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DOUBLE, DOUBLE TOIL AND TROUBLE: BANK REGULATORY POLICY AT MID-DECADE*

*Michael P. Malloy***

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INTRODUCTION

THE U.S. bank regulatory system is in the midst of a decade of significant change and challenge. This Article seeks to focus upon some of the more striking developments that define the current state of the system and the challenges that it now confronts. In this regard, the Article focuses on four major legislative initiatives.

Part I of this Article examines the effects of the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),[1] which significantly restructured the system as it prepared to enter a new decade.[2] Part II identifies certain important developments under the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"),[3] which were intended to reinforce the efforts to improve the safety and soundness of the system that was still reeling from the effects of the wave of depository institution failures that had begun in the previous decade.[4]

With this background in mind, Part III examines at length the recent enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("IBBEA"),[5] the first major deregulatory initiative since 1980,[6] which has poised the nation on the brink of genuine interstate banking.[7] This development raises as many policy questions as it settles. In particular, will the emergence of an interstate banking system threaten the availability of credit resources to local communities ostensibly served by banks drawn into an interstate system of competition? IBBEA provides a number of safeguards intended to

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1. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in scattered sections of 12 U.S.C.) [hereinafter FIRREA]. For a discussion of the effects of FIRREA, see Daniel B. Gail & Joseph J. Norton, *A Decade's Journey from "Deregulation" to "Supervisory Reregulation": The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 Bus. Law. 1103 (1990); Daniel B. Gail & Joseph J. Norton, *The Financial Institutions Reform, Recovery and Enforcement Act of 1989: Dealing with the Regulators*, 107 Banking L.J. 196 (1990); Michael P. Malloy, *Nothing to Fear but FIRREA Itself: Revising and Reshaping the Enforcement Process of Federal Bank Regulation*, 50 Ohio St. L.J. 1117 (1989) [hereinafter Malloy, *Nothing to Fear*]; Anthony C. Providenti Jr., Note, *Playing with FIRREA, Not Getting Burned: Statutory Overview of the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 59 Fordham L. Rev. S323 (1991); *see also* 1 Michael P. Malloy, Banking Law and Regulation § 1.4.3 (1994) [hereinafter Malloy, Banking Law and Regulation] (discussing the background of FIRREA).

2. *See infra* notes 12-134 and accompanying text.

3. Pub. L. No. 102-242, 105 Stat. 2236 (1991) (codified as amended in scattered sections of 12 U.S.C.) [hereinafter FDICIA]. For a discussion of FDICIA, see 1 Malloy, Banking Law and Regulation, *supra* note 1, § 1.4.5 and accompanying tables. *See also* Cynthia C. Lichtenstein, *U.S. Restructuring Legislation: Revising the International Banking Act of 1978, For the Worse?* 60 Fordham L. Rev. S37 (1992) (discussing effects of FDICIA on U.S. regulation of U.S. operations of foreign banks).

4. *See infra* notes 135-263 and accompanying text; *see also infra* notes 399-429 and accompanying text (discussing FDICIA's amendments to the International Banking Act of 1978).

5. Pub. L. No. 103-328, 1994 U.S.C.C.A.N. (108 Stat.) 2338 (to be codified in scattered sections of 12 U.S.C.) [hereinafter IBBEA].

6. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of 12 U.S.C.). For a discussion of the purpose and effects of the 1980 legislation, see generally Joseph A. DiNuzzo, *The Depository Institutions Deregulation Committee: Did It Achieve the Goal?* 101 Banking L.J. 100 (1984); Ronald L. Weaver & Andrew M. O'Malley, *The Depository Institutions Deregulation and Monetary Control Act of 1980: An Overview*, 98 Banking L.J. 100 (1981).

7. *See infra* notes 264-473 and accompanying text.

ensure continued access by local communities to adequate financial services.[8] In addition, the recently enacted Riegle Community Development and Regulatory Improvement Act of 1994 ("CDRIA")[9] is intended to provide federal financial incentives for a new breed of community development financial institutions that will specialize in economic revitalization and community development.[10]

Part IV of this Article offers some conclusions, intended to assess the prospects facing federal bank regulatory policy in the remainder of the decade and beyond.[11] It concludes that challenges to the success of the latest series of bank regulatory initiatives remain and that significant regulatory objectives are as yet unaddressed or unfulfilled.

I. DOUBLED OVER: FIRREA AND THE CRISIS IN BANK REGULATORY POLICY

Throughout the previous decade, losses in the savings associations industry mounted to record heights.[12] Largely in response to this growing crisis, FIRREA was signed into law on August 9, 1989.[13] This part summarizes the principal features of FIRREA.

A. *The Regulatory Environment*

Among the principal statutory purposes of FIRREA was the restructuring of the regulatory environment of depository institutions.[14] Some indication of the nature of the fundamental change underlying the legislation is suggested by a simple shift in terminology. The Federal Deposit Insurance Act ("FDIA")[15] now generally refers to "in-

8. *See, e.g., infra* notes 447-50 and accompanying text (discussing IBBEA provisions with respect to community access).

9. Pub. L. No. 103-325, 1994 U.S.C.C.A.N. (108 Stat.) 2160 (codified in scattered sections of 12 U.S.C.) [hereinafter CDRIA].

10. *See, e.g., infra* notes 447-49 and accompanying text (discussing CDRIA incentives).

11. *See infra* notes 474-84 and accompanying text.

12. *See, e.g.*, Nathaniel C. Nash, *Savings Loss Put at $2.3 Billion*, N.Y. Times, Mar. 22, 1989, at D1 (reporting 1988 fourth-quarter deficit in savings industry that brought 1988 total to record $12.1 billion deficit). Deposit withdrawals at thrifts were also setting record highs. *See* Nathaniel C. Nash, *Savings and Loan Withdrawals In December a Record $8.1 Billion*, N.Y. Times, Feb. 11, 1989, at 1. The term "savings association" is defined as a generic concept including federally chartered S&Ls and savings banks, state-chartered building and loan associations, S&Ls, homestead associations, cooperative banks (other than those that are "state banks" under 12 U.S.C. § 1813(a)(2)), and "any corporation (other than a bank) that the [FDIC] Board of Directors and the Director of the Office of Thrift Supervision jointly determine to be operating in substantially the same manner as a savings association." FIRREA § 204(b)(1)(C), 12 U.S.C. § 1813(b).

13. FIRREA, 12 U.S.C. § 1811 note.

14. *See id.*

15. Pub. L. No. 797, 64 Stat. 873 (codified as amended in scattered sections of 12 U.S.C.) [hereinafter FDIA].

sured depository institutions"[16] rather than "insured banks."[17] Thus, with FIRREA, federal bank regulation took a further step towards structural realignment around a unifying, functional concept like "depository institution" as its basic frame of reference.

This realignment had certain concrete consequences for the structure of federal regulation. The Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") was expanