: BUILDING A STRONGER SYSTEM 4 (Feb. 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81411/consult_newfinancial_regulation170211.pdf.
620 *Id*. at 10.
621 *Id*.
622 *Id*.
623 *Id*. at 12.
624 *Id*.
625 *Id*.
626 *Id*.
627 Pensions Act 2004, ch. 35, Part 1, §1. The Pension Regulator took over the functions of the Occupational Pensions Review Authority that the Pensions Act 1995 had created to regulate workplace pensions. Pensions Act 1995, ch. 26, §1.
628 *Id*., §5.
629 Memorandum of Understanding between the Financial Conduct Authority and the Pensions Regulator §§5-6 (April 2013). Personal pensions in the United Kingdom are similar to individual retirement accounts in the United States.

In order to protect defined benefit plan participants in the event that a plan became insolvent, the Pensions Act 2004 created the Pensions Protection Fund (PPF), which operates in ways that are similar to the US Pension Benefit Guaranty Corporation.[630] Prior to the Pensions Act 2004, the United Kingdom did not have any government agency that provided insurance against the insolvency of a defined benefit plan.[631] The PPF is funded by four mains sources: (1) a levy imposed on eligible defined benefit plans covered by the PPF, of which 80 percent would be comprised of a risk-based pension protection levy and 20 percent would be comprised of a scheme-based pension protection levy, (2) the recovery of assets from the insolvent employers of pension plans that it takes over, (3) the assets transfer to it when it takes over a pension plan, and (4) the returns on its investments.[632] Unlike in the United States where the amount charged to plans is set forth in the statute, the Board of the PPF is required every year to set the levies that will be charged to the covered plans.[633] The PPF does not have free reign to set any amount it wants. The Secretary of State sets the ceilings for the risk-based pension protection levy and the scheme-based pension protection levy for each defined benefit plan covered by the PPF, which places caps on the amounts that the PPF can charge.[634]

When the PPF takes over a pension plan, the amounts that participants will receive depends upon whether they were already receiving benefits at the time of the insolvency. If they were, then the PPF will continue to pay the 100 percent of the amounts owed to them under the plan.[635] If they were not, then the PPF will only pay 90 percent of the amounts owed to them under the plan from the date when they are eligible to begin collecting their benefits under the plan's terms.[636]

The Pensions Act 2004 also created the Fraud Compensation Fund (FCF) to protect pension plans that have lost money due to fraud.[637] The FCF is separate fund administered by the Pensions Protection Fund and it took over the functions of the Pensions Compensation Board.[638] The Pensions Act 1995 created the Pensions Compensation Board to provide compensation in cases involving pension plans that were held in trust schemes, the employer had become insolvent, the assets of the plan represented less than 90 percent of the plan's liabilities, and the value of the plan's assets had been reduced due to fraud or some other prohibited activity.[639] Unlike the Pensions Protection Fund, the FCF covers both defined contribution plans and defined benefit plans.[640] The FCF primarily is funded from a levy charged on all defined contribution and defined benefit plans.[641] The FCF will pay compensation if the following four conditions are met: (1) the pension plan is an eligible pension plan, (2) it is doubtful that the employer

---

[630] Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §108; Djuna Thurley, *Pensions Protection Fund*, H.C. Library S.N. 3917, July 25, 2012, at 4-5, 30, http://www.parliament.uk/briefing-papers/SN03917.pdf [hereinafter Thurley 2012]

[631] Thurley 2012, *supra* note 630, at 4.

[632] Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §§175-181; Thurley 2012, *supra* note 630, at 17. The risk-based levy is calculated based on three factors: (1) the difference between the value of a pension plan's assets and the amount of its protected liabilities, (2) except for certain regulated pension plans, the likelihood of the employer associated with the pension plan becoming insolvent, and (3) certain other risk factors that the Board of the PPF deems appropriate. Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §175. The scheme-based levy is calculated based on two factors: (1) the amount of a pension plan's liabilities to or in relationship to its members and (2) certain other risk factors that the Board of the PPF deems appropriate. *Id*., ch. 35, Part 2, §175.

[633] Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §§175, 178.

[634] *Id.*, ch. 35, Part 2, §178.

[635] Pensions Act 2004, *supra* note 627, ch. 35, Schedule 7; Thurley 2012, *supra* note 630, at 8-9.

[636] Pensions Act 2004, *supra* note 627, ch. 35, Schedule 7; Thurley 2012, *supra* note 630, at 8-9.

[637] Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §188.

[638] *Id*., ch. 35, Part 2, §§188, 302.

[639] Pensions Act 2005, ch. 26, §§78-81.

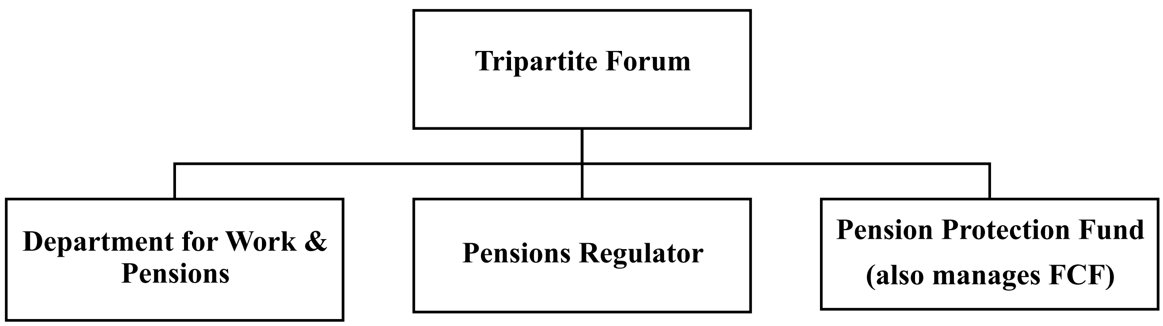
[640] Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §188; Thurley 2012, *supra* note 630, at 6 (quoting from the Pension Protection Fund, Annual Report and Accounts 2008/09).

[641] Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §189.

sponsoring the plan will be able to continue as a "going concern," (3) it is no possibility of the pension plan being rescued, and (4) the value of the plan's assets was reduced by a fraudulent act.[642]

The UK Department for Work and Pensions is responsible for administering, among other things, the Basic State Pension, which is the UK equivalent of Social Security in the United States, and the Pension Credit, which provides welfare payments to persons of pensionable age. The UK Department for Work and Pensions, the Pensions Regulator, and the Pensions Protection Fund entered into a Memorandum of Understanding in 2008 that governs their interactions with one another and delineates their areas of responsibilities.[643] This Memorandum of Understanding also created a forum to promote cooperation, coordination, and the exchange of information among the UK Department for Work and Pensions, the Pensions Regulator, and the Pensions Protection Fund.[644] This forum is called the Tripartite Forum.[645] Figure 19 illustrates the organizational structure for the UK pension regulatory agencies under this arrangement.

Figure 19: UK Pensions Regulatory Structure[646]



VIII. Relevance of the UK's Consolidations for the United States

Given that the United Kingdom has only had a twin peaks system for about two years, it is perhaps too early to tell if it will perform better than the single, integrated regulator that it had prior to the financial crisis. Nevertheless, the fact that the United Kingdom was sufficiently dissatisfied with how a single financial regulator operated and was willing to undertake the time and expense to move away from it to a modified twin peaks structure, should give advocates of single, completely integrated financial regulators pause about the wisdom of adopting such a system.

Thus, one of the main lessons that the United Kingdom demonstrates for the United States is that a consolidated regulatory structure by itself and without regard for the internal structures within the financial regulators is not a panacea. The United Kingdom had a consolidated regulatory structure prior to the 2008 financial crisis but this did not prevent UK banks from failing.

---

642 Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §185 (providing that compensation may be paid on such terms as the Board of the Pension Protection Fund may deem appropriate); FAQ Answer, When may compensation from the FCF be paid?, http://www.pensionprotectionfund.org.uk/FAQs/Pages/details.aspx?itemid=189&search=t&subjectid=9.
643 Memorandum of Understanding between the Department for Work and Pensions, the Pensions Regulator and the Pension Protection Fund (Feb. 2008), http://www.thepensionsregulator.gov.uk/docs/mou-dwp-tpr-ppf.pdf [hereinafter Pensions MOU].
644 *Id.*, §§14-31.
645 *Id.*, §15.
646 Pensions MOU, *supra* note 643, §15; Pensions Act 2004, *supra* note 627, ch. 35, Part 2, §188.

In fact, during the 2008 financial crisis, the UK government provided more financial aid to the financial services sector in the US government provided when one takes into account the differences in the nations' GDPs. The UK National Audit Office found that the total level of assistance that the UK government provided to the financial sector during the financial crisis totaled £847 billion (about US$1.4 trillion), which included purchases of shares in the banks and offers of guarantees, insurance, and loans made to banks.[647]

As noted above, between 2000 and 2013, while the United Kingdom had three government entities with primary regulatory authority over the financial services system — the Financial Services Authority, the Bank of England, and the Treasury, regulatory authority for most financial services, including pensions, was concentrated in the UK FSA until April 1, 2013 when the Financial Services Act 2012 took effect.[648] The UK FSA provided both prudential and market conduct supervision for financial services.[649] In order to coordinate the activities of the UK FSA, the Bank of England, and the Treasury between 1998 and 2013, the United Kingdom formed the Tripartite Standing Committee on Financial Stability comprised of representatives of all three agencies.[650]

Thus, the UK FSA was responsible for controlling or preventing prudential risks that might lead to the financial institutions failing while the Tripartite Standing Committee was responsible for dealing with crises, including making determinations regarding when to bail out firms. Neither worked well in the run up to the 2008 financial crisis.

One reasons that the UK FSA failed to provide adequate prudential regulation and supervision might be that it was captured by the industry that it was supposed to oversee. It had allowed itself to identify too closely with the firms that it was intended to regulate. This might have occurred because in the years immediately prior to the crisis, its internal structure was organized along institutional lines, even though its original internal organization had been based on risks or objectives.

The UK FSA initially had moved the furthest towards fully integrated regulation by regulating based on "objective," which usually meant regulating particular risks, such as prudential or market conduct risks, rather than based on industry sector, such as banking, insurance or securities.[651] From 1998 to 2000, the UK FSA had a department for Financial Supervision that handled prudential risks and a department for Authorization, Enforcement, and Consumer Protection that handled market conduct risks as shown in Figure 20. In these early years of the UK FSA's existence, its internal structure looked similar to the twin peaks model employed by Australia and the Netherlands.[652]

---

[647] UK National Audit Office, MAINTAINING FINANCIAL STABILITY ACROSS THE UNITED KINGDOM'S BANKING SYSTEM 5-8 (Dec. 4, 2009), available at: http://www.nao.org.uk/publications/0910/uk_banking_system.aspx [hereinafter UK NATIONAL AUDIT OFFICE FINANCIAL STABILITY REPORT]; US-UK Pound Exchange Rates, *supra* note 604, (used exchange rate on Dec. 4, 2009, which was £1.00 = US$ 1.6242). The UK government spent £117 billion on purchases of shares in banks and loans to banks and provided £200 billion in liquidity support, £250 billion in guarantees on wholesale borrowing by banks, and £280 billion in insurance coverage on bank assets. UK NATIONAL AUDIT OFFICE FINANCIAL STABILITY REPORT at 5-8.

[648] Financial Services Act, 2012, *supra* note 522; H.M. Treasury Press Release, *supra* note 522.

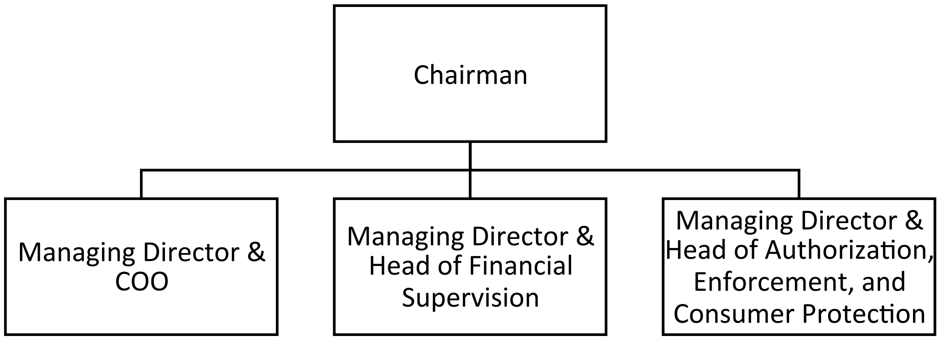
[649] Clive Briault, *The Rationale for a Single National Financial Services Regulator* 5, 24-25 (Fin. Services Authority, FSA Occasional Papers in Fin. Reg., May 1999).

[650] UK Financial Stability MOU at 4.

[651] UK FSA ANN. REP. 2000/01 11-12 (2001).

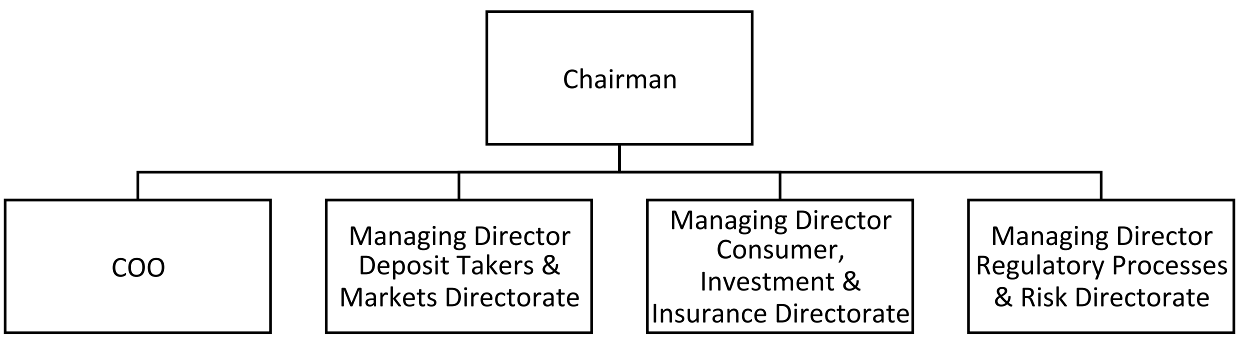
[652] GROUP OF THIRTY, THE STRUCTURE OF FINANCIAL SUPERVISION: APPROACHES AND CHALLENGES IN A GLOBAL MARKETPLACE 31 (2008).

Figure 20
UK FSA Structure from 1998 to 2000[653]



In 2001, the UK FSA began to move back towards an internal organizational structure based on industry segments rather than by objectives. From 2001 to 2003, the UK FSA had three main departments – one for Deposit Takers and Markets, which supervised banks and other depository institutions, one for Consumer, Investment, and Insurance, which supervised capital markets and insurance, and one for Regulatory Processes and Risk, as illustrated in Figure 21.[654] It also has a number of cross sector leaders that touch on issues that arise in all three departments, such as auditing and accounting and asset managements.[655] The UK FSA, however, did not cover all of the financial services firms until 2004 when it finally added coverage of mortgage and general insurance intermediation.[656]

Figure 21
UK FSA Structure from 2001 to 2003[657]

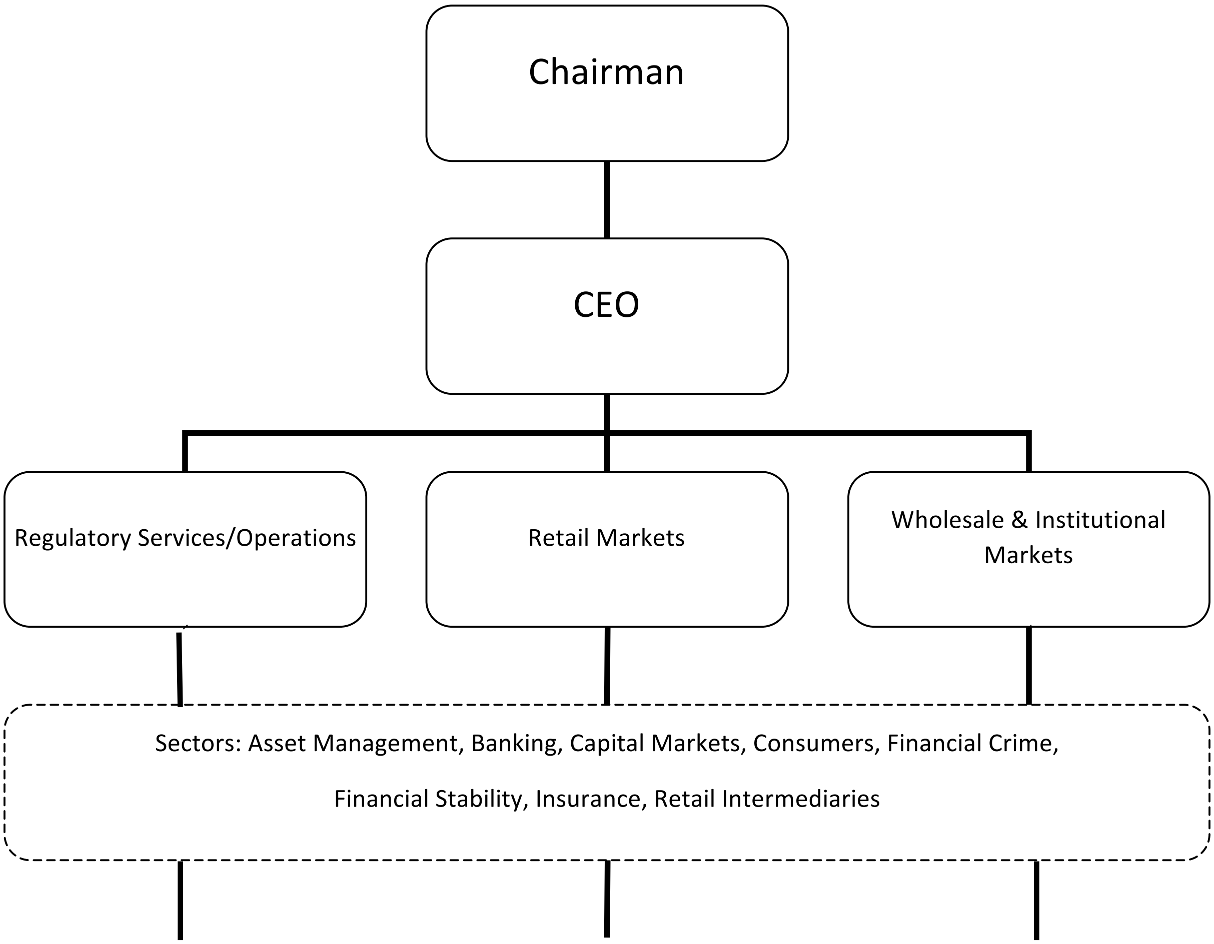


In 2004, the UK FSA underwent a major reorganization, which restructured its departments more along the lines of specific industry segments as shown in Figure 22. As a result, its internal structure mimicked in many ways the mixture of institutional and functional regulatory agencies found in the US regulatory structure and in the structures of those nations that still maintain separate banking, insurance and securities divisions within a single agency.

---

653 UK FSA ANN. REP. 1997/98, Appendix 2: FSA Organisational Chart, 45 (1998); UK FSA ANN. REP. 1999/2000, Appendix 2: UK FSA Organisational Chart as of 30 June 2000, 71 (2000).
654 UK FSA, ANN. REP. 2006/07 4 (2007).
655 *Id.*
656 UK FSA, ANN. REP. 2004/05 5 (2005).
657 UK FSA ANN. REP. 2000/01, Appendix 2: Organisational Chart, 72 (June 2001); UK FSA ANN. REP. 2002/03, Appendix 2: FSA as of 31 March 2003, 122 (June 2003).

Figure 22
UK FSA structure from 2004 to 2009[658]



The UK FSA kept this structure until 2009 when it went through another major reorganization to bring its internal structure back to something that more approximated the twin peaks approach with a department for Risk and another for Supervision.[659] With this reorganization, the UK FSA effectively conceded that an institutional internal structure had allowed financial services firms to capture, at least, some of the divisions or departments within the UK FSA. This reorganization proved to be too little, too late. As already noted, in 2010, the newly elected UK government announced that it planned to create a twin peaks structure, which was the death knell for the United Kingdom's experiment with a single regulator.

Furthermore, the experience of the UK FSA in the run up to the financial crisis and during the crisis demonstrates that consolidated regulators can be subject to regulatory competition that can result in a race

---

[658] UK FSA ANN. REP. 2003/04, Appendix 2: FSA June 2004, 50 (June 2004); UK FSA ANN. REP. 2005/06, Appendix 2: FSA May 2006, 51 (June 2006); UK FSA ANN. REP. 2008/09, 4 (June 2009).

[659] UK FSA, Organisational Chart (effective from Oct. 1, 2009), *available at* http://www.postonline.co.uk/digital_assets/3991/FSAORGANOGRAMEXTERNAL1.pdf.

to the bottom. It is just that these pressures may come from international, rather than domestic, regulatory competition.

Elements within the governments of both the United States and the United Kingdom fostered regulatory competition prior to the 2008 financial crisis because they wanted their countries to be the primary financial services marketplace in the world. Between 2000 and 2008, London tried to re-overtake New York with the aid of the UK FSA. Private groups and government officials conducted major studies on competitiveness were done to assess the competitive advantages of the United Kingdom and the United States.[660]

The City of London Corporation began commissioning biannual reports from Z/Yen Group in March 2007 to ascertain how competitive London was as a financial center and to create a Global Financial Centres Index (GFCI).[661] In its March 2010 report, Z/Yen Group concluded that London and New York were tied for the top spot as the world's leading financial center, based on a survey of market participants and regulators.[662] This was the first time that London and New York had tied for the top position on the GFCI, previously London had consistently been ranked number 1 over New York in the survey.[663]

The ironic thing about this competition was that the firms pushing deregulation in the United States were the same ones pushing deregulation in London and most of them were American financial conglomerates. Over 75 percent of the banks authorized to do business within the United Kingdom were branches or subsidiaries of foreign banks.[664] In the wake of the Big Bang, the United Kingdom saw most of its major investment or merchant banks taken over by foreign firms or go out of business.[665] The only major deviation from this trend was Barclays' acquisition of large portions of Lehman Brothers following its financial collapse in September 2008.[666] As a result of Lehman Brothers deal, Barclays Capital vaulted up the league tables to become a major investment banking competitor. It rose to the seventh position on Mergermarket's league table of financial advisors for global mergers and acquisition in terms of value for the first three quarters of 2009, up substantially from its 37th ranking on the 2008 league table.[667]

---

[660] United Kingdom HM Treasury, Financial Services in London: Global opportunities and challenges (March 2006), http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/1E0/E6/bud06_cityoflondon_262.pdf [hereinafter HM TREASURY FINANCIAL SERVICES REPORT].

[661] Z/Yen Group, GLOBAL FINANCIAL CENTRES 7, 1 and 3 (March 2010), http://217.154.230.218/NR/rdonlyres/661216D8-AD60-486B-A96F-EE75BB61B28A/0/BC_RS_GFC7full.pdf. The City of London Corporation is the local governmental authority for London's financial district.

[662] *Id.* at 1.

[663] *Id.*

[664] HM TREASURY FINANCIAL SERVICES REPORT, *supra* note 660, at 8.

[665] David Kynaston, THE CITY OF LONDON, VOL. IV: A CITY NO MORE 1945-2000 (Chatto & Windus, 2001) at 735-735 and 782-783.

[666] Lehman Brothers Press Release, *Barclays to Acquire Lehman Brothers' Businesses and Assets* (Sept. 16, 2008), http://www.lehman.com/press/pdf_2008/0916_barclays_acquisition.pdf. This was the second attempt by Barclays at gaining a major global investment banking presence. At the time of the Big Bank, Barclays Bank was one of the UK's four large clearing banks. It attempted to expand into investment banking when it acquired De Zoete Bevan, a stock brokerage, and Wedd Durlacher Mordaunt & Co., a stock jobber, and merged them with Barclays Merchant Bank and Barclays Investment Management to create BZW in 1986. Kynaston, *supra* note 665, at 644-645. Barclays, About us, Who we are and what we do, Our History webpage, http://group.barclays.com/About-us/Who-we-are-and-what-we-do/Our-history This venture proved unsuccessful and in 1997 Barclays sold the equities and corporate finance portions of BZW to Credit Suisse First Boston, keeping only the debt business to form the basis for what became Barclays Capital. This venture proved unsuccessful and in 1997 Barclays sold the equities and corporate finance portions of BZW to Credit Suisse First Boston, keeping only the debt business to form the basis for what became Barclays Capital.

[667] Press Release, Mergermarket, Global M&A Round-Up for Q1-Q3 2009, at 6 (Oct. l, 2009).

Thus, the United Kingdom's experiments with consolidated financial regulators demonstrate that consolidated regulation by itself is not a panacea. It must be done thoughtfully and must take into consider whether units within the regulatory agencies or agencies might be made susceptible to regulatory capture by the new organizational structure. In addition, the United Kingdom's experience illustrates that regulatory structures must address the pressures that they may face from other international actors, not just domestic ones. Financial services is an international business. Financial services firms will use the ease with which they can relocate operations to play national regulators against each other in order to achieve a regulatory environment that will allow them to maximize their profits while minimizing or avoiding the downsides of the risks that their operations are creating.

EUROPEAN UNION

The European Central Bank

I. Background

In 1987, the EU adopted the Single European Act for the purpose of creating a single market within the union.[668] This single market would not be able to realize its full potential without the creation of a single currency.[669] The single currency's goal was to significantly increase the economic welfare of the EU by increasing price transparency, do away with exchange rate risks and reduce transaction costs.[670] With these goals in mind, in 1988 the members of the European Economic Community decided to attempt a monetary union.[671]

However, the monetary union did not bring about monetary unification.[672] The countries involved with the monetary union continued to use capital controls such as variable exchange rates to avoid changes in relative price among other member states.[673] In hindsight the proposal of a single currency was not a realistic goal of the monetary union, but instead a "good intention" that did not have the required framework to support it.[674]

In 1989, the *Delors Report* recommended that the monetary union be realized in three steps.[675] The focus of Stage One was on removing barriers to the future monetary amalgamation.[676] Stage Two would set up the organizational framework for the final monetary union.[677] Stage Three would lock the exchange rates irrevocably and assign every organization their responsibilities.[678]

The Treaty on the European Union, or Maastricht Treaty, was signed in 1992, which established the European Union (EU).[679] Stage One began in 1990 and Stage Two began in 1994.[680] Stage Three, which included the creation of the ECB, began in 1999.[681] The newly coined joint currency, the Euro, was introduced in 2002 with the concurrently irrevocable exchange rates.[682]

The Delors Report proposed a single central bank and system of central banks proposed for effectiveness concerns.[683] Mr. Delors was concerned that different, independent actions taken by separate central banks acting alone would prevent a singular monetary policy for the proposed monetary union from being quickly implemented.[684] The ECB was also to be independent from any national governments or EU

---

668 HANSPETER K. SCHELLER, THE EUROPEAN CENTRAL BANK: HISTORY, ROLE AND FUNCTIONS, 20 (2004).
669 *Id.*
670 *Id.*
671 *Id.*
672 Marcello de Cecco & Alberto Giovannini, *Does Europe Need its Own Central Bank?, in* A EUROPEAN CENTRAL BANK? PERSPECTIVES ON MONETARY UNIFICATION AFTER TEN YEARS OF THE EMS, 1, 2 (Marcello de Cecco & Alberto Giovannini eds., 1989).
673 *Id.*
674 *Id.* at 4.
675 *Id.* at 21.
676 *Id.*
677 *Id.*
678 *Id.*
679 *Id.*
680 *Id.*
681 *Id.* at 22.
682 *Id.* at 24.
683 JACQUES DELORS ET AL., REPORT ON ECONOMIC AND MONETARY UNION IN THE EUROPEAN COMMUNITY, (photo. reprint 1989) (1989).
684 *Id.*

agencies.[685] The ECB would work with each of the national central banks to form the European System of Central Banks (ESCB) which was thought to correspond best with the diversity present in the European community.[686]

II. Reasons for the Creation of the ECB

The primary goal of the ECB is price stability[687] which leads to the smooth operation of business practices in the Eurosystem.[688] The Eurosystem is comprised of EU members who have converted their national currency to the euro and the member nations are referred to as member states. The ECB defines price stability as inflation rates of below but close to two percent over the medium term throughout the Eurosystem.[689] While pursuing the goal of price stability, the ECB is also called to support general economic policies within the Eurosystem.[690] In support of these general policies, the ECB is the central bank for the Eurosystem and is the sole issuer of paper currency.[691]

The ECB is given many competences related to its job as the central bank for the entire Eurosystem. It is required to define and implement the monetary policy of the Eurosystem.[692] The ECB is also required to conduct foreign exchange operations.[693] It is called upon to hold and manage the reserves of all the Eurosystem states.[694] Finally, the ECB is necessary to ensure the smooth operation of payment systems within the Eurosystem.[695] The ECB is required to either carry out these tasks itself or to delegate them to the national central banks of the Eurosystem members.[696] The ECB is allowed to fulfill these functions without authorization from the EU or the Eurosystem member states if such action is necessary to carry out the goals.[697]

III. Process by which the ECB was Created

The European Monetary Institute (the Institute) was created on January 1, 1994, and was the beginning of Stage Two of the process leading towards the European Monetary Union (EMU).[698] On January 1, 1999, the ECB was created and took over for the Institute.[699] The Institute's sole goal was to manage the transition period between Stages Two and Three, culminating with the adoption of the euro in some EU members.[700] At this point, the exchange rates of all the new Eurosystem members were locked in irrevocably.[701]

---

[685] *Id.* at 22.
[686] *Id.*
[687] Radek Foukal, *The European Central Bank – History, Structure, and the Decision Making Process*, THE NEUMANN BUSINESS REVIEW 1, 7 (Spring 2010).
[688] *Id.* at 4.
[689] *Id.* at 11.
[690] SCHELLER, *supra* note 668, at 45.
[691] *Id.* at 48
[692] *Id.* at 50.
[693] *Id.*
[694] *Id.*
[695] *Id.*
[696] *Id.* at 51.
[697] *Id.* at 68.
[698] *Id.* at 22.
[699] *Id.* at 25.
[700] *Id.* at 21.
[701] *Id.* at 25.

The Treaty on the European Union contemplated the monetary union in Europe in 1992.[702] Article 127(1) sets out the primary goals of the ECB as price stability.[703] Article 127(2) lays out the competences of the ECB after its creation.[704] Article 129(2) gives the ECB full status as a legal entity and entitles it to all the commensurate rights of such an entity.[705]

The Institute, created in Stage Two of the monetary union, was created solely to aid the transition from independent national central banks to the ESCB.[706] The Institute, unlike the ECB to come, did not have any monetary policy decision-making powers.[707] Its goal was to coordinate monetary policy between the discrete national central banks and promote merger of national monetary policy.[708] Such cooperation was to increase price stability throughout the future Eurosystem.[709] The Institute was also to conduct research and provide recommendations about monetary policy to the EU, and facilitate the use of the European Currency Unit (the precursor to the euro) among EU states.[710]

In Stage Three, the Institute had different goals, including developing the infrastructure for the forthcoming ECB and ESCB, as well as developing a monetary policy strategy and policy instruments.[711] It supervised the technical arrangements regarding the euro.[712] Finally, it was required to promote cross-border payments among the future Eurosystem members and develop the framework the ECB would use to conduct foreign exchange operations.[713] Upon the completion of its tasks and the installation of the ECB, the Institute would be liquidated, with no mention of what would happen to its staff.[714]

IV. European Central Bank Operations

A. Governance of the ECB

The ECB is comprised of three different decision-making entities: the Governing Council, the Executive Board and the General Council.[715] The Governing Council consists of the members of the Executive Board, as well as the governors of the national central banks in the Eurosystem.[716] The goal of the Governing Council is to make monetary policy decisions for the Eurosystem related to liquidity and interest rates.[717] The Executive Board is made up of the President of the ECB as well as four individuals who a majority of the European council appoint,[718] based on professional accomplishments or banking experience.[719] The purpose of the Executive Board is to conduct the day to day business of the ECB, such

---

702 SCHELLER, *supra* note 668, at 16.
703 Consolidated Version of the Treaty on European Union, Art. 127, 2010 Official Journal of the European Union, C 83/01, at 102.
704 *Id.*
705 *Id.* at 103.
706 EUROPEAN MONETARY INSTITUTE, THE EUROPEAN MONETARY INSTITUTE, 9 (1997).
707 *Id.* at 13.
708 *Id.*
709 *Id.* at 15.
710 *Id.*
711 *Id.*
712 *Id.*
713 *Id.*
714 Willem F. Duisenberg, *Foreword* to EUROPEAN MONETARY INSTITUTE, THE EUROPEAN MONETARY INSTITUTE, at 3 (1997).
715 Foukal, *supra* note 687, at 6.
716 *Id.*
717 *Id.*
718 EUROPEAN CENTRAL BANK, https://www.ecb.europa.eu/ecb/orga/decisions/eb/html/index.en.html.
719 Foukal, *supra* note 687, at 6.

as the implementation of monetary policy adopted by the Governing Council.[720] The Executive Board also prepares for meetings of the Governing Council.[721] The General Council is comprised of the President and Vice President of the ECB and the governors of all the national central banks in the EU, regardless of their enrollment in the Eurosystem.[722] The General Council complies statistical and reporting data for the ECB and sets the guidelines for employees of the ECB.[723]

B. Funding of ECB

The independence of the ECB is central to its operations. As a result, the ECB does not receive financial support from the EU. The ECB has its own budget and its capital comes from the national central banks in the euro area.

C. Responsibilities of ECB

The ECB requires a set of four criteria be fulfilled before a nation can join the Eurosystem.[724] First the member's inflation rate must not be more than "the average inflation rate of the three best performing member states by more than one and a half percent" for the preceding two years. [725] Second, the long-term interest rates were not to be greater than two percent more than the average of those same best-performing member states' interest rates.[726] Third, the prospective member's exchange rate must have stayed within the margins provided by the exchange rate mechanism for two years.[727] The exchange rate mechanism (and its successor exchange rate mechanism II) are used to keep currencies within ±2.25 percent of the rates set upon the creation of the ECB.[728] Finally, the prospective member's deficit to GDP ratio must not be higher than three percent while its government debt to GDP ratio must not exceed sixty percent.[729]

In the wake of the financial crisis of 2008, the European Union created the Single Supervisory Mechanism (SSM) to supervise banks operating within the European Union. The SSM only came into force on November 4, 2014. Nations that are members of the Eurozone are required to participate in the SSM. EU members states that are not part of the Eurozone, such as the United Kingdom, may voluntarily participate if they so choose.

The Single Supervisory Mechanism does not include the Single Resolution Board, which was created at the same time. The Single Resolution Board acts as the resolution authority for EU banks. It works with national authorities to "ensure an orderly resolution of failing banks with minimal costs for taxpayers and to the real economy."[730]

Under the Single Supervisory Mechanism, the European Central Bank works with national banking regulators to ensure the safety and soundness of banks operating within the European Union. The

---

[720] *Id.*
[721] *Id.*
[722] *Id.* at 7.
[723] *Id.*
[724] *Id.* at 6.
[725] *Id.*
[726] *Id.*
[727] *Id.*
[728] EUROPEAN CENTRAL BANK, http://ec.europa.eu/economy_finance/euro/emu/road/ems_en.htm.
[729] Foukal, *supra* note 687, at 6.
[730] Single Resolution Board, Mission, http://srb.europa.eu/.

European Central Bank "directly supervises 123 significant banks" that hold about 82 percent of the banking assets within the European Union.[731]

The ECB may determine a bank is "significant" and should be subject to its supervision if the bank meets one of the following criteria:

1. The "total value of the bank's assets exceeds €30 billion";
2. The bank is economically significant either for a single EU nation or for the EU as a whole;
3. The "total value of its assets exceeds €5 billion and the ratio of its cross-border assets/liabilities in more than one other participating Member State to its total assets/liabilities is above 20 percent";
4. The bank has requested or is receiving "funding from the European Stability Mechanism or the European Financial Stability Facility"; or
5. The bank is "one of the three most significant banks established in a particular country."[732]

In order for a bank to cease to be classified as "significant," it must fail to meet those criteria for three consecutive years.[733]

V. Advantages and Disadvantages of ECB

One prominent benefit of being subject to the regulation of the ECB is the price transparency among fellow members of the EMU.[734] This transparency was supposed to make it easy for individuals or businesses to compare prices and find the most competitive suppliers in the ES.[735] Like transparency, another benefit was the smaller transaction cost across borders.[736] By joining the EMU, there was also to be no more exchange rate uncertainty between member states.[737] This would make it easier for individuals to recognize relative changes in price because there would no longer be the variability of the exchange rate in the way.[738] Finally, there was to be greater price and exchange rate stability because of credibility of the ECB as an international organization.[739] If investors can be sure that the price will remain static into the future, they will not need to demand any premiums in order to hold risks for the long term.[740] Also, maintaining price stability would make it less likely that resources would be diverted to protect against inflation.[741] Instead, they could be used for socially beneficial investments.[742] Together, these were supposed to encourage greater economic unification of the EU into a single market.[743] The emergence of a single European market where investing across borders becomes easier creates jobs.[744]

731 European Central Bank, Banking Supervision, About, Single Supervisory Mechanism, https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html.
732 European Central Bank, Banking Supervision, Supervisory Practices, List of Supervised Banks, Criteria for Determining Significance, https://www.bankingsupervision.europa.eu/banking/list/criteria/html/index.en.html.
733 *Id*.
734 Fraser Hosford, *The EMU Illusion*, http://www.tcd.ie/Economics/SER/archive/1996/HOSFORD.HTM.
735 Foukal, *supra* note 687, at 5.
736 Hosford, *supra* note 734.
737 *Id.*
738 SCHELLER, *supra* note 668, at 46.
739 Hosford, *supra* note 734.
740 SCHELLER, *supra* note 668, at 46.
741 *Id.*
742 *Id.*
743 Hosford, *supra* note 734.
744 Foukal, *supra* note 687, at 5.

In the Eurosystem, the euro has led to a substantial rise in trade between member states.[745] Empirical evidence suggests that the creation of the euro led to an increase in trade between Eurosystem partners of up to fifty percent.[746] These trade increases also have supply side benefits that increase welfare and the productivity of capital and labor.[747] A major benefit to Eurosystem members has been the credibility offered by the ECB.[748] Other benefits include the increase in bargaining power of the Eurosystem member states due to the increased stability of the euro.[749]

A final benefit of the ECB is the policies adopted by the ECB should force member states to curb deficits.[750] With the interest rates being brought down, debt servicing costs being reduced, and removing seignorage (making money as the central bank collects old currency and circulates new currency) at the national level, member states would not have the same options that they allowed them to live above their means before the EMU.[751]

However, one prominent cost to the establishment of the ECB was the threat of asymmetric shocks.[752] Asymmetric shocks occur when one member of the EMU experiences an economic shock that was not present in other members.[753] This asymmetric shock could lead to monetary policy that would not be beneficial for one region in order to help the member that was experiencing an economic downturn.[754] Another cost of following the ECB into the EMU was the threat of losing the member states' culture because of a loss of a stand-alone financial policy.[755]

There initially was some concern that the signing of the Maastricht Treaty and the subsequent movement towards the EMU altered the European business cycle.[756] However, there is evidence that the changes to the business cycle of the EU was already changing before either the Maastricht Treaty was signed or the ECB was created.[757] There was no clear structural break in the business cycle due to these events, and thus it was concluded that there was no correlation.[758]

According to one author, the feasibility of a monetary union rests on whether or not the member states comprise an optimal currency area.[759] An optimal currency area is when different countries are subject to the same economic shocks at the same time, and thus a single monetary policy will help each of them at the same time.[760] However, it is suggested that the entire Eurosystem is not an optimal currency area, but rather than a subset of the member states are.[761] If all the members of the EMU do not together constitute an optimal currency area, then any monetary policy adopted by the ECB will be beneficial to some

[745] George S. Tavlas, *Benefits and Costs of Entering the Eurozone,* 24 Cato Journal 89, 93 (2004).
[746] *Id.* at 100.
[747] *Id.*
[748] *Id.* at 94.
[749] *Id.* at 97.
[750] *Id.* at 101.
[751] *Id.*
[752] *Id.*
[753] *Id.*
[754] *Id.*
[755] *Id.*
[756] FABIO CANOVA ET AL, DID THE MAASTRICHT TREATY OR THE ECB CREATION ALTER THE EUROPEAN BUSINESS CYCLE?, 2 (2008).
[757] *Id.* at 35.
[758] *Id.* at 36.
[759] THOMAS I. PALLEY, EUROPEAN MONETARY UNION: AN OLD KEYNESIAN GUIDE TO THE ISSUES, 2, (2006).
[760] *Id.* at 8.
[761] *Id.*

members while being either neutral or detrimental to other member states.[762] In fact, as countries recover from the 2008 sovereign debt crisis, the distinction between "core" recovering countries and "peripheral" non-recovering countries becomes pronounced.[763] Given these differences, there is also the risk of regional bias in the implementation of monetary policy from the ECB.[764] There is also the threat that temporary economic shocks might become permanent due to the non-optimal currency area nature of the EMU.[765]

While the evidence would suggest that the adoption of a single currency would increase the productivity of capital and labor, and thus output, so far that has not occurred.[766] This would suggest that the level of output among the Eurosystem is related to the labor and production markets which are both relatively rigid.[767]

A further disadvantage of the organization of the ECB is the inability to provide new capital.[768] Central banks can solve liquidity problems, but that are unable to infuse new equity capital into the market.[769] Injection of new equity capital is the province of the fiscal authority, which in the Eurosystem are all at the national level.[770] This presents problems for the ECB because it is at the mercy of the national authorities which much all individually comply with banking aid laws.[771]

The real costs of joining the EMU under the ECB and the euro were calculated at between one-tenth of one percent of GDP for larger countries and one percent of GDP for small, open, less developed countries.[772]

Since the crisis in 2007-2008, the ESCB has received poor reviews from its member states. In 2014, the inflation rate in the Eurosystem was at0.4 percent over the medium term, far short of the required just below 2 percent.[773] Germany is opposed to "qualitative easing," a process of government buying of specified amounts of financial assets from commercial banks to raise the price of those assets while lowering their availability, in the Eurosystem.[774] Germany is concerned that a country might "inflat[e] their problems away," which the Maastricht Treaty prohibits.[775]

---

762 Fernanda Nechio, *Monetary Policy When One Size Does Not Fit All*, FRBSF Economic Letter, June 13, 2011, at 4.
763 *Id.*
764 AUDREY BUF ET AL., THE PROPENSITY TO FORM COALITIONS IN THE ECB GOVERNING COUNCIL, 19 (2013).
765 Jacques Mélitz, *The Evidence About the Costs and Benefits of the EMU,* 4 Swedish Econ. Policy Review 359, 393 (1997).
766 Tavlas, *supra* note 745, at 100.
767 *Id.*
768 ROSA M. LASTRA, LEGAL FOUNDATIONS OF INTERNATIONAL MONETARY STABILITY 309 (Oxford Univ. Press, 2006).
769 *Id.*
770 *Id.* at 310.
771 *Id.*
772 Robert P. Inman & Daniel L. Rubinfeld, *The EMU and Fiscal Policy in the New European Community: An Issue for Economic Federalism*, 14 Int'l Review of Law and Econ., 147, 149 (1994).
773 John Aziz, *Europe is in an Epic Depression – and it's Getting Worse*, THE WEEK (Aug. 15, 2014) http://theweek.com/article/index/266423/europe-is-in-an-epic-depression-mdash-and-its-getting-worse.
774 *Id.*
775 Matt O'Brien, *Europe's Greater Depression is Worse than the 1930s*, WONKBLOG (Aug. 14 2014) http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/14/europes-greater-depression-is-worse-than-the-1930s/.

The ECB's response to the financial crisis in 2007-2008 also revealed weaknesses inherent in its organizational structure.[776] The ECB is reliant on the member states to transfer capital between themselves, as it does not have the authority to mandate such transfers.[777] The ECB is unable to act when the member states' own national parliament adopt financial measures at odds with the other Eurosystem members, because it does not have the power to enforce fiscal policy on all the member states.[778] Its only power is in monetary policy as it relates to the interest rate.[779] In fact, the severity of the crisis was in part a result of the weakness of the monetary union in the Eurosystem where it was difficult for the ECB to respond with the quickness necessary.[780]

Since the crisis, the ECB has considered becoming a banking union. A banking union would have been able to break the cycle of sovereign and banking risks and lead to equality among banking institutions regardless of which member state they are located in.[781]

The ECB did pass new measures in an attempt to encourage growth in June, 2014.[782] However, waiting on those measures before expecting growth is not warranted.[783] The steps taken were not bold enough, and increasingly the risks to the Eurosystem's economy is trending toward deflation or further stagnation.[784]

VI. Relevance of the Creation of the ECB for the United States

Though there are lessons to be learned from the ECB, many elements are only fully understandable within the particular historical, political, economic and geographic context of the EU.[785] The ECB and the Federal Reserve Banks are not structurally similar. The Federal Reserve System (FRS) has twelve banks each serving a specific region, while the independent ECB and national banks of the Eurosystem members serving their own countries comprise the ESCB.[786] Further, the FRS has approximately 1,700 employees while the European System of Central Banks (ESCB) has only around 600 employees of its own, though that number is set to increase.[787] The FRS governors are appointed by the president for a term of fourteen years and staggered so that no president appoints more than two members should each member serve their full term.[788] These presidential choices are ratified by the Senate.[789] The ECB members are appointed by the European Council for seven-year terms and are not subject to ratification by any agency.[790] The European Council is an official institution of the EU that otherwise defines general policy guidelines for the EU as a whole.[791]

---

776 José Luis Malo de Molina, *The European Central Bank's Response to the Crisis*, , BANCO DE ESPAÑA, July-August 2013 at 37.
777 *Id.* at 38.
778 *Id.*
779 *Id.*
780 *Id.* at 42.
781 *Id.* at 45.
782 David Shipley et al., *Europe's Economy is Broken,* BLOOMBERG VIEW (Aug. 14, 2014) http://www.bloombergview.com/articles/2014-08-14/europe-s-economy-is-broken.
783 *Id.*
784 *Id.*
785 LASTRA, *supra* note 768 at 205.
786 EUROPEAN ECONOMIC AND MONETARY UNION, http://www.unc.edu/depts/europe/conferences/eu/Pages/emu7.htm.
787 *Id.*
788 *Id.*
789 *Id.*
790 *Id.*
791 EUROPEAN COUNCIL, http://www.european-council.europa.eu/the-institution?lang=en.

Functionally the agencies are also different, with the FRS rotating four votes among member banks while every member of the ECB has a vote on policy matters.[792] The FRS is also much more transparent than the ECB, which is not required to publish matters it considered before coming to a policy decision.[793]

The Eurosystem is large and generally a closed economy where not much business is conducted with outside countries, whereas the United States is not.[794] Therefore, what is economically profitable for the Eurosystem is not necessarily good for the United States. In the years 1999-2005 the Eurosystem GDP growth was low while the unemployment rate was steady at around eight and a half percent.[795] In that same span of time, the US had higher inflation, but its GDP also grew much faster, while its interest rates fluctuated between four and six percent.[796] The difference between official interest rates is too small to account for these differences on its own.[797]

Further, no single American State has the level of output or debt as the members of the Eurosystem.[798] Finally, although the US is a monetary union, it is not as troubled by asymmetric shocks as the Eurosystem might be.[799] This is because of a higher degree of labor mobility and the availability of specific fiscal policy to offset any asymmetric shocks, both of which are absent in the Eurosystem.[800]

In discussions on whether or not increase centralization of European banking regulations, several member states such as the UK and Germany have taken experimented with a single regulator or a quasi-single regulator structure within their own sovereign jurisdictions.[801] According to some, such action might have led to the adoption of a single regulator by the EU as a whole.[802] That has not happened yet, however. "[M]any academics and policy makers" doubt the need to consolidate regulation into a single entity in the EU.[803] Some of the concern about a single regulator is the resulting concentration of power and the potential for insufficient institutional transparency.[804] Other options of centralization of financial supervision considered in the Eurosystem were centralization among multiple supervisors, centralization of certain functions and centralization in a single financial sector.[805] The ECB in November of 2014 however will begin new banking supervision roles as part of the Single Supervisory Mechanism.[806] The goal of this new mechanism is two-fold: to ensure the safety and stability of the banking system and to increase financial cooperation within the EU.[807]

---

792 *Id.*
793 C. Sardoni & L. Randall Way, *Monetary Policy Strategies of the European Central Bank and the Federal Reserve Bank of the US* 1-22 (The Levy Econ. Inst., Working Paper No. 431, 2005).
794 *Id.* at 12.
795 *Id.* at 15.
796 *Id.*
797 *Id.*
798 *Id.* at 16.
799 Nechio, *supra* note 762, at 4.
800 *Id.*
801 LASTRA, *supra* note 768 at 324.
802 *Id.*
803 *Id.*
804 *Id.*
805 *Id.*
806 EUROPEAN CENTRAL BANK, https://www.ecb.europa.eu/ssm/html/index.en.html.
807 *Id.*

Immediately following the financial crisis in 2007-2008, the Federal Reserve continued to cut interest rates, even in the face of inflation.[808] In contrast, the ECB did not cut interest rates during the same period, but rather it provided low interest capital since banks would not loan to one another due to a lack of confidence.[809] In some ways the dual mandate of the Federal Reserve, price stability and full employment, kept the Federal Reserve from cutting interest rates enough to help, since such a move would have an injurious effect on employment.[810] The ECB's slower, steadier procedure for dealing with interest rates lessened negative impact on economic growth.[811] However, this was not the answer for long term recovery, as noted above.[812] The ECB was unable to go so far as the Federal Reserve System in reacting to the financial crisis because the ECB is not involved in monetary policy like the Federal Reserve.[813] The ECB was instead forced to rely on the Eurosystem member governments to spend more in order to stimulate the economy.[814]

---

808 Christian Reiermann, *Keep Calm and Don't Panic: What the Fed Could Learn from Europe's Central Bank*, SPEIGEL ONLINE INTERNATIONAL (Apr. 29, 2008), http://www.spiegel.de/international/business/keep-calm-and-don-t-panic-what-the-fed-could-learn-from-europe-s-central-bank-a-550522-2.html.
809 *Id.*
810 *Id.*
811 *Id.*
812 *See* de Molina, *supra* note 776.
813 Pan Pylas & David McHugh, *ECB Action Alone Can't Lift Gloom Over Europe*, ASSOCIATED PRESS (Sept. 5, 2014) http://hosted.ap.org/dynamic/stories/E/EU_EUROPE_ECONOMY?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT.
814 *Id.*

European Insurance and Occupational Pensions Authority

I. Background

The European Insurance and Occupational Pensions Authority (EIOPA) was part of a movement before and during the global financial crisis of 2007-2008 toward a more integrated European regulatory supervision.[815] The European Parliament called upon the European Commission to fundamentally reform the existing Committees which supervised banks, insurance and occupational pensions, and securities.[816] The EIOPA was one of three European Supervisory Authorities as well as the European Systemic Risk Board (ESRB) that Jacques de Larosière and other European bankers in his group advocated. The actual creation of these organizations in 2011, known collectively as the European System of Financial Supervision (ESFS), was in a large part a reaction to the financial crisis and the perceived weakness of the EU supervisory framework.[817]

In October 2008, the European Parliament asked the European Commission to reform the then existing supervisory structure.[818] The European Parliament formed a group of experts, chaired by Jacques de Larosiѐre, the former President of the European Bank of Reconstruction and Development, to prepare a report analyzing the causes of the financial crisis.[819] In February 2009, the group issued its report (the Larosière Report), which recommended the creation of a new EU regulatory structure for financial services with European supervisory authorities for banking, securities, and insurance. In 2010, the European Parliament adopted the new supervisory framework proposed in the Larosière Report after open debate.[820] On January 1, 2011, the new European Supervisory Authorities (ESAs) opened their doors and began to work.[821] The ESAs included the European Banking Authority, the European Insurance and Occupational Pensions Authority, and the European Securities and Markets Authority.

II. Reasons for the Creation of the EIOPA

Before the financial crisis in 2007-2008, the EU wanted more integration among supervisors in keeping with the increasingly integrated financial markets.[822] The creation of the European System of Financial Supervisors, of which EIOPA is a part, was intended to strengthen the supervisory framework of the Eurosystem to avoid further crises.[823]

---

815 European Insurance and Occupational Pensions Authority, About EIOPA, https://eiopa.europa.eu/about-eiopa [hereinafter, About EIOPA].

816 FABRICE DEMARIGNY, JONATHAN MCMAHON & NICHOLAS ROBERT, REVIEW OF THE NEW EUROPEAN SYSTEM OF FINANCIAL SUPERVISION (ESFS): PART 1: THE WORK OF THE EUROPEAN SUPERVISORY AUTHORITIES (EBA, EIOPA, ESMA), 19 (European Parliament, 2013).

817 ASS'N FOR FIN. MARKETS IN EUROPE, RESPONSE TO THE EU COMMISSION CONSULTATION ON THE REVIEW OF THE EUROPEAN SYSTEM OF FINANCIAL SUPERVISION [ESFS], 10, (2013).

818 DEMARIGNY ET AL., *supra* note 816, at 19.

819 HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU, REPORT (Feb. 25, 2009), http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf [hereinafter the Larosière Report].

820 DEMARIGNY ET AL., *supra* note 816, at 19.

821 *Id.*

822 About EIOPA, *supra* note 815.

823 DEMARIGNY ET AL., *supra* note 816, at 18-19.

III. Process by which the EIOPA was Created

The EU Regulation No. 1094/2010 created the EIOPA.[824] The EIOPA has a legal personality, and its offices are located in Frankfurt am Main, in Germany.[825] In accordance with this regulation, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) was renamed the EIOPA and given additional administrative powers.[826]

IV. European Insurance and Occupational Pensions Authority's Operations

A. Governance of the EIOPA

The EIOPA replaced CEIOPS, which was classified as a Level 3 Committee within the European Union. The Wise Men Group in 2001 proposed three levels of committees with different levels of regulatory authority.[827] Level 1 committees were authorized to establish framework principles, Level 2 committees were given implementation powers, and Level 3 committees were delegated certain supervisory powers.[828] The EIOPA was created to be a much more powerful incarnation of the CEIOPS, having all of the existing powers, and adding the mandate to coordinate the implementation of supervisory standards between the other European Supervisory Authorities and the ESRB.[829]

The EIOPA has a board of supervisors with a chairperson, a head of one competent national public authority, a representative of the European Commission, and a representative from each of the other two European Supervisory Authorities and from the ESRB.[830]

B. Funding of the EIOPA

EIOPA's budget is funded in part by the national supervisory authorities that deal with pensions and insurance in the EU member countries and in part by the European Union.[831] In 2014, about 40 percent of EIOPA's budget came from contributions from the EU while the remainder came from the national supervisory authorities.[832]

C. EIOPA's Responsibilities

The EIOPA is an independent advisory body to the European Parliament, Council of the European Union, and the European Commission.[833] The objective of the EIOPA is to "protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses, and more generally the ESFS, is to ensure the stability and

---

[824] Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 Nov. 2010, 2010 J.O. (L. 331) 48, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1094&from=EN [hereinafter EU Regulation No. 1094/2010].
[825] *Id*. Art. 5, 7.
[826] *Id*. Art. 8.
[827] ALEXANDRE LAMFALUSSY ET AL., FINAL REPORT OF THE COMMITTEE OF WISE MEN ON THE REGULATION OF EUROPEAN SECURITIES MARKETS, 22 (2001).
[828] *Id*.
[829] Larosière Report, *supra* note 819, at 48; EU Regulation No. 1094/2010, *supra* note 824, Art. 8.
[830] EU Regulation No. 1094/2010, *supra* note 824, ¶ 52.
[831] EIOPA, ANNUAL REP. 2013, 102 (2014), https://eiopa.europa.eu/Publications/Reports/Annual_Report_2013_01.pdf.
[832] *Id.*
[833] EU Regulation No. 1094/2010, *supra* note 824, ¶ 44.

effectiveness of the EU's financial system."[834] The EIOPA is responsible for contributing to the creation of regulatory standards and practices in the area of insurance and occupational pensions.[835] EIOPA is also responsible for monitoring and assessing market trends in the insurance and pensions markets in the European Union.[836] Finally, it is responsible for the protection of pension scheme and insurance policy holders.[837]

EIOPA's main area of focus currently is finalizing and implementing Solvency II.[838] Solvency II aims to establish a harmonized regime for solvency regulation organized around three pillars.[839] Pillar I defines quantitative financial requirements, including capital adequacy rules, for insurance firms. Pillar II defines the supervisory activities of each national authority. Pillar III defines the reporting and public disclosure requirements for insurance firms and supervisory authorities. The EIOPA has set January 1, 2016 as the deadline for the delivery of the regulatory and supervisory framework for the technical implementation and application of Solvency II.[840]

V. Advantages and Disadvantages of ECB

Given the small amount of time since the formation of the EIOPA and other organizations that comprise the ESFS, there has not been a chance for proper evaluations, but there are some preliminary observations.

The Larosière Report prepared in 2009 considered consolidation of all EU level supervisory agencies into a single regulatory agency.[841] The Larosière Report concluded that the complexity and costs for a single regulator would be too great, although it felt that such a single regulator might be possible with greater international integration among the member states.[842] Thus, the Larosière Report concluded that its proposed structure would be more cost effective than the alternatives.

The EIOPA contributes to financial stability within the European Union in several ways.[843] By preparing semi-annual surveys which showcase important market developments, through the EIOPA opinion on the period of low-interest rates submitted at the end of 2012, through regular meetings with the ECB, and by sharing information with the ESRB every quarter.[844]

---

834 *Id*. Art. 1.
835 *Id.* Art. 8.
836 *Id.*
837 *Id.*
838 Directive 2009/138/EC of the European Parliament and of the Council of 25 Nov. 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), 2009 J.O. (L. 335) 1, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0138&from=EN [hereinafter Solvency II Framework Directive].
839 Financial regulators in the EU began discussing further insurance solvency regulatory reforms beyond Solvency I in the early 2000s which eventually culminated in the adoption of the Solvency II Directive in 2009.
840 EIOPA, Solvency II, Introducing Solvency II, https://eiopa.europa.eu/regulation-supervision/insurance/solvency-ii.
841 Larosière Report, *supra* note 819, at 58.
842 *Id.*
843 DEMARIGNY ET AL., *supra* note 816, at 84.
844 *Id.*

The difference between day to day supervision and system management is large, with the two goals at odds with one another.[845] According to HM Treasury, the ESFS and the European Supervisory Authorities, including EIOPA, have done a good job focusing on system management rather than attempting to focus on the day to day supervision.[846]

The installation of three distinct supervisory agencies, however, does not seem efficient to some commentators.[847] The concern is that three different European Supervisory Authorities will duplicate work among themselves, causing further inefficiency.[848]

Budget constraints and limitations among the administrative process have so far kept the EIOPA from acquiring sufficient experienced staff to supervise consistently.[849] Although the budget of the EIOPA increased by over €8 million euros from 2011 to 2013, the EIOPA still believes that this amount is not necessary to adequately complete its mandates.[850]

Concerns have also been raised about the required delegation of authority from the national authorities to the EIOPA.[851] The terms of the delegation were uncertain. In addition, the national authorities expressed reluctance to delegate power to the EIOPA because of the perceived importance of "national accountability mechanisms."[852] This delegation might be helpful during the implementation of the Solvency II directive to address some lingering doubts about uneven implementation.[853] However, there could still be significant operational risks during the change-over process.[854]

HM Treasury noted that the European Supervisory Authorities, including EIOPA, need to analyze the marketplace more, in order to effectively promote healthy competition.[855] HM Treasury also points to the large number of technical standards that the European Supervisory Authorities are required to draft as a problem conflicting with their goals of regulation.[856]

There is a potential within the ESFS for large conflicts of interest between the rulemaking and decision-making bodies.[857] Such conflict was common in the earlier supervisory agencies.[858] Conflict arose from conflict of interests between board member's national and international focuses.[859] Because agency board

---

845 HM TREASURY, UK RESPONSE TO THE COMMISSION SERVICES CONSULTATION ON THE REVIEW OF THE EUROPEAN SYSTEM OF FINANCIAL SUPERVISION 3 (2013), http://ec.europa.eu/internal_market/consultations/2013/esfs/docs/contributions/public-authorities/hm-treasury-united-kingdom_en.pdf [hereinafter UK Response].
846 *Id.*
847 Wolf Klinz and Jürgen Klute, *Strasbourg Round-up: European System of Financial Supervision (ESFS) Review*, THE PARLIAMENT MAGAZINE (March 12, 2014), https://www.theparliamentmagazine.eu/articles/special-report/strasbourg-round-european-system-financial-supervision-esfs-review.
848 *Id.*
849 DEMARIGNY ET AL., *supra* note 816, at 78.
850 *Id.* at 80.
851 *Id.* at 82.
852 *Id.*
853 *Id.*
854 *Id.*
855 UK Response, *supra* note 845, at 6.
856 *Id.* at 7.
857 Madalina Busuioc, *Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope*, 19 EUROPEAN L.J. 111, 120 (2013).
858 *Id.*
859 *Id.* at 119-120.

members are often drawn from national boards, they retain their bias toward their own national interest at the cost of the international needs.[860]

According to the Bureau Européen des Unions de Consommateurs (BEUC), a consumer organization in Europe, the European Supervisory Authorities' warning system is not enough, and the European Supervisory Authorities need to work to protect consumers more through better communication.[861] The BEUC agrees with the European Parliament that there is not sufficient staff working with the European Supervisory Authorities, and it states that the European Supervisory Authorities are generally "short staffed" and are thus reliant on stakeholders to feed them information.[862] This puts the industry in a good position to steer the supervisors instead of the other way around.[863] Consumer advocates are also not strongly represented among these stakeholders – only four of thirty stakeholders in the EIOPA are consumer advocates.[864]

The Association for Financial Markets in Europe (AFME) believes that the European Supervisory Authorities are not independent enough from the European Commission and national authorities.[865] The AFME also believes that the European Supervisory Authorities need to strengthen their supervisory practices as best they can and conduct peer reviews with each other.[866] The AFME, like the European Parliament and the BEUC also believes that limited resources are a source of concern among the European Supervisory Authorities.[867] With more responsibilities being added, the AFME would also agree that the eight million euro increase in operating budget for the EIOPA is not substantial enough to fulfill their duties.[868]

VI. Relevance of the Creation of the EIOPA for the United States

The most immediate and direct impact that EIOPA has had on the United States is through Solvency II. Solvency II would require that non-EU insurance companies be regulated both at the entity and group levels by a supervisory authority equivalent to the national authorities within the EU in order for their capital held outside of the EU to count towards their capital requirements.[869] It is unclear at this time if US state regulation would be deemed equivalent under this standard, or to what extent the states would have to change their laws and regulations to be deemed equivalent. In the long run, Solvency II may pressure US regulators to adopt the same or similar standards for regulating insurance so that US insurance companies with international operations are not handicapped when they try to compete in the EU. It remains to be seen how this interplay between the US and the EU over regulatory equivalency will ultimately influence US regulatory standards.

