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Robert J. Laughlin

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CAUSES OF THE SAVINGS AND LOAN DEBACLE

INTRODUCTION

The thrift industry¹ was designed to help people in local communities afford their own homes.² To accomplish this goal, thrifts accepted savings from individuals and in turn made low-rate mortgage loans to local citizens.³

Thrift asset portfolios have been traditionally restricted in their composition to long-term, fixed-rate mortgages that were financed by short-term deposits.⁴ After the Great Depression, the industry prospered under this regulatory framework, functioning best when interest rates were stable.⁵ Thrifts profited from the spread between the rate they paid to depositors and the rate they charged on mortgage loans.⁶ Since the late 1960s, however, the thrift industry has steadily deteriorated. The inability of thrifts to diversify their portfolios left them vulnerable to the "maturity gap" risk inherent in funding long-term mortgage loans with short-term customer deposits. For many years, Congress, the executive branch⁷ and the industry itself⁸ minimized or ignored the industry's de-

1. The term "thrift" includes savings-and-loan associations, credit unions and savings banks. See M. Stich, *How to Profit from the Savings and Loan Crisis* 230 (1989). All three accept funds primarily from individual depositors and then lend them to the public as home mortgages. See *id.* For the purposes of this Note, "thrift" will be used interchangeably with "savings and loan".

2. See H.R. Rep. No. 54(I), 101st Cong., 1st Sess., pt. 1, 291, 294, reprinted in 1989 U.S. Code Cong. & Admin. News at 90 [hereinafter House Report].

3. See Yang, Gleckman, Miller, Ivey & Carson, *The S&L Mess-and How to Fix it*, Bus. Wk., Oct. 31, 1988, at 131; cf. S. Pizzo, M. Fricker & P. Muolo, *Inside Job: The Looting of America's Savings and Loans* 25 (1989) [hereinafter *Inside Job*] ("starting a small community-based savings and loan bordered on performing community service—local people pooling their resources to assure there would be a safe place for their savings and a source for home loans").

Originally, thrifts were only authorized to extend mortgages on property located within a fifty-mile radius of the home office. See House Report, *supra* note 2, at 293, reprinted in 1989 U.S. Code Cong. & Admin. News at 89. By 1983, most geographical restrictions were lifted and most thrifts were permitted to lend nationwide. See *id.*

4. See Long, Schilling & Van Cleef, *Enhancing the Value of the Thrift Franchise: A Possible Solution for the Dilemma of the FSLIC?*, 37 Cath. U.L. Rev. 385, 393 (1988).

5. See *Budget Issues for Fiscal Year 1983: Hearings before the Comm. on the Budget of the House of Representatives*, 97th Cong., 2d Sess. 178 (1982) [hereinafter *Budget Hearings*] (statement of Andrew S. Carron, Research Associate, Brookings Institution).

6. See Clark, et. al., *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 Bus. Law. 1013, 1019 (May 1990) [hereinafter *Regulation of Savings Associations*]. In fact, it was so easy for thrifts to make a profit that some argue that the industry previously ran by a 3-6-3 rule: pay depositors three percent interest, charge borrowers six percent interest, and tee off on the golf course by three in the afternoon. See Rudolph, *Finally the Bill has Come Due*, Time, Feb. 20, 1989, at 73.

7. See Scott, *Never Again: The S&L Bailout Bill*, 45 Bus. Law. 1883, 1883 (June 1990).

8. See *Fix the Thrifts, or Pay and Pay*, N.Y. Times, Mar. 4, 1989, at A26, col. 1.

cline. As a result, by the late 1980s the industry was in a dire financial condition.

This Note examines the causes of the thrift industry's demise. Part I examines the industry from 1966 to 1980. Part II analyzes the restructuring of the thrift industry throughout the 1980s, including the effects of the Depository Institutions Deregulation and Monetary Control Act of 1980, the Garn-St Germain Depository Institutions Act of 1982 and the Competitive Equality Banking Act of 1987. This Note concludes that the thrift crisis was caused by inherent structural problems within the industry, congressional carelessness and regulatory lapses.

I. THE INDUSTRY BACKGROUND FROM 1966 TO 1980

A. Interest Rate Regulation

Because of rising interest rates throughout the mid-1960s, thrifts were faced with an earnings decline.⁹ Since thrifts' investments were restricted to fixed-rate, long-term mortgages, the industry's income level remained stable, but its expenses—the interest paid on deposits—fluctuated to reflect market rates.¹⁰ In 1966, in an effort to insulate the thrift industry from interest rate fluctuations,¹¹ Congress extended to thrifts the interest rate ceilings embodied in Regulation Q.¹² Regulation Q “specifically refers to the interest-rate regulations of the Federal Reserve”¹³ and had previously applied only to commercial banks.¹⁴

The interest rate ceiling imposed on thrifts under Regulation Q was set higher than the ceiling imposed on commercial banks.¹⁵ Depositors were

9. See White, *The S&L Debacle*, in Annual Survey of Financial Institutions and Regulation, *The S&L Crisis: Death and Transfiguration*, 59 Fordham L. Rev. S57, S61 (1991) [hereinafter White I]; L. White, *The Debacle of the S&Ls in the United States: Some Cautionary Lessons for the Regulation of Financial Institutions* 8-9 (1990) (unpublished) [hereinafter White II] (on file at Fordham Law Review).

10. See White II, *supra* note 9, at 17-20.

11. See *Regulation of Savings Associations*, *supra* note 6, at 1019.

12. See Act of Sept. 21, 1966, Pub. L. No. 89-597, 80 Stat. 823 (1966). Regulation Q limited the interest rate that thrifts could pay on deposits. See *id.*

13. R. Brumbaugh, *Thrifts Under Siege* 14 (1988).

14. See L. Ritter & W. Silber, *Principles of Money, Banking, and Financial Markets* 89 (5th ed. 1985). Commercial banks were originally subjected to Regulation Q in response to the banking system collapse of 1933. See *id.* Legislators reasoned that the high interest expense associated with excessive interest rate competition in attracting deposits during the 1920s negatively affected the banking industry. See *id.* To compensate for this higher expense, banks invested in high yielding, risky ventures that weakened the overall banking system. See *id.* Regulation Q was thus enacted to prevent similar competition in the future. See *Financial Market Deregulation*, Am. Banker, Mar. 13, 1984, at 8.

15. See A. Carron, *The Plight of the Thrift Institutions* 5 (1982). In 1970, the differential was 0.50%, but in 1973 it was cut to 0.25%. See G. Krefetz, *All About Saving* 21 (1987). Indeed, in 1981 commercial banks could pay 5.25%, while savings-and-loans were allowed to pay 5.50% interest on deposits. See Scharff, *The Savings Revolution*, Time, June 8, 1981, at 60.

Prior to 1966 the interest rate limit on commercial banks' deposits rose with the market rate of interest, and thus commercial banks were able to remain very competitive with thrifts. See A. Carron, *supra*, at 5. Indeed, thrifts were forced to offer rates in excess of

therefore encouraged to invest in thrifts rather than commercial banks in hopes of ensuring a steady flow of funds for mortgage lending.¹⁶ In fact, depositors had few investment alternatives other than the thrift industry¹⁷ as unregulated investment vehicles, such as money market accounts, were unavailable until the early 1970s.¹⁸

B. The Economic Environment

Inflation¹⁹ during the 1970s factored into the thrift industry's demise. In 1970, the consumer price index ("CPI"),²⁰ the primary measure of inflation, rose to 5.9%²¹ due to increased domestic spending,²² coupled with a near capacity economy.²³ The Nixon Administration instituted wage and price controls as a combatant measure,²⁴ but they were eventu-

those offered by commercial banks to compensate for the customer's inconvenience associated with thrift's inability to offer consumer services, such as checking accounts, that were available at commercial banks. *See id.*

16. *See* S. Rep. No. 368, 96th Cong., 1st Sess. 3, *reprinted in* 1980 U.S. Code Cong. & Admin. News 236, 238-39 [hereinafter Senate Report]; Benston, *Federal Regulation of Banking: Analysis and Policy Recommendations*, 13 Issues Bank Reg. (BAI) No. 4, at 23-24 (Winter 1983) (LEXIS, Nexis library, Banking file) (Regulation Q was extended to thrifts "as [a] means of keeping funds flowing into mortgages"). By extending Regulation Q to thrifts, Congress also intended to encourage home ownership by enabling thrifts to offer lower rates to home buyers. *See* Heinemann, *The Great Money Migration*, N.Y. Times, Aug. 21, 1983, § 3, at 4, col. 6.

17. In 1970, the federal government further limited the investment options available by raising the minimum investment denomination of United States Treasury Bills to \$10,000, an amount beyond the means of most depositors. *See* White I, *supra* note 9, at S63.

18. *See id.*, at S64. Money market funds achieved great success in attracting depositors in the late 1970s and early 1980s. *See infra* notes 68-70 and accompanying text.

19. Inflation is an "abnormal increase in available currency and credit beyond the proportion of available goods, resulting in a sharp and continuing rise in price levels." *The American Heritage Dictionary* 674 (1978).

Regulation Q's low interest rate ceilings exacerbated each inflationary period. *See* Senate Report, *supra* note 16, at 4, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 239-40. Because the return that savers earned in banks was negative after considering taxes and inflation, Regulation Q's low interest rate ceilings actually discouraged people from saving and encouraged spending. *See id.*; G. Krefetz, *supra* note 15, at 37.

20. As a measure of inflation, the CPI attempts to quantify the change in price for an indexed set of goods and services bought by the average consumer. *See* Blacks Law Dictionary 287 (5th ed. 1979).

21. *See* G. Wilson, *Inflation: Causes, Consequences and Cures* 33 (1982). In 1965, the CPI measured 1.7%. *See id.*

22. *See* Isaac, *Casting Blame Only Diverts Attention from S&L Cleanup*, Am. Banker, July 26, 1990, at 4. The Johnson Administration's fiscal policy most criticized as being inflationary was the decision to fund the Vietnam War without collecting sufficient taxes to pay for it. *See* N. Eichler, *The Thrift Debacle* 31 (1989); L. Lindberg & C. Maier, *The Politics of Inflation and Economic Stagnation: Theoretical Approaches and International Case Studies* 31-32 (1985); G. Wilson, *supra* note 21, at 33; *Cf.* M. Stich, *supra* note 1, at 11 (credit crunches occurred because government funded the Vietnam War without raising taxes). Inflation resulted when the Federal Reserve subsequently increased the money supply to compensate for the resulting deficit. *See* N. Eichler, *supra* at 31.

23. *See* F. Balderston, *Thrifts in Crisis: Structural Transformation of the Savings and Loan Industry* 4 (1985); L. Lindberg & C. Maier, *supra* note 22, at 31-32.

24. *See* N. Eichler, *supra* note 22, at 34.

ally removed. By 1974 the CPI reached twelve percent.²⁵ After falling to 5.8% in 1976, the CPI increased steadily each year until 1980.²⁶

In 1979, in an effort to combat inflation, the Federal Reserve restricted the money supply, sending interest rates, a reflection of the cost of funds, soaring.²⁷ Although there have been four periods of high and volatile interest rates since the mid-1960s,²⁸ none has had more impact on the thrift industry than the 1979 to 1980 period.

C. Disintermediation

Thrifts and other depository institutions, like investment banks and insurance companies, are "financial intermediaries," entities that receive financial assets (like deposits) and invest them in firms in need of funds (like borrowers). During periods of high market interest rates thrifts experienced "disintermediation," a phenomenon whereby market interest rates rise above government imposed rate ceilings,²⁹ causing depositors to withdraw funds and invest them in instruments that provide a higher return.³⁰ The outflow of deposits from thrifts severely limited the amount of funds available to make loans³¹ and to meet expenses.³² After witnessing three periods of disintermediation from the mid-1960s to mid-

25. See *id.*, at 34; L. Lindberg & C. Maier, *supra* note 22, at 33. The Organization of Petroleum Exporting Countries ("OPEC") induced an energy crisis in 1973 and 1974 that also contributed to the 1974 CPI surge. See F. Balderston, *supra* note 23, at 5; Willax, *Pundits Ignore the Real Villain in S&L Crisis: Inflation*, *Am. Banker*, Mar. 9, 1989, at 4.

26. See G. Wilson, *supra* note 21, at 33. The United States experienced successive years of double-digit inflation in 1979 and 1980 when the inflation rate reached 13.3% and 12.4%, respectively. See L. Ritter & W. Silber, *supra* note 14, at 168.

27. See Simpson, *Developments in the U.S. Financial System Since the Mid-1970s*, 74 *Fed. Reserve Bull.* 1, 4 (1988). The Federal Reserve concentrated on money supply aggregates and allowed interest rates to find their own levels. See F. Balderston, *supra* note 23, at 56. This change enabled the prime rate to reach 20% by 1981. See *S&L Crisis, Hearing of the House Banking, Finance and Urban Affairs Comm.*, Oct. 1, 1990, at 2 [hereinafter *S&L Crisis Hearing*] (testimony of Donald Regan, former Secretary of the Treasury) (LEXIS, Nexis library, Fednews file).

28. See House Comm. on Banking, Finance and Urban Affairs, *The Report of the Interagency Task Force on Thrift Institutions*, H.R. Doc. No. 14, 96th Cong., 2d Sess. 3-4 (1980) [hereinafter *Task Force Report*]. These periods were: 1966, 1969-70, 1973-74 and 1979-80. See *id.* The thrift industry also witnessed varying degrees of disintermediation during these periods. See *infra* note 33 and accompanying text.

29. For a discussion of Regulation Q's interest-rate ceilings, see *supra* notes 9-18 and accompanying text.

30. See Mahoney & White, *The Thrift Industry in Transition*, 71 *Fed. Reserve Bull.* 137, 141 (1985).

31. See *Budget Hearings, supra* note 5, at 203 (statement of Richard Pratt, former Chairman, Federal Home Loan Bank Board); Benston, *supra* note 16, at 216.

32. See *Consumer Financial Services Act of 1977: Hearings on H.R. 8981 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 78 (1977) [hereinafter *Hearings*] (statement of Fernand J. St Germain, Chairman, Subcommittee); *cf. Task Force Report, supra* note 28, at 4-7 ("advances have played a crucial role in satisfying short-term liquidity needs").

1970s,³³ in 1978, the Federal Home Loan Bank Board ("FHLBB"),³⁴ then the thrift regulatory body, authorized thrifts to offer money market savings certificates that were tied to current market interest rates.³⁵ This device required a six-month minimum deposit³⁶ and a ten thousand dollar minimum balance which many small savers could not afford.³⁷ It therefore had limited success³⁸ in stemming the outflow of funds from thrifts.³⁹

II. THE RESTRUCTURING OF THE THRIFT INDUSTRY

A. *Depository Institutions Deregulation and Monetary Control Act of 1980*

In an attempt to restructure the thrift industry, Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA").⁴⁰ Among other things, DIDMCA attempted a limited economic deregulation of the thrift industry. It authorized thrifts to place up to twenty percent of their assets in short-term,⁴¹ market-rate⁴² investments, thereby increasing both industry-wide liquidity and earn-

33. See *Hearings*, *supra* note 32, at 78 (statement of Fernand J. St Germain, Chairman, Subcommittee). During these early periods of disintermediation, thrifts had a choice of two unappealing options to meet their liquidity needs: either borrow expensively in the open market or sell assets. See *Task Force Report*, *supra* note 28, at 3-4. Selling thrift assets (long-term mortgages) in periods of rising interest rates generally resulted in losses, however. See *infra* notes 82-85 and accompanying text.

34. The FHLBB is the independent agency of the federal government's executive branch responsible for chartering federal savings-and-loans and regulating all associations insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"). See M. Stich, *supra* note 1, at 210.

35. See A. Carron, *supra* note 15, at 9; A. Gart, *Banks, Thrifts, and Insurance Companies* 14 (1985).

36. See A. Carron, *supra* note 15, at 9. In early 1980, the FHLBB also authorized thrifts to offer 30-month small-saver certificates on terms similar to the six-month certificate. See *id.*

37. See Seiders, *Changing Patterns of Housing Finance*, 67 Fed. Reserve Bull. 461, 463 (1981).

38. In 1979, 20% of the total balances in all thrift accounts were composed of money-market savings certificates, see R. Brumbaugh, *supra* note 13, at 40, and rose to 36% in 1980. See N. Eichler, *supra* note 22, at 45. Paying market interest rates on these balances, however, severely strained thrift industry earnings. See *infra* notes 73-75 and accompanying text.

39. See Seiders, *supra* note 37, at 463. In 1978, thrifts were allowed to offer their money market at an interest rate that was .25% higher than commercial banks, which were offering a comparable account. See Moran, *Thrift Institutions in Recent Years*, 68 Fed. Reserve Bull. 725, 729 (1982). In March 1979, however, "this differential was made effective only at lower levels of interest rates, and deposit growth at savings and loans . . . weakened considerably relative to that at commercial banks." *Id.*

40. See Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 [hereinafter DIDMCA] (codified at various sections of 12 U.S.C.).

41. These investments include such things as consumer loans, commercial paper and corporate debt securities. See *id.* § 401(c)(2), 94 Stat. at 153 (codified at various sections of 12 U.S.C.).

42. See A. Carron, *supra* note 15, at 66.

ings potential. Additionally, it authorized thrifts to offer Negotiable Order of Withdrawal checking accounts ("NOW"),⁴³ trust services⁴⁴ and credit cards.⁴⁵ Legislators reasoned that depositors would be more willing to accept lower deposit rates in exchange for "one stop" banking convenience.⁴⁶ These measures gave thrifts increased flexibility in generating revenue.⁴⁷

DIDMCA also increased the level of federal deposit insurance coverage from \$40,000 to \$100,000.⁴⁸ This increase in the level of deposit insurance effectively guaranteed the liabilities of insolvent thrifts.⁴⁹ It enabled thrift management to gamble with depositor's funds, confident that the government would bear any losses.⁵⁰ Increased deposit insurance muted depositor motivation to investigate the solvency of thrift institutions.⁵¹ Before deposit insurance, thrifts were self-regulated; if depositors felt that an institution had become too risky, they would withdraw their funds.⁵² The advent of federal deposit insurance, however, removed this self-limiting feature.⁵³ Commentators have argued that the increased risk to taxpayers associated with federal deposit insurance should have been mitigated by increased regulatory supervision.⁵⁴ Instead, however, the premium thrifts paid to the Federal Savings and Loan Insurance Corporation ("FSLIC")⁵⁵ for deposit insurance was set

43. See DIDMCA, *supra* note 40, § 303, 94 Stat. at 146 (codified as amended at 12 U.S.C. § 1832(a) (1988)).

44. See *id.* § 403, 94 Stat. at 156-58 (codified as amended at 12 U.S.C. § 1464 (1988)).

45. See *id.* § 402, 94 Stat. at 155-56 (codified as amended at 12 U.S.C. § 1464(b) (1988)).

46. See A. Carron, *supra* note 15, at 66.

47. See P. Rose, *The Changing Structure of American Banking* 308-09 (1987).

48. See DIDMCA, *supra* note 40, § 308(a)-(c), 94 Stat. at 147-48 (codified as amended at various sections of 12 U.S.C.). The \$60,000 increase in deposit insurance has caused a significant amount of controversy. See *History of a Blank Check*, Wall St. J., May 24, 1990, at A14, col. 1; White II, *supra* note 9, at 10; *Who is to Blame for the S & L Crisis?*, Fortune Mar. 13, 1989, at 152; cf. *S&L Crisis Hearing*, *supra* note 27, at 15 (statement of Donald Regan, former Secretary of the Treasury) (deposit insurance increase was made in the "dead of night"). The increase was made with little debate, no congressional hearings, see *Inside Job*, *supra* note 3, at 11, and over the objections of the Federal Deposit Insurance Corporation ("FDIC"). See Isaac, *supra* note 22 at 4.

49. See e.g. R. Kormendi, V. Bernard, S. Pirrong & E. Snyder, *Crisis Resolution in the Thrift Industry* 13-14 (1989) [hereinafter *Crisis Resolution*] (comparing deposit insurance to a put option, requiring the "government to pay out assistance if the asset base of a savings and loan falls below a certain level").

50. See N. Eichler, *supra* note 22, at 80.

51. See Sussman, *Economics of Thrift Crisis Suggest Need to Reinforce Market Discipline Over Managers*, 52 Banking Rep. (BNA) No. 1, at 30 (Jan. 2, 1989).

52. Cf. *id.* ("The decision to provide deposit insurance set a higher priority of giving small depositors confidence than on exposing thrifts to depositor scrutiny.")

53. See *Financial Market Deregulation*, *supra* note 14, at 12; cf. P. Rose, *supra* note 47, at 366 (deposit insurance "has reduced the effectiveness of the self-regulating powers of the market"). Holders of insured accounts had little or no reason to be concerned with the quality of the institution or to demand an increased return commensurate with an increased risk. See Scott, *supra* note 7, at 1886.

54. See *infra* notes 148-159 and accompanying text.

55. For a complete discussion of the origins of FSLIC insurance, see Note, *Too Many*

by statute and "was the same rate for all insured institutions, regardless of the riskiness of their assets, the size of their equity capital, or the capability of their management."⁵⁶ Furthermore, federal deposit insurance was available to state-chartered institutions,⁵⁷ even though such institutions were not adequately regulated by the federal government.⁵⁸

Finally, because Congress believed that Regulation Q failed to curb disintermediation,⁵⁹ DIDMCA established the Depository Institutions Deregulation Committee ("DIDC")⁶⁰ to phase out the artificial interest rate constraints of Regulation Q.⁶¹ Congress believed that Regulation Q impeded the thrift industry's ability to compete with uninsured investment vehicles for deposits,⁶² and therefore failed to provide a steady flow of funds for mortgage lending. Regulation Q also tended to discriminate against small depositors because they could not afford the minimum balance requirement of the thrift money market, nor did they have access to higher yielding uninsured money market mutual funds.⁶³ Small savers,

Consonants and not Enough Consonance: The Development of the S&L Regulatory Framework, in Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S263, S281-83 (1991).

56. Scott, *supra* note 7, at 1886; see also Crisis Resolution, *supra* note 49, at 13 ("a key fault with the insurance system is that FSLIC charged all savings and loans (regardless of their riskiness) a flat premium calculated as a percent of all deposits").

57. For a discussion of the availability of federal deposit insurance to state-chartered thrifts see Note, *supra* note 55, at S282.

58. See *Solving the FSLIC Crisis, Panel Meeting at the 1989 Washington Seminar*, May 15, 1989, at 8 [hereinafter *Panel Meeting*] (testimony of Sen. Donald Riegle, Chairman, Senate Banking Committee) (LEXIS, Nexis library, Fednews file); *National Press Foundation Forum on the Savings and Loan Crisis "Where Was Congress?"*, Apr. 24, 1989, at 6 [hereinafter *Forum*] (statement of Rep. Jim Leach) (LEXIS, Nexis library, Fednews file); See also *S&L Crisis Hearing*, *supra* note 27, at 50 (testimony of Richard Pratt, former Chairman, FHLBB) (federal insurer should have been able to control the risks it was insuring).

59. See Senate Report, *supra* note 16, at 3-4, reprinted in 1980 U.S. Code Cong. & Admin. News at 238-40.

60. See DIDMCA, *supra* note 40, § 203(a), 94 Stat. at 142 (codified at 12 U.S.C. § 3502 (1988)).

61. See *id.* § 204(a), 94 Stat. at 143 (codified at 12 U.S.C. § 3502 (1988)). DIDMCA mandated that the DIDC phase out and ultimately eliminate the interest rate ceilings, which "may be paid on deposits and accounts as rapidly as economic conditions warrant." *Id.* Such phase-out and elimination were to occur within six years of DIDMCA's enactment. See *id.* § 205(a), 94 Stat. at 143 (codified at 12 U.S.C. § 3504 (1988)).

Congress ignored previous calls for the removal of interest rate ceilings and the expansion of thrift asset powers. After the thrift industry's first bout with disintermediation in the late 1960s, Congress authorized a study of the industry by the FHLBB. See *S&Ls—Don't Blame Deregulation*, Wash. Post, Jan. 29, 1989, at D7 (LEXIS, Nexis library, Wpost file). The FHLBB recommended the removal of interest rate ceilings and expanded asset powers, but Congress failed to act. See *id.* In 1971, similar recommendations were made by the President's Commission on Financial Structure and Regulation (Hunt Commission), but again Congress ignored the recommendations. See A. Carron, *supra* note 15, at 8; see also A. Gart, *supra* note 35, at 12-13 (discussing recommendations of Hunt Commission and their incorporation into DIDMCA).

62. See DIDMCA, *supra* note 40, § 202(a), 94 Stat. at 142 (codified at 12 U.S.C. § 3501 (1988)).

63. See *Financial Market Deregulation*, *supra* note 14, at 8.

therefore, were prevented from obtaining a market rate.⁶⁴

B. *State of the Industry: 1980 to 1982*

1. Severe Disintermediation

Although DIDMCA authorized the newly formed DIDC⁶⁵ to phase out interest rate ceilings, Congress failed to provide the DIDC with specific guidance in this regard.⁶⁶ As a result, artificial interest rate ceilings remained in place and disintermediation remained prevalent during 1980 and 1981.⁶⁷ In 1981, total deposit outflows from thrifts exceeded deposit inflows by \$25.5 billion.⁶⁸ Regulation Q further failed to protect thrifts from increased competition from Wall Street investment houses,⁶⁹ which offered investment devices, such as money market funds,⁷⁰ that were not subject to artificial rate ceilings. Consequently, in both 1981 and 1982 Federal Home Loan Banks⁷¹ were required to make loans to thrifts to

64. *See id.*

65. *See supra* note 61 and accompanying text.

66. *See* A. Carron, *supra* note 15, at 56. Even the legislation itself was subject to varying interpretations: "Savings and loan associations viewed this new legislation as a six-year extension of Regulation Q and the housing differential. . . . On the other hand, commercial banks saw it as attaining their long sought goal to end the housing differential." *Id.* (quoting *Depository Institutions Deregulation Comm.: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. 63 (1980)) (statement of Edwin J. Brooks, Jr., president, U.S. League of Savings Associations) (alterations in original).

67. A. Carron, *The Rescue of the Thrift Industry* 2-3 (1983) [hereinafter *Rescue*].

68. *See Budget Hearings, supra* note 5, at 203 (statement of Richard Pratt, former Chairman, FHLBB). For seven consecutive quarters beginning in January 1981, savings-and-loans had total net outflows of \$45.7 billion. *See* N. Eichler, *supra* note 22, at 71.

In 1981, FSLIC-insured associations' total mortgage loans were \$52.1 billion, the lowest lending volume since 1974, and 27% less than that of 1980. *See Budget Hearings, supra* note 5, at 203 (statement of Richard Pratt, former Chairman, FHLBB). The association's share of total new mortgage loans dropped from approximately 50% during most of the 1970s to 26% in the first three quarters of 1981. *See id.* at 203-4.

69. *See* Benston, *supra* note 16, at 25; *see also* McCord, *The Depository Institutions Act of 1982*, 6 Issues Bank Reg. (BAI) No. 2, at 6 (Autumn 1982) (Wall Street attracted some of the thrift industry's most affluent customers). Balances in money market mutual funds increased from \$6.4 billion in 1978 to \$150.9 billion in 1981. *See Financial Market Deregulation, supra* note 14, at 8.

70. *See Hearings, supra* note 32, at 77-78 (statement of Fernand J. St Germain, Chairman, Subcommittee). Money market funds are liquid and offer high rates. *See* LaFalce, *Banking in the Eighties*, 37 Bus. Law. 839, 844 (1982). Although such funds are not federally insured, they have been perceived as safe due to their composition of short-term corporate and government securities. *See* G. Krefetz, *supra* note 15, at 57; Scharff, *supra* note 15, at 60.

71. Congress established the Federal Home Loan Bank System in 1932 to afford home financing institutions a central credit facility, as well as to serve as a secondary liquidity source to its members during heavy withdrawal periods. *See* Savings Institution Sourcebook 15 (1984). All FSLIC-insured savings institutions were required to join the Federal Home Loan Bank System. *See id.* Most thrifts were thus members of the system and eligible to receive loans; total outstanding loans to thrifts grew from \$6 billion in 1966 to over \$40 billion by January 1980. *See Task Force Report, supra* note 28, at 4. Such loans were tied to money market rates. *See* F. Balderston, *supra* note 23, at 55.

avert an industry-wide liquidity crisis.⁷²

2. Interest Rate Mismatch

As market interest rates rose throughout the late 1970s and early 1980s, the spread between rates paid to depositors and rates charged on long-term mortgage commitments narrowed.⁷³ By the second half of 1981, the industry's average cost of funds (deposits and borrowings) was 11.5%, while the average asset portfolio yield was only ten percent.⁷⁴ As a result, more than eighty percent of FSLIC-insured associations sustained a net loss in 1981.⁷⁵

To prevent such losses in the future, the DIDMCA preempted state usury laws that restricted interest rates chargeable on loans and mortgages.⁷⁶ In April 1981, the FHLBB adopted regulations allowing federal thrifts to issue Adjustable Rate Mortgages ("ARM").⁷⁷ Because ARM yields adjust to reflect market interest rates,⁷⁸ regulators hoped thrifts would be able to match revenues with expenses.⁷⁹ This move, however,

72. See N. Eichler, *supra* note 22, at 71; G. Krefetz, *supra* note 15, at 24.

73. See Long, Schilling & Van Cleef, *supra* note 4, at 402.

This narrowing was caused by the increased interest expense associated with the 1978 issuance of the thrift money market savings certificate. See R. Brumbaugh, *supra* note 13, at 40-43. Commentators argue that thrift industry deregulation was performed backwards. See *S&L Crisis Hearing*, *supra* note 27, at 44 (statement of Richard Pratt, former Chairman, FHLBB); Wayne, *Savings Institutions Reshaping Operation in Face of Big Losses*, N.Y. Times, May 25, 1981, at D4, col. 3. Thrifts were authorized to pay high market interest rates on deposits beginning in 1978, yet they were not authorized to invest such deposits at the market rate until 1980, when DIDMCA granted thrifts increased investment powers. See *supra* notes 40-47 and accompanying text.

The thrift industry found itself in an unfamiliar position compared to previous decades when passbook rates were set by the federal government and mortgage ceilings were set by state usury laws. The industry in the regulated environment of the mid-1970s maintained a spread between revenues and expenses averaging from 1.5% to 1.8%. See Wayne, *supra*, at D4, col. 2.

74. See *Budget Hearings*, *supra* note 5, at 201-02 (statement of Richard T. Pratt, former Chairman, FHLBB); M. Stich, *supra* note 1, at 13. In 1981 and 1982 alone, the savings-and-loan industry lost approximately \$9 billion dollars. See House Report, *supra* note 2, at 296, reprinted in 1989 U.S. Code Cong. & Admin. News at 92. Such losses resulted in an industry return on assets in 1981 and 1982 of negative 0.73% and negative 0.65%, respectively. See *id.* Moreover, in 1981, 1982 and 1983 there were 81, 252 and 102 thrift failures, respectively. See *id.*

75. See *Budget Hearings*, *supra* note 5, at 202 (statement of Richard T. Pratt, former Chairman FHLBB); see also M. Stich, *supra* note 1, at 13 (85% of FSLIC-insured institutions operated at a loss in final six months of 1981).

76. See DIDMCA, *supra* note 40, § 501(a)(1), 94 Stat. at 161 (codified at 12 U.S.C. 1735f-7 (1988)).

77. See e.g., *Budget Hearings*, *supra* note 5, at 205 (statement of Richard T. Pratt, former Chairman HLBB) (in 1981, the "Board adopted regulations which allow a truly flexible, interest-rate sensitive mortgage instrument"). Some states, including California, already allowed their own state-chartered thrifts to issue ARMs. See White I, *supra* note 9, at S63-64.

78. See Mahoney and White, *supra* note 30, at 146.

79. See *Budget Hearings*, *supra* note 5, at 205 (statement of Richard T. Pratt, former Chairman, FHLBB).

"was long overdue."⁸⁰ Because of disintermediation and heavy industry losses, thrifts lacked the funds to dedicate to ARMs. In addition, the maturity gap between short-term deposits and long-term loans exacerbated the problem. Furthermore, borrower reluctance to pre-pay low rate mortgages during periods of rising interest rates made it increasingly difficult for thrifts to turn such mortgages into higher yielding assets, such as ARMs.⁸¹

At this time, thrifts considered selling older fixed-rate mortgages in the secondary market to increase liquidity. Higher interest rates, however, generally diminished the market value of thrifts' low-yielding mortgages,⁸² making thrifts hesitant to engage in such sales.⁸³ Further, the loss incurred by selling these loans could have diminished thrifts' already weakened⁸⁴ capital ratios below minimum regulatory standards,⁸⁵ thereby increasing the likelihood of regulatory intervention.

3. Regulatory Lapse and a Policy of Forbearance

In the early 1980s, industry-wide net worth⁸⁶ plummeted due to the unfavorable interest rate spread.⁸⁷ Because the FSLIC lacked sufficient

80. See White II, *supra* note 9, at 10.

81. See A. Carron, *supra* note 15, at 33; Willax, *supra* note 25, at 4. Such inability resulted from the high interest rates of the late 1970s and early 1980s, which decreased the number of early mortgage prepayments. See Moran, *supra* note 39, at 728. "Periods of high interest rates slow portfolio turnover further, as people defer home construction and purchases until rates decline. The rate of return on the portfolio increases only slowly under such conditions." Savings Institutions Sourcebook, *supra* note 71, at 15. In 1977, for example, mortgage turnover was approximately 14%, but after the interest rate increase from 1979 to 1982, turnover fell to approximately seven percent. See Rescue, *supra* note 67, at 4.

82. See Farnsworth, *U.S. Aid for Thrift Units Poses Questions of Need*, N.Y. Times, July 2, 1981, at D6, col. 1. The decrease in asset value was due to the below market return they were receiving on their long-term mortgages. See *Regulations of Savings Associations*, *supra* note 6, at 1019; Farnsworth, *supra*, at D6, col. 1. Because thrift liabilities remained either unchanged or increased, such liabilities became increasingly difficult to meet with assets generating below market returns. See Benston, *supra* note 16, at 24.

Depository institutions are not required to mark to market their loan portfolios, but rather are permitted to value their loans at historical cost. See G. Kaufman & R. Kormendi, *Deregulating Financial Services* 132 (1986). Thus the book value of such loans was higher than the corresponding market values. Indeed, "take a fully-amortizing 25-year mortgage made at the end of 1975 at an interest rate of 9%, the average then prevailing. Putting shifts in prepayment possibilities or in the borrower's credit risk, that loan would, in the 15%-world of late-1980, be subject to a market discount of about 32%." See Scott, *supra* note 7, at 1887 n.21.

83. See R. Brumbaugh, *supra* note 13, at 43.

84. See *infra* notes 86-87 and accompanying text.

85. See A. Gart, *supra* note 35, at 86-87.

86. Net worth (or capital) is the dollar value of a thrift's total assets less total liabilities. See M. Stich, *supra* note 1, at 221.

87. See House Report, *supra* note 2, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94. A thrift's solvency was primarily determined by the ratio of its net worth to its total assets. See Moran, *supra* note 39, at 731. When the net-worth ratio fell below FHLBB established levels, see *infra* note 90, for a certain time period, regulatory agencies were supposed to intervene. This regulatory intervention could have included

funds to close insolvent thrifts and pay insured depositors, the FHLBB instituted a policy of forbearance hoping that interest rates would decrease and return thrifts to profitability.⁸⁸ This policy of forbearance enabled thrifts to “technically avoid insolvency”⁸⁹ while actually remaining insolvent.

Consistent with this policy, the FHLBB initiated a reduction in capital standards,⁹⁰ lowering the required amount of ownership capital at risk, while enabling thrifts to lend or invest at increasingly high levels.⁹¹ The depositors⁹² and the federal government⁹³ would have borne any losses beyond thrift owners’ initial capital investment. Decreased capital requirements “enabled institutions to undertake explosive asset and liability growth without increasing the institution’s capital base.”⁹⁴

anything from forced mergers with financially sound institutions to possible liquidation. See Moran, *supra* note 39, at 731.

88. See *Findings of Booz Allen & Hamilton Study of FHLBB: Hearing before the Subcomm. on Gen. Oversight and Investigations of the House of Representatives Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 1st Sess. 133 (1987). One commentator estimates that industry net worth in 1980 was negative \$17.5 billion, based on the market value of assets and liabilities. See N. Eichler, *supra* note 22, at 44. The FSLIC, however, only had reserves of \$6.5 billion. See *id.*

89. See House Report, *supra* note 2, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94.

90. See *supra* notes 86-87 and accompanying text. The minimum capital requirement was reduced from five percent to four percent in 1980 and then to three percent in 1982. See House Report, *supra* note 2, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94. Lower capital standards decreased the total investment that thrift owners were required to maintain as a buffer against losses. See G. Kaufman & R. Kormendi, *supra* note 82, at 134; White II, *supra* note 9. Capital serves other useful functions as well, such as “enhancing the safety of depositor funds, helping maintain public confidence in the financial system, and supporting the expansion of banks and thrifts.” See House Report, *supra* note 2, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94.

Minimum capital requirements, as well as investment and liability restrictions, are examples of safety and soundness regulations. See White II, *supra* note 9, at 3-4. These regulations were designed to protect depositors and the deposit-insurance fund from losses. See *id.* at 4. The liberal availability of deposit insurance increased the importance of safety and soundness regulation. See *id.* at 3. Conversely, economic regulations, such as interest-rate regulation and branch-location restrictions, were designed to shield thrifts from competition, as well as to ensure low-cost financing for home buyers. See *id.*

91. See White II, *supra* note 9, at 5-7; Nash, *Who to Thank for the Thrift Crisis*, N.Y. Times, June 12, 1988, § 3, at 14, col. 2. Because of the concept of limited personal liability, thrift owners’ losses were limited to their initial capital investment. See N. Eichler, *supra* note 22, at 76; White I, *supra* note 9, at S58.

92. “Uninsured depositors are not a significant number. There are [approximately] one or two percent of the deposits in an insolvent savings and loan that are above one hundred thousand dollars.” See White I, *supra* note 9, at S61.

93. See N. Eichler, *supra* note 22, at 76.

94. See Long, Shilling & Van Cleef, *supra* note 4, at 409. Many thrift owners believed that rapid growth was the easiest manner in which to generate new capital and regain profitability. See House Report, *supra* note 2, at 298-99, reprinted in 1989 U.S. Code Cong. & Admin. News at 94-95. A five percent capital level meant, for example, that thrift owners had to maintain a \$1 safety cushion for every \$20 of loans; but by lowering the standard to three percent, institutions could lend \$33 with the same \$1 cushion. See Nash, *supra* note 91, § 3, at 14, col. 2.

The FHLBB also made it easier for thrifts to meet these reduced capital standards through creative accounting techniques. The FHLBB granted thrifts the option of following either Generally Accepted Accounting Principles ("GAAP") or Regulatory Accounting Principles ("RAP") for the purposes of financial statement preparation.⁹⁵ Reporting under RAP often produced a more favorable thrift net worth than under GAAP without producing any real economic difference.⁹⁶ The application of RAP understated the number of thrifts considered insolvent for regulatory purposes.⁹⁷ RAP, for example, allowed thrifts to amortize losses on the sale of assets over the remaining life of the asset⁹⁸ instead of recognizing the entire loss in the period of the sale, as required under GAAP.⁹⁹ Moreover, thrifts exploited the weaknesses of both RAP and GAAP standards to present an illusion of financial strength that did not exist. GAAP generally required thrifts to value assets, liabilities and

95. See A. Gart, *supra* note 35, at 99. While the FHLBB was responsible for determining RAP, the Financial Accounting Standards Board primarily promulgates GAAP. See R. Brumbaugh, *supra* note 13, at 36-39. The differences between RAP and GAAP are so significant that commentators argue that such differences played a major role in the thrift crisis. See House Report *supra* note 2, at 297, reprinted in 1989 U.S. Code Cong. & Admin. News at 93; R. Brumbaugh, *supra* note 13, at 39; Breeden, *Thumbs on the Scale: The Role that Accounting Practices Played in the Savings and Loan Crisis*, in Annual Survey of Financial Institutions and Regulation, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. 557 (1991).

RAP was generally more liberal than GAAP with respect to income recognition. See A. Gart, *supra* note 35, at 99. Some argue that allowing more liberal accounting procedures further debilitated an accounting system ("GAAP") that already allowed thrifts to overstate their financial positions. See N. Eichler, *supra* note 22, at 71-72; see also White I, *supra* note 9, at S60 (advocating change to market-value accounting system).

96. See House Report, *supra* note 2, at 298, reprinted in U.S. Code Cong. & Admin. News at 94. RAP "masked the true magnitude of the thrift industry's woes and the level of insolvency of the FSLIC." *Id.* RAP accomplished this by boosting reported net worth through balance sheet adjustments above what it would have been otherwise. See Moran, *supra* note 39, at 731. Such adjustments, however, did little to decrease thrift losses or to permit them to absorb losses in any real way. See *id.* RAP therefore "represent[ed] 'solutions' in an accounting sense rather than in basic economic terms." *Id.*

97. See R. Brumbaugh, *supra* note 13, at 44; cf. Isaac, *supra* note 22, at 4 (insolvent thrifts were allowed to continue operation due to regulatory accounting techniques). By 1984, thrift industry net worth computed under RAP was nine billion dollars higher than that computed under GAAP. See House Report, *supra* note 2, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94; R. Brumbaugh, *supra* note 13, at 44. In other words, thrift industry capital, its buffer against loss, was overstated by nine billion dollars. See House Report, *supra* note 2, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94. The difference grew to \$13.3 billion by 1986 and \$14.9 billion by 1988. See *id.*

98. See G. Kaufman & R. Kormendi, *supra* note 82, at 132; Moran, *supra* note 39, at 733.

99. See R. Brumbaugh, *supra* note 13, at 43-44. The principle reason this provision was adopted was to encourage thrifts to restructure their asset portfolios by selling older fixed-rate mortgages and acquiring higher yielding assets, such as adjustable-rate mortgages. See *id.*; Long, Schilling & Van Cleef, *supra* note 4, at 428. Deferred losses grew from six million dollars in 1980, see Cope, *Did Pratt's Piloting Sink S&L Industry?*, Am. Banker, Oct. 1, 1990, at 14, to six billion dollars in 1984. See R. Brumbaugh, *supra* note 13, at 44.

off-balance sheet items at historical cost, not at current market value.¹⁰⁰ RAP, conversely, permitted thrifts to include in their net worth calculation appraised equity capital,¹⁰¹ which represented the unrealized appreciation of thrift assets.¹⁰² As a result, thrifts were permitted to include a favorable increase in asset value in their net worth calculation without recognizing the unfavorable unrealized depreciation of other assets, such as long-term mortgages.¹⁰³

In 1982, Congress enabled thrifts to further bolster their increasingly endangered net worth through the issuance of net worth certificates,¹⁰⁴ capital instruments that were added to thrift net worth as a means of "providing additional time for the regulatory agencies to arrange the further consolidation of the industry."¹⁰⁵ The FSLIC sold these certificates to financially troubled thrifts in exchange for promissory notes and a portion of the institution's future profits.¹⁰⁶ Although net worth certificates

100. See White I, *supra* note 9, at S60; cf. N. Eichler, *supra* note 22, at 71 (GAAP does not require adjustment to market value). GAAP thus allowed thrifts to mask their financial woes, particularly in the late 1970s when the market value of thrift long-term mortgages plunged. See *supra* notes 82-85 and accompanying text. Thrifts were not required under GAAP to recognize any losses or to include unrealized depreciation in their net worth calculation for regulatory purposes. See White II, *supra* note 9, at 7. By 1982, most thrifts had a negative net worth when assets were valued at market. See Scott, *supra* note 7, at 1887. One commentator estimates that by mid-1981, thrift assets at book value were overstated by \$86.5 billion. See A. Carron, *supra* note 15, at 83.

101. See House Report, *supra* note 2, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94.

102. Appraised equity capital is the difference between the market value of property like land and buildings and the book value. See Moran, *supra* note 39, at 732. Appraised equity capital did not appear on thrift balance sheets, nor was it reported in the net worth figure in thrift financial statements. See *id.* at 733. Instead, it was used by the regulatory agencies in reviewing thrift's overall financial health. See *id.*

103. See *supra* notes 82-85 and accompanying text. Appraised equity capital could only be included in a thrift's regulatory net worth calculation once; on December 31, 1985, the permission to use this accounting procedure expired. See Moran, *supra* note 39, at 733.

For a detailed discussion of other RAP techniques, see House Report, *supra* note 2, at 298, reprinted in 1989 U.S. Code Cong. & Admin. News at 94; R. Brumbaugh, *supra* note 13, at 41-47; Moran, *supra* note 39, at 731-34.

104. See *infra* note 106. The net worth program was designed to aid thrifts whose poor financial condition was due primarily to mortgage lending activities. See Long, Shilling & Van Cleef, *supra* note 4, at 403-04.

105. See Rescue, *supra* note 67, at 16.

106. See Long, Shilling & Van Cleef, *supra* note 4, at 404. This exchange increased thrift net worth without a cash infusion by the FSLIC, thereby "cushion[ing] the impact on the insurance funds." See Rescue, *supra* note 67, at 15. The three primary qualifications that a thrift had to meet to be eligible to receive capital certificates were losses in the previous two quarters, a net worth less than or equal to three percent and investments in residential mortgages aggregating at least 20% of its loans. See Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 202B, 96 Stat. 1469, 1490 (1982) [hereinafter Garn-St Germain] (codified at 12 U.S.C. § 1811 (1988)).