For now, the EU has unilaterally resolved the matter by allowing the European Commission and EIOPA jointly to classify a non-EU country, like the US, as having solvency standards that are "provisionally equivalent" to those required under Solvency II as long as they meet certain standards.[870] The Omnibus II

---

[860] *Id.*
[861] Bureau Européen des Unions de Consommateurs, Review of the European System of Financial Supervision: BEUC Response to the European Commission consultation, 5 (2013).
[862] *Id.*
[863] *Id.*
[864] *Id.* at 6.
[865] DEMARIGNY ET AL., *supra* note 816, at 4.
[866] *Id.* at 6.
[867] *Id.* at 14.
[868] *Id.*
[869] Solvency II Framework Directive, *supra* note 838, Art. 172.
[870] Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in

Directive that contains the requirements for provisional equivalence entered into force on April 16, 2014. The requirements for being deemed provisionally equivalent include, among other things: (1) a finding that the non-EU nation has a solvency regime in place that meets the requirements for Solvency II or that such a regime may be adopted by the non-EU nation in the future; (2) the non-EU nation has a risk based regime that employs both quantitative and qualitative solvency requirements; (3) the non-EU nation has legislation in place that would allow it to exchange confidential supervisory information with EIOPA and other authorities; and (4) the non-EU nation has an independent system of supervision.[871] The non-EU nation does not need to apply to the European Commission and EIOPA in order to be deemed by them as provisionally equivalent.[872] Provisional equivalence may be granted for an initial ten-year period and may be renewed for an unlimited number of additional ten-year periods when that initial period expires.[873] Under the Omnibus II Directive, the European Commission and EIOPA could classify the US state insurance regulatory regimes as provisionally equivalent without the states having to apply or make any commitments to change their solvency standards.

The EU felt pressured to enact this compromise after lobbying from many large EU insurers with US operations. Prudential, one of the UK's largest insurance companies, evened warned that it was considering relocating its operations out of London because of the Solvency II equivalence requirements and the questions raised about whether the US would meet them.

Perhaps another area where the creation of EIOPA is most relevant to the United States is in the consideration of a single regulator for all of the international supervisory agencies into a single agency. The Larosière Report found that such a step might be useful in the future of the EU after more political integration.[874] The United States is extremely politically integrated already, and thus the extra costs contemplated in the Larosière Report (political identity in the face of a super-national regulator and dealing with problems across the borders of sovereign states) are issues that are already at play in American federalism. In fact, pension regulation in the United States already involves the preemption of state laws by federal laws, such as the Employee Retirement Income Security Act.[875]

In the wake of the financial crisis in 2007-2008, it was obvious that better communication among financial supervisors would be necessary.[876] To that end, the United States and the European Union organized a formal dialogue designed to foster cooperation between their respective insurance supervisors.[877] This trans-Atlantic dialogue led to a detailed project plan for cooperation (the US-EU Dialogue Report) in 2012.[878] The US-EU Dialogue Report focused on seven ways that the EU and US would work together: professional confidentiality standards and information sharing; shared group supervision standards; solvency and capital requirements; insurance and collateral requirements; supervisory reporting, data collection and analysis standards; peer reviews; and independent

---

respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), 2014 J.O. (L153) 1, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0051&from=EN.

[871] *Id*. Art. 227.

[872] *Id*.

[873] *Id*.

[874] Larosière Report, *supra* note 819, at 58.

[875] J. MARK IWRY, REGULATION AND SUPERVISION OF PRIVATE PENSIONS IN THE UNITED STATES, 2 (2002).

[876] *EU-US Dialogue Project*, NAT'L ASS'N OF INS. COMM'RS & THE CENTER FOR INS. POLICY AND RESEARCH, http://www.naic.org/cipr_topics/topic_euus_project.htm.

[877] Hogan Lovells & Sara Bradstock, *EU and US Dialogue Project*, ASS'N OF CORPORATE COUNCIL, http://www.lexology.com/library/detail.aspx?g=2c0f6265-5bd7-473a-9ffc-aecf5367b9fd.

[878] EU-US DIALOGUE PROJECT: THE WAY FORWARD: OBJECTIVES AND INITIATIVES FOR THE FUTURE, 1 (2012) [hereinafter THE WAY FORWARD].

examinations.[879] This report was updated in 2014 to reflect changes in both the EU and the US, and to reflect how the dialogue was developing.[880]

The first focus of the US-EU Dialogue Report was to promote the flow of information between the US and EU supervisors.[881] The 2012 report indicated that the two governments should discuss the possibility of a "Multilateral Memorandum of Understanding" in order to build confidence and formalize the information sharing network.[882]

Another area of focus was solvency and capital requirements for insurers.[883] The report suggested that uniform requirements would lead to a more accurate and consistent measure of risk profiles, both over time and across jurisdictions.[884] The governments were to look at how solvency and capital requirements interact with other supervisory tools as well, such as general financial analysis.[885]

The report also called on the supervisory authorities to share their best practices for analysis and consideration.[886] The report believed that this consideration would lead to the evolution of greater reporting consistency.[887] In particular, the report envisioned the US authorities learning from the EU authorities' experiences in group reporting and analysis.[888] The exchange of information and experiences would allow authorities to identify common and inter-linked risks present in the markets more effectively.[889]

The report recommended that peer reviews among the supervisory agencies be conducted.[890] The goal of peer reviews is to ensure an independent view of the supervisory authority.[891] Such an independent view leads to more consistent application of the regulation to the insurers.[892] Specifically, the US authorities were called on to consider whether or not to move to a college of supervisors approach, like that adopted by the European Union.[893]

The final area covered in the report was third party examinations of the supervisory authorities.[894] The third party reviews would ensure consistency of application of the regulation by the supervisory authorities.[895]

---

879 *Id.*
880 *Id.*
881 THE WAY FORWARD, *supra* note 878.
882 *Id.*
883 THE WAY FORWARD, *supra* note 878, at 3.
884 *Id.*
885 *Id.*
886 *Id.*
887 *Id.*
888 *Id.*
889 *Id.*
890 THE WAY FORWARD, *supra* note 878, at 4.
891 *Id.*
892 *Id.*
893 *Id.*
894 THE WAY FORWARD, *supra* note 878, at 5.
895 *Id.*

European Securities and Markets Authority

I. Background

The European Securities and Markets Authority (ESMA) is an independent entity that "is charged with enhancing the protection of investors and promoting stable and well-functioning financial markets in the European Union."[896] ESMA reports to the European Parliament, the European Council, and the European Commission.[897] It began operating in January of 2011.[898]

II. Reasons for the Creation of the ESMA

ESMA was created as a response to the 2008 financial crisis by then European Commission President José Manuel Durão Barroso.[899] In 2009, the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, the former President of the European Bank of Reconstruction and Development, issued a report (the Larosière Report) detailing the problems with the European system of financial regulation and supervision.[900] The report noted that, while financial institutions operate across borders using the single market, supervision had remained mostly at the national level.[901] The report concluded that a stronger financial sector in the European Union would require greater harmonization of financial regulations among member states and the establishment of mechanisms for ensuring agreement and co-ordination between supervisors of the same cross-border institution or in colleges of supervisors.[902] The report outlined the need for a system to coordinate decision-making rapidly and effectively in emergency situations.[903] The overall objective of this new structure is to safeguard the stability and effectiveness of the EU financial system.[904] The Larosière Report called for the creation of the ESMA to be one of the mechanisms for achieving these objectives.[905]

III. Process by which the ESMA was Created

The European Commission brought forth proposals in September 2009 to dismantle the Committee of European Securities Regulator (CESR), which previously had coordinated national regulations governing securities and derivative products within the European Union, and to replace it with the ESMA.[906] On September 22, 2010, the European Parliament, following an agreement from all of the member states in the European Council, voted through a new supervisory framework for financial regulation in the Europe Union.[907] The European Parliament and the European Council incorporated this concept into Regulation No. 1095/2010 to create the ESMA, which forms an integral part of the European System of Financial

---

[896] EUROPEAN SECURITIES AND MARKETS AUTHORITY, ANN. REP. 2013, 12 (2014), http://www.esma.europa.eu/system/files/esma_2013_annual_report.pdf [hereinafter ESMA ANNUAL REP. 2013]
[897] *Id*. at 15.
[898] *Id*. at 12.
[899] EUROPEAN SECURITIES AND MARKETS AUTHORITY, FREQUENTLY ASKED QUESTIONS: A GUIDE TO UNDERSTANDING ESMA 3 (2011), http://www.cmvm.pt/CMVM/Cooperacao%20Internacional/Grupos%20Internacionais/ESMA/Documents/ESMA-2011-009%20-%20FAQ%20on%20ESMA%20final.pdf [hereinafter, ESMA FAQ].
[900] Larosière Report, *supra* note 819.
[901] *Id*. at 27-29.
[902] *Id*. at 28-29, 48.
[903] *Id*. at 51-52.
[904] *Id*. at 13, 15, 48-57.
[905] *Id*. at 49.
[906] ESMA FAQ at 4.
[907] *Id*.

Supervision.[908] ESMA came into being on January 1, 2011 with seat in Paris, France.[909] It is the legal successor to the Committee of European Securities Regulators and has taken over all existing and ongoing tasks and responsibilities from the CESR.[910]

IV. European Securities and Markets Authority's Operations

A. Governance of the ESMA

The ESMA is a union body with a legal personality.[911] The ESMA has a Board of Supervisors, a Management Board, a Chairperson, an Executive Director, and a Board of Appeal.[912]

The Board of Supervisors is composed of the heads of the relevant competent authorities in each member state, who can vote, and the ESMA Chairperson, who cannot vote, a representative from the European Commission, who cannot vote, a representative from the ESRB, who cannot vote, a representative from the European Banking Authority, who cannot vote, and a representative from EIOPA, who cannot vote.[913] It serves as the principal decision making power for the ESMA.[914] While most decisions by the Board of Supervisors are taken by a simple majority vote, those involving the ESMA's rulemaking authority require a qualified majority vote.[915] As of November 1, 2014, a qualified majority vote is defined in Article 16 of the Treaty on European Union as "at least 55 percent of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 percent of the population of the [European] Union."[916]

The Management Board is composed of the ESMA Chairperson and six other members elected by the voting members of the ESMA Board of Supervisors.[917] Each elected member of the Management Board serves a two-and-a-half-year term.[918]

The Chairperson is appointed by the Board of Supervisors.[919] The Chairperson serves for a five-year term, which may be extended once.[920]

B. Funding of the ESMA

Initially, the ESMA received 40 percent of its funding from the European Union and 60 percent from contributions by the EU member states.[921] The EU member states' contributions are based upon the

---

[908] Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 Nov. 2010, 2010 J.O. (L. 331) 84, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1095&from=EN [hereinafter EU Regulation No. 1095/2010].
[909] *Id*. Preamble, ¶ 69.
[910] *Id.* Art. 76(4).
[911] *Id.* Art. 5.
[912] *Id.* Art. 6.
[913] *Id*. ¶ 52.
[914] *Id*.
[915] *Id.* Art. 44.
[916] Consolidated Version of the Treaty on European Union, 2012 J.O. (C 326) 13, Art. 16, http://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf.
[917] EU Regulation No. 1095/2010, *supra* note 908, Art. 45(1).
[918] *Id*.
[919] *Id.* Art. 48.
[920] *Id*.
[921] *Id*. ¶ 68.

weighing of votes.[922] By 2013, however, the ESMA had diversified its sources of funding. In, 2013, 31 percent of the ESMA's budget came from the European Union, 46 percent came from the EU member states, 20 percent came from fees and assessments on the credit rating agencies supervised by the ESMA, and 3 percent came from fees and assessments on the trade repositories supervised by the ESMA.[923] The total budget for the ESMA in 2013 was about €28.2 million (about US$34.1 million).[924]

C. ESMA's Responsibilities

As noted above, the ESMA's objectives are to protect investors and to promote financial stability in the securities markets.[925] To achieve these objectives, the ESMA has both regulatory and supervisory responsibilities. The Treaty on the Functioning of the European Union (TFEU) limits the authority to issue binding regulations and laws to the European Commission.[926] As a result, the ESMA is limited to setting technical standards, which are supervisory in nature, and non-binding guidelines and recommendations.[927] It also provides advice to the European Parliament, the European Council, and the European Commission.[928]

In addition, the ESMA exercises its supervisory functions primarily by coordinating work of the national regulatory authorities.[929] It does, however, directly supervise financial entities that operate throughout the European Union, including credit rating agencies and trade repositories.[930]

To promote financial stability, the ESMA conducts economic analyses of securities markets, looking for trends and potential risk that might threaten the system.[931] It reports its findings to the European Parliament, the European Commission, the EU Council, the European Systemic Risk Board, EIOPA, and the European Banking Authority.[932]

V. Advantages and Disadvantages of ESMA

The ESMA offers the potential for helping the EU financial markets run smoother and more cohesively than they previously did. It would do this both through its standard setting activities and through its guidance and recommendations.

Conversely, the ESMA might adversely affect regulation and supervision of securities within the European Union by eliminating regulatory diversity that might result in better rules.[933] In addition,

[922] *Id*.
[923] ESMA ANNUAL REP. 2013, *supra* note 896, at 68.
[924] ESMA ANNUAL REP. 2013, *supra* note 896, at 68; US-Euro Exchange Rates, *supra* note 352 (the exchange rate on Dec. 31, 2014 was €1.00 = US$ 1.2101).
[925] ESMA ANNUAL REP. 2013, *supra* note 896, at 12.
[926] Consolidated Version of the Treaty on the Functioning of the European Union, 2012 J.O. (C 326) 47, Art. 291, http://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf.
[927] EU Regulation No. 1095/2010, *supra* note 908, Art. 10-15.
[928] *Id*. ¶ 45.
[929] *Id*. Art. 21, 29.
[930] EU Regulation No. 1095/2010, *supra* note 908, Art. 29, 81; ESMA ANNUAL REP. 2013, *supra* note 896, at 12.
[931] ESMA ANNUAL REP. 2013, *supra* note 896, at 12.
[932] *Id*. at 13.
[933] Carmine Di Noia & Matteo Gargantini, *Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)*, 57 EUROPEAN SEC. ORG. L. REV. 1, 42 (2014).

increasing centralization of regulatory and supervisory decisions might lead to regulators ignoring or failing to recognize local circumstances that would have been addressed by local or national authorities.[934]

Given that the ESMA has only existed for a little over four years, assessing whether, on balance, it has proved beneficial may be premature. To the extent that such assessments have been done, the assessments have found the ESMA's record to be mixed. For example, in a 2015 report, the UK House of Lords concluded that the ESMA and the other European Supervisory Agencies had "been responsible for much good work" but that they were "hampered by several fundamental weaknesses, including a lack of authority, insufficient independence, marginal influence over the shape of primary legislation, insufficient flexibility in the correction of legislative errors, and inadequate funding and resources."[935]

Others have expressed similar views regarding the problems with the European Supervisory Authorities, including the ESMA. They have called for these agencies to have more independence and more discretion when imposing penalties. Carmine Di Noia, the Deputy Director General of the Luiss-Guido Carli University in Italy, and Matteo Gargantini, a Senior Research Fellow at the Max Planck Institute in Luxembourg, commented that the existing structure has resulted in a duplication of rulemaking authority between the ESMA and the European Commission.[936] They note that giving the ESMA greater authority to set technical standards would reduce this overlap. They, however, point out that the downsides of such greater authority include the possibility that the ESMA might "pursue self-interested policies, disregard innovation, or indulge in excessive regulation."[937]

On February 18, 2015, Jonathan Hill, the European Commissioner for Financial Stability, Financial Services and Capital Markets Union, issued a Green Paper that sought comments on how the European Union ought to revise its existing regulatory structure.[938] In the area of securities regulation, the Green Paper commented that, while the European Union had made significant progress to develop a "single rulebook," differences among member states in how those rules are interpreted, implemented, and enforced undermined the consistent application of the rules across the European Union.[939]

VI. Relevance of the Creation of the ESMA to the United States

The United States already has federal regulators for securities and commodities. To the extent that the SEC and the CFTC should be consolidated, the examples of consolidated regulators at the national level of other OECD nations would be better models than the ESMA.

To the extent that the ESMA harmonizes the regulations and practices of the EU national securities regulators, it will give the EU nations greater influence over the development of international standards for securities regulations because they will share the same regulatory preferences when negotiating at international forums, like the International Organization of Securities Commissions (IOSCO) or the Financial Stability Board.

---

934 *Id.*
935 UK HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, THE POST-CRISIS EU FINANCIAL REGULATORY FRAMEWORK: DO THE PIECES FIT?, 2014-15, HL Paper 103, at 5.
936 Di Noia & Gargantini, supra note 933, at 36-37.
937 *Id*. at 37.
938 European Commission, Green Paper: Building a Capital Markets Union, COM(2015) 63 (Feb. 18, 2015), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:63:FIN&from=EN.
939 *Id*. at 21-24.

Conclusion

No nation has devised a perfect regulatory structure for addressing the risks posed by financial services. Nevertheless, the twin peaks model adopted by Australia, the United Kingdom, France, and, with certain modifications, Canada has several advantages over the institutionally oriented and fragmented structure that the United States currently employs.

First, it allows financial regulators to survey the entire financial services industry to create regulations that address specific risks or achieve certain objectives. This broad scope allows the regulators to create a level playing field in which similar institutions or services must comply with similar regulatory standards rather than allowing some institutions to gain a competitive advantage by capturing a regulator with a narrow institutional focus and persuading it to allow weaker regulations or a more laissez faire regulatory environment in one area of the financial services market.

Second, it eliminates regulatory gaps because the regulators are responsible for the entire financial services sector. Regulatory gaps, particularly in the area of securitization, contributed to the 2008 financial crisis. On the other hand, just because a regulator has authority to act does not mean that it will act. In some cases, the pre-crisis regulators had the authority to regulate a product or firm and chose not to do so. A twin peaks model will not prevent regulatory in-action. It would, however, make it easier for legislators to hold regulatory agencies accountable when the agencies failed to act when they should have.

Third, it allows the prudential regulator to better assess the prudential risks posed by financial conglomerates on a consolidated basis than the existing fragmentary structure within the United States can. US regulators of financial conglomerates lack the expertise in-house to understand and assess the risks posed by the multitude of subsidiaries within a conglomerate. In addition, US regulators often must rely on the information gathered by functional regulators for other purposes in order to assess the risks posed by the financial conglomerate. Only if this information proves inadequate may the US regulators directly seek the information that they need from the financial conglomerate's subsidiaries.

The prudential regulators in Australia, France, the United Kingdom, and Canada do not face such hurtles as they have on-staff experts from every financial services area. Furthermore, they have the authority to obtain the necessary information directly from the financial conglomerate or its subsidiaries.

Fourth, having a separate agency responsible for consumer protection also minimizes the likelihood that consumer protection regulations will be sacrificed to advance prudential considerations. Too often in the United States, agencies responsible for both prudential supervision and consumer protection would elect not to implement strong consumer protection provisions because of concerns that such regulations might weaken the solvency of the entities under their supervision. The supervised entities played on these concerns in attempt to foster a weaker regulatory environment in which they could maximize their profits.

These problems laid the groundwork for the creation of the Consumer Financial Protection Bureau within the United States. The CFPB, in some ways, acts like the market conduct regulators in Australia, France, and the United Kingdom, although its areas of responsibility are not as broad as their areas. For example, the CFPB has no authority over insurance products while the market conduct regulators in Australia, France, and the United Kingdom do.

Fifth, the twin peaks model designates one agency as the primary systemic risk regulator and holds it accountable for identifying and addressing systemic risks. The systemic risk regulator must work with and coordinate its activities with those of the other regulators. This coordination is easier to achieve because of the smaller number of regulators involved. In the United States, the Financial Stability Oversight Council (FSOC) and the Federal Reserve share responsibility for managing systemic risks. The

FSOC with ten voting members and five non-voting members is unwieldy. Getting that many agencies to agree on a course of action may prove too time consuming and might result in the FSOC failing to take the appropriate actions until it is too late. The United Kingdom struggled to get just three regulators (the UK FSA, HM Treasury, and the Bank of England) to agree on the appropriate course of action in the run up to the 2008 financial crisis. It seems doubtful that the much larger FSOC would be more successful.

Thus, the case studies illustrates the advantages and disadvantages of adopting a more consolidated regulatory framework than the one that the United States employs. None of them are perfect. Each nation continues to make adjustments to way that they regulate financial services. Nevertheless, the case studies demonstrate that a nation's regulatory structure can have a profound impact in how it develops the rules to govern financial services and how successfully it implements and enforces them. Regulatory structures do make a difference. Thus, the United States would be well served to evaluate whether it is time to undertaken more substantial reforms to its regulatory structure than those enacted by the Dodd-Frank Act.