Congressional members linked the net worth certificate program to the grant of additional and more flexible investment powers to the thrift industry under Garn-St Germain. See Long, Shilling & Van Cleef, *supra* note 4, at 403 n. 125. "To offer a net worth guarantee program to the thrift institutions without simultaneously allowing them

increased the thrifts' net worth,¹⁰⁷ they had little positive effect on earnings.¹⁰⁸

C. *The Garn-St Germain Depository Institutions Act of 1982*

In passing the Garn-St Germain Depository Institutions Act of 1982 ("Garn-St Germain"),¹⁰⁹ Congress again attempted to restructure the thrift industry. Congress' intent was to ensure a high degree of future home mortgage lending through strengthened financial institutions and a revitalized housing industry.¹¹⁰ First, and most importantly, it enabled thrifts to further diversify their asset portfolios.¹¹¹ Second, Garn-St Germain created an account that was competitive and comparable to money market mutual funds.¹¹² Third, it conferred new powers to the FHLBB to deal with financially troubled thrifts.¹¹³ Fourth, Garn-St Germain created a program to aid financially troubled thrifts.¹¹⁴ Finally, it removed the interest rate differential between thrifts and commercial

broader lending power is to tie our guarantee power to a set of institutions which will not be able to earn their way out of their current problems." *Id.* at 403-04 n.125 (quoting 128 Cong. Rec. 27,349 (1982) (statement of Rep. Frank)).

107. Net worth certificates were considered capital even under GAAP. *See* Long, Shilling & Van Cleef, *supra* note 4, at 403 n.125.

108. *See* Rescue, *supra* note 67, at 24.

109. *See* Garn-St Germain, *supra* note 106 (codified at various sections of 12 U.S.C.).

110. *See id.* at preamble.

111. Garn-St Germain facilitated asset diversification in six ways. First, Garn-St Germain authorized thrifts to invest up to 40% of total assets in loans for nonresidential real property. *See* Garn-St Germain, *supra* note 106, § 322, 96 Stat. at 1499 (codified as amended at 12 U.S.C. § 1464(c)(1)(B) (1988)). Second, it allowed thrifts to invest in other thrifts' time deposits or savings accounts provided that the accounts were insured by the federal government. *See id.* § 323, 96 Stat. at 1499-500 (codified as amended at 12 U.S.C. § 1464(c)(1)(G) (1988)). Third, Garn-St Germain allowed thrifts to invest all their assets in local or state government obligations. *See id.* § 324, 96 Stat. at 1500 (codified as amended at 12 U.S.C. § 1464(c)(1)(H) (1988)). Fourth, it authorized thrifts to invest up to 10% of total assets in commercial, corporate, business or agricultural loans. *See id.* § 325, 96 Stat. at 1500 (codified as amended at 12 U.S.C. § 1464(c)(1)(R) (1988)). Fifth, Garn-St Germain allowed thrifts to invest up to 30% of total assets in consumer loans. *See id.* § 329, 96 Stat. at 1502 (codified as amended at 12 U.S.C. § 1464(c)(2)(B) (1988)). Finally, it authorized thrifts to invest up to 10% of total assets in tangible personal property. *See id.* § 330, 96 Stat. at 1502 (codified as amended at 12 U.S.C. § 1464(c) (1988)).

112. *See* Garn-St Germain, *supra* note 106, § 327, 96 Stat. at 1501 (codified as amended at 12 U.S.C. § 3503(c)(1)-(3) (1988)). The account was insured by the federal government, was liquid and paid a market rate. *See Banks Prepare for New Market-Rate Deposit Account*, Banking J., at 35, (Nov. 1982). Individuals were therefore able to obtain benefits comparable to those of institutional investors. *See infra* notes 125-127 and accompanying text. In December 1982 alone, this new account attracted \$43 billion in funds, *see* Rescue, *supra* note 67, at 18, and helped to stem the massive disintermediation that thrifts experienced in the 1980 to 1982 period. *See supra* notes 65-72 and accompanying text.

113. *See* Garn-St Germain, *supra* note 106, § 123, 96 Stat. at 1483-85 (codified as amended at 12 U.S.C. § 1730a (1988)).

114. *See id.* § 122, 96 Stat. at 1480-83 (codified as amended at 12 U.S.C. § 1729(f) (1988)).

banks.¹¹⁵

D. *State of the Industry: 1982 and Beyond*

1. State-Chartered Thrifts Granted Broad Investment Powers

Since the Garn-St Germain Act liberalized federal restrictions on thrifts, many state-chartered thrifts abandoned the state system and joined the federal system.¹¹⁶ In response, many states, California, Texas and Florida in particular, granted thrifts investment powers that were far more liberal than those authorized by Garn-St Germain.¹¹⁷ Many state-chartered thrifts were therefore able to abandon traditional home mortgage lending for riskier ventures, such as fast food restaurants, low-grade corporate notes and commercial paper.¹¹⁸ The resulting high failure rate among state-chartered institutions was commensurate with this increased risk.¹¹⁹ Because most state-chartered thrifts were federally insured, a significant portion of FSLIC expenditures in the late 1980s went to depositors of failed state institutions.¹²⁰

As a result of these expanded investment powers, management of both state and federally-chartered thrifts, experienced in evaluating credit risks associated with home mortgage loans, found itself evaluating credit risks associated with complex investments.¹²¹ As a result, the industry suffered increased losses due to credit failures outside the realm of traditional thrift investments.¹²² Texas thrifts, for example, were particularly hard hit when oil prices plunged in the mid-1980s, causing real estate prices to decline.¹²³ Therefore, thrifts that had either invested in or fi-

115. *See id.* § 326, 96 Stat. at 1500-01 (codified at various sections of 12 U.S.C.).

116. *See* F. Balderston, *supra* note 23, at 18.

117. *See* Sussman, *supra* note 51, at 29. By 1984, greater than one third of all states had granted their state-chartered thrifts broader investment powers than those granted to federally chartered thrifts. *See* House Report, *supra* note 2, at 297, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 93. For example, under DIDMCA federally-chartered thrifts could invest up to three percent of their assets in subsidiary service corporations. *See* DIDMCA, *supra* note 40, § 401(c)(4)(B), 94 Stat. at 154 (codified at 12 U.S.C. § 1464(c) (1988)). Some states, however, including California, allowed their state-chartered thrifts to invest up to 100% of their assets in subsidiary service corporations without placing any statutory investment restrictions on the service corporations. *See* Cal. Fin. Code § 7252 (West 1989). Therefore, in theory, California-chartered thrifts could invest up to 100% of their assets in directly owned real estate while federally-chartered thrifts could invest only three percent. *See* N. Eichler, *supra* note 22, at 75.

118. *See Regulation of Savings Associations, supra* note 6, at 1021; Hayes, *Thrift Units on Coast Surging*, N.Y. Times, Nov. 15, 1984, at D1, col. 3.

119. *See Panel Meeting, supra* note 58, at 8-9 (testimony of Rep. LaFalce).

120. "Seventy percent of all FSLIC expenditures during 1988 went to pay for problems created by high-risk, ill-supervised, state-chartered thrifts in California and Texas. Those same two states absorbed 54 percent of FSLIC expenditures in 1987." House Report, *supra* note 2, at 297, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 93.

121. *See* N. Eichler, *supra* note 22, at 122.

122. *See* House Report, *supra* note 2, at 299, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 95. A recession in the southwest severely compounded the thrift industry's poor financial condition. *See id.*

123. *See Regulation of Savings Associations, supra* note 6, at 1019. The tax law change

nanced real estate ventures were financially weakened by this market price decline.¹²⁴

2. Brokered Deposits and Industry Growth

The removal of rate ceilings on deposits of \$100,000 or more¹²⁵ and the increase in deposit insurance to \$100,000¹²⁶ created an influx of deposits beginning in 1982. Because thrifts could offer federally-insured \$100,000 accounts at market rates, Wall Street brokers funneled cash to thrifts in \$100,000 bundles called brokered deposits.¹²⁷ The elimination of the limitation on thrift holdings in brokered deposits¹²⁸ further con-

in 1986 removed many of the investment advantages associated with holding real estate, thus causing a further price decline. See White I, *supra* note 9, at S67.

124. See White I, *supra* note 9, at S66-67. Much of the collateral that Texas thrifts were holding, therefore, had fair market values below the book values of the corresponding outstanding mortgage loans. When borrowers defaulted on those mortgages, thrifts were stuck with losses for the difference.

125. See Sprague, *Finger-Pointers Rewriting History of the S&L Crisis*, Am. Banker, Aug. 22, 1990, at 5.

126. See *supra* note 48 and accompanying text. The reason that the increase to \$100,000 was so significant to the thrift industry dates back to 1970. See Sprague, *Unrelated Series of Events Led to S & L Crisis*, Am. Banker, May 3, 1984, at 9 [hereinafter *Series of Events*]. When thrift industry regulators were confronted with the bailout of Penn Central Railroad, they removed Regulation Q interest rate ceilings on deposits of \$100,000 or greater so that large banks could attract large deposits. See Sprague, *supra*, note 125, at 5; *Series of Events, supra*, at 4. As a result, an institutional market was established in which \$100,000 bundles were deposited in government-insured accounts at thrifts. See Seward & Zaitzeff, *Insurability of Brokered Deposits: A Legislative Analysis*, 39 Bus. Law. 1705, 1713 (1984). Although this institutional market was available to investors in 1980, it did not become prevalent in the industry until 1982.

127. See Pusey, *Fast Money and Fraud*, N.Y. Times, Apr. 23, 1989, § 6, at 32, col. 3. From January 1982 to December 1983, brokered deposits in FSLIC institutions grew from \$3 billion to \$30 billion. See *FDIC and FHLBB Final Rule on Brokered Deposits*, 42 Wash. Fin. Rep. (BNA) No. 14, at 6 (Apr. 2, 1984) (LEXIS, Nexis library, Bnabnk file). Many individual thrifts grew at double-digit rates; one thrift used brokered deposits to grow from \$72 million in 1981 to \$820 million in 1985. See *S&L Crisis Hearing, supra* note 27, at 27 (statement of Rep. Joseph Kennedy II).

From 1983 through 1986 total thrift liabilities grew a remarkable 65% from \$674 billion to \$1.1 trillion—with \$824 billion insured by the FSLIC. However, the Bank Board did not consider rapid growth a 'problem' until 1985. In an attempt to reduce FSLIC's risk exposure to losses caused by the failure of rapid growth thrifts with poorly collateralized loan portfolios, the Bank Board adopted regulations linking net worth requirements to growth rates and required thrifts to obtain supervisory approval before directly investing more than 10 percent of their assets in potentially high-risk ventures In 1985 the House Banking Committee approved legislation to curtail thrift direct investment powers, but the legislation never reached the House Floor.

House Report, *supra* note 2, at 299, reprinted in 1989 U.S. Code Cong. & Admin. News at 95. Computers and advanced technology further enabled brokers to move funds around the country with enormous speed and ease. See R. Brumbaugh, *supra* note 13, at 74-75.

128. See *S&L Crisis Hearing, supra* note 27, at 27-28 (testimony of Rep. Joseph Kennedy, II). Thrifts were previously authorized to invest only five percent of total assets in brokered deposits. See *id.* Depositor losses from the failure of Penn Square Bank also

tributed to the deposit influx. Consequently investors were able to obtain market-rate returns on deposits that were federally insured.

The desire for brokered deposits precipitated an interest rate competition among thrifts.¹²⁹ Higher interest rates increased thrift expenses and resulted in lower profits.¹³⁰ Because of these higher expenses, brokered deposits had to be invested quickly¹³¹ and at high rates. As a result, many thrifts made hasty investments¹³² that involved unusually high credit risks.¹³³ Many institutions doubled and tripled in size as a result of brokered deposits,¹³⁴ thereby increasing their investment activity and the number of new loans being issued. The industry, however, lacked experienced thrift management and staff to effectively evaluate this increased activity.¹³⁵

In 1984, the FDIC and FHLBB recognized¹³⁶ that the influx of brokered deposits encouraged rapid industry-wide growth and risky in-

encouraged depositors to seek insured investments. See Gramley, *Statements to Congress*, 70 Fed. Reserve Bull. 291, 292 (1984); Seward & Zaitzeff, *supra* note 126, at 1713.

129. See Klinkerman, *High Rates at Insolvent Texas S&L Irk Competitors*, Am. Banker, Oct. 28, 1988, at 10-11; Goodman, *Great Places to Put Your Rainy Day Cash*, Money, Mar. 1986, at 113; cf. Hayes, *supra* note 118, at D1, col. 3 (Columbia Savings and Loan nearly quintupled in size in two years because it paid top dollar to attract funds).

130. See M. Stich, *supra* note 1, at 30; Klinkerman, *supra* note 129, at 11. Because of intense competition for brokered deposits, one commentator estimates that Texas thrifts paid between 34 and 87 basis points more in interest than the rest of the nation, costing thrifts nearly \$800 million in added interest expense. See Klinkerman, *supra* note 129, at 11. Shortly before its closure, one Maryland thrift offered a certificate of deposit ("CD") paying 11.5% interest while New York thrifts were offering a comparable CD paying only 8.79%. See Krefetz, *supra* note 15, at 29.

131. See *FDIC and FHLBB Final Rule on Brokered Deposits*, *supra* note 127, at 6-7.

132. See *id.*

133. See Gramley, *supra* note 128, at 293.

134. See *supra* note 127.

135. See *S & L Crisis Hearing*, *supra* note 27, at 13 (statement of Donald Regan, former Secretary of the Treasury). Thrift regulators found inadequate credit analysis and poor loan documentation at 92% of failed thrifts. See House Report, *supra* note 2, at 300, reprinted in 1989 U.S. Code Cong. & Admin. News at 96. Although federal regulations mandated that loans secured by real estate be appraised, 88% of failed thrifts did not comply; those that did comply often produced insufficient or inaccurate documents. See *id.*

136. Indeed, the Federal Deposit Insurance Corporation (FDIC) and the FHLBB found

significant correlation between associations which use brokered deposits and those which have supervisory problems. In 1982 and 1983, more than half of the insured institutions that were closed by the FSLIC had brokered funds in excess of one-third of their deposits. Almost half of the institutions with a net worth below acceptable levels had brokered deposits in excess of 20 percent of their total deposits.

FDIC and FHLBB Final Rule on Brokered Deposits, *supra* note 127, at 6. This high correlation between brokered deposits and thrift failures existed because brokered deposits were one of the few sources of funds that troubled institutions were able to attract. See Gramley, *supra* note 128, at 293. One commentator argues that "rapid growth . . . often funded by brokered deposits" was a key ingredient in most thrift failures since 1982. See N. Eichler, *supra* note 22, at 117; cf. A. Gart, *supra* note 35, at 7 (aggressive practices related to bidding for funds caused an increased risk of thrift failure).

vestment strategies.¹³⁷ Both agencies thus issued regulations that restricted federal deposit insurance to \$100,000 per brokerage firm.¹³⁸ Those regulations were struck down, however, in *FAIC Securities, Inc. v. United States*,¹³⁹ where the court held that the FDIC and FHLBB lacked the statutory authority to impose such restrictions. Although the FDIC, FHLBB¹⁴⁰ and Federal Reserve¹⁴¹ looked to Congress for legislation restricting brokered deposits, their pleas went unanswered.

3. Entry of the Thrift Entrepreneurs

After the state and federal liberalization of thrift investment powers, entrepreneurs were increasingly attracted to thrifts as investments.¹⁴² Such attraction resulted from reduced capital requirements, the availability of deposit insurance¹⁴³ and the ability to invest in broad classes of assets. Many of the thrifts that experienced rapid growth between 1983 and 1985 were managed by "speculating neophytes" who tended to invest in non-traditional assets.¹⁴⁴

Some investors viewed thrift ownership as an opportunity to engage in self-dealing and fraud at taxpayer expense.¹⁴⁵ Some commentators have argued that fraud played a significant role in the thrift debacle,¹⁴⁶ while others have maintained that fraud was a mere symptom and not a cause of the overall crisis.¹⁴⁷

137. See N. Eichler, *supra* note 22, at 118; Isaac, *supra* note 22, at 5. The Federal Reserve also supported restrictions on brokered deposits in the form of a "cap" or limit on the total amount of brokered deposits an institution may maintain. See Gramley, *supra* note 128, at 293-94.

138. See Gramley, *supra* note 128, at 293.

139. See 595 F. Supp. 73, *aff'd*, 753 F.2d 166 (D.C. Cir. 1985).

140. See N. Eichler, *supra* note 22, at 118; Isaac, *supra* note 22, at 5.

141. See Gramley, *supra* note 128, at 291.

142. See F. Balderston, *supra* note 23, at 128. Entrepreneurs entered the industry by either acquiring existing thrifts or chartering new ones. See *id.* at 127-28; Long, Schilling & Van Cleef, *supra* note 4, at 406.

143. See R. Brumbaugh, *supra* note 13, at 69; N. Eichler, *supra* note 22, at 75; Inside Job, *supra* note 2, at 317.

144. See White II, *supra* note 9, at 12-13.

145. See Rosenbaum, *A Financial Disaster with Many Culprits*, N.Y. Times, June 6, 1990, at D4, col. 2.

146. Fraud's role in the thrift crisis has been examined quite thoroughly. See, e.g., *Bank and Thrift Fraud: Hearing before the Senate Banking Committee*, Aug. 2, 1990, at 9 [hereinafter *Fraud Hearing*] (statement of William Seidman, chairman, FDIC) (LEXIS, Nexis library, Fednews file); *Panel Meeting*, *supra* note 58, at 9 (testimony of Sen. Donald Riegle, Chairman, Senate Banking Committee); J. Adams, *The Big Fix* (1990); R. Brumbaugh, *supra* note 13, at 69, 86 n.2; G. Kaufman & R. Kormendi, *supra* note 82, at 52; Inside Job, *supra* note 2; Long, Schilling & Van Cleef, *supra* note 4, at 406, 410; Chernow, *The Menace of the Small Bank*, Wall St. J., Oct. 31, 1990, at A14, Col. 5; Rosenbaum, *supra* note 145, at D4, col. 1.

147. See *Fraud Hearing*, *supra* note 146, at 5 (statement of Sen. Kerry); Scott, *supra* note 7, at 1892-93; Thomas & Ricks, *Tracing the Billions*, Wall St. J., Nov. 5, 1990, at A6, Col. 2.

4. Deregulation and Decreased Supervision

A relaxation of regulatory scrutiny facilitated questionable management practices.¹⁴⁸ Throughout the early 1980s, White House policy diminished the number and responsibilities of thrift examiners.¹⁴⁹ Troubled and insolvent institutions were therefore often overlooked and not examined on a timely basis.¹⁵⁰

The lack of sufficient supervision was exacerbated by a lack of a trained and experienced examiner force.¹⁵¹ Bank examiners that were trained to analyze long-term mortgage portfolios suddenly found themselves scrutinizing complex business transactions such as land swaps, tax shelters and stock mergers.¹⁵² Additionally examiners were underpaid,¹⁵³ under-trained and over-worked.¹⁵⁴

Commentators have argued that the federal government should have supervised both state-chartered and federally-chartered thrifts more closely¹⁵⁵ because the federal government was the insurer of thrift activities.¹⁵⁶ Others have reasoned, however, that state regulators¹⁵⁷ should have borne the burden of monitoring state-chartered thrifts more closely in light of increased investment powers granted by state legislatures.¹⁵⁸

148. See House Report, *supra* note 2, at 301, reprinted in 1989 U.S. Code Cong. & Admin. News at 97 ("[t]he lack of adequate supervision and examination of thrifts was one of the primary causes of the thrift crisis").

149. See Bartlett, *A Stronger Savings Regulator*, N.Y. Times, Jan. 24, 1989, at D7, col. 1. Such cuts were exacerbated by infrequent thrift examinations. See *Forum*, *supra* note 58, at 2 (statement of Sen. William Proxmire).

150. Cf. White II, *supra* note 9, at 12 (due to a decrease in examiner force throughout the early eighties, "the number of examinations relative to the size of the industry . . . fell").

151. See Stich, *supra* note 1, at 120.

There [was] also a limited staff available to deal with the unprecedented number of troubled institutions. In 1980 there were 34 FSLIC employees to handle 297 troubled institutions. By 1985, the FSLIC staff had grown to 159 (over half of whom had only two years of experience), but the number of troubled institutions had risen to 655. Over the same period, the number of field examiners declined. In 1980 there were 700 examiners to handle 297 troubled institutions. By 1985, the number of examiners had decreased to 679, while the number of troubled institutions had increased to 791. Thus, even if the FSLIC's reserves had been adequate, the limited number of personnel and their relative inexperience would have made it difficult to address the growing problem of insolvent institutions in a timely manner.

Brumbaugh, *supra* note 13, at 53.

152. See *S&L Crisis Hearing*, *supra* note 27, at 58 (statement of Rep. Gonzalez).

153. See M. Stich, *supra* note 1, at 120.

154. See *Inside Job*, *supra* note 2, at 14; Bartlett, *supra* note 149, at D7, col. 1. Such conditions were reflected in the field examiner turnover rate, which increased 60% from 1981 to 1984, to over 16% per year. See R. Brumbaugh, *supra* note 13, at 67.

155. See *S&L Crisis Hearing*, *supra* note 27, at 8 (statement of Rep. Neal); *Panel Meeting*, *supra* note 58, at 8 (testimony of Sen. Donald Riegle, Chairman, Senate Banking Committee).

156. See Scott, *supra* note 7, at 1883; White II, *supra* note 9, at 6.

157. State thrifts "are chartered under state statutes and are supervised and examined by agencies of the state government." A. Carron, *supra* note 15, at 2.

158. See *Forum*, *supra* note 58, at 8 (statement of Rep. John Lafalce).

Either way, more stringent regulatory supervision was urgently needed throughout the 1980s.¹⁵⁹

D. *Competitive Equality Banking Act of 1987*

In a further attempt to revamp the thrift industry, Congress enacted the Competitive Equality Banking Act of 1987 ("CEBA").¹⁶⁰ CEBA's purpose was to "ensure that savings associations fulfill their mission of providing affordable home financing."¹⁶¹ CEBA, among other things, "formalized and tightened" the qualified thrift lender test ("QTL" Test) established in 1982 by Garn-St Germain.¹⁶²

CEBA's QTL Test required thrifts to maintain at least sixty percent of their tangible assets in "qualified-thrift investments" in three out of four quarters for two out of three years.¹⁶³ Thrifts that failed to meet these levels were eligible to receive Federal Home Loan Bank advances only in proportion to their qualified thrift investment percentage.¹⁶⁴ Additionally, once a thrift failed the QTL Test, it was denied QTL status for a five-year period.¹⁶⁵

Although Congress intended CEBA's QTL Test to force thrifts to increase home mortgage lending, Congress was dissatisfied with the result,¹⁶⁶ as evidenced by Congress' amendment of the QTL Test two years later in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA").¹⁶⁷ Prior to the FIRREA amendments, assets qualified as qualified thrift investments even if they were "only tangentially associated with residential real estate and housing," such as deposits held

159. This was especially true because the vast majority of thrifts (83% from 1980 to 1981) were mutual in nature and therefore owned by depositors, not equity stockholders. See A. Carron, *supra* note 15, at 2. There was a greater need for monitoring because there were no stockholders to ensure that the organizations were being run efficiently and not fraudulently. See Benston, *supra* note 16, at 14; cf. Sussman, *supra* note 51, at 30 (stockholders have the greatest interest in the financial decisions of an institution and thus "exert influence over decisions of management").

160. Pub. L. No. 100-86, 101 Stat. 552 (1987).

161. See *Regulation of Savings Associations*, *supra* note 6, at 1065 (citing H.R. Rep. No. 261, 100th Cong., 1st Sess. 137 (1987)).

162. Rehm, *Bill Would Force Thrifts to Focus on Home Loans or Lose Charters*, *Am. Banker*, March 23, 1989, at 1.

163. See 12 U.S.C. § 1730a(o)(1)(B) (1988).

164. See 12 U.S.C. § 1430(e) (1988). For example, a thrift "that had 59% of its tangible assets invested in qualified thrift investments would only be eligible to receive advances in amounts equal to 59% of the maximum amount which the association would have been eligible to receive if it had satisfied the QTL Test." *Regulation of Savings Associations*, *supra* note 6, at 1072.

165. See 12 U.S.C. § 1730 (n)(2) (1988).

166. See *Regulation of Savings Associations*, *supra* note 6, at 1066.

167. Pub. L. No. 101-73, § 303(b), 103 Stat. 183, 350 (to be codified at 12 U.S.C. § 1467a). For a complete discussion of the FIRREA amendments to the QTL Test, see Note, *Playing With FIRREA, Not Getting Burned: Statutory Overview of the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, in *Annual Survey of Financial Institutions and Regulation*, The S&L Crisis: Death and Transfiguration, 59 *Fordham L. Rev.* S323, S328-30 (1991).

by other thrifts and notes and obligations issued by the FSLIC.¹⁶⁸ Furthermore, CEBA only required thrifts to comply quarterly with the QTL Test, rather than on a constant basis.¹⁶⁹

Some commentators have argued that the sixty percent qualified thrift investment requirement was insufficient to return thrifts to the home lending business.¹⁷⁰ Others, however, have criticized the QTL Test because it did not allow thrifts to diversify their assets, but rather forced them to concentrate their assets in residential mortgage loans that had already proved troublesome.¹⁷¹ Still other critics of the QTL Test maintain that the test negatively impacted the thrift industry because it made thrifts less attractive to acquirors and only perpetuated the thrifts financial difficulties.¹⁷²

CONCLUSION

The thrift crisis, the culmination of many forces, could have been avoided if timely action had been taken. The structure of the industry was flawed because of its inherent sensitivity to interest-rate risk. Non-diverse portfolios of long-term, fixed-rate mortgages funded by short-term obligations proved to be a disastrous combination.

Congress was careless in raising deposit insurance to \$100,000 and granting it to state-chartered thrifts without effectively monitoring their activities; hence, Congress enabled insured institutions to shift their investment risks to the taxpayers. Meanwhile, the FHLBB decreased the level and quality of capital standards, allowing troubled institutions to increase their total loss exposure by allowing them to lower ownership equity. Failure to heed calls by the FDIC, FSLIC and the Federal Reserve for restrictions on brokered deposits further enabled troubled institutions to expand.

FIRREA was enacted to bring about vast structural change and was designed to improve and protect the thrift industry's viability in the future. Only time will tell, however, if the debacle of the 1980s can be overcome.

Robert J. Laughlin

168. See *Regulation of Savings Associations*, *supra* note 6, at 1066-67.

169. See *id.* at 1068.

170. See Rehm, *Bill Would Force Thrifts to Focus on Home Loans or Lose Charters*, *Am. Banker*, Mar. 23, 1989, at 1.

171. See, e.g., *Beyond the Beltway*, *ABA Banking J.*, at 44 (Mar. 1990) (arguing that the QTL Test was flawed because it required thrifts to invest too heavily in residential mortgages).

172. See, e.g., *Washington Briefs*, *ABA Banking J.*, at 8 (May 1990) (QTL Test "makes thrifts less attractive to acquire and perpetuates their financial difficulties).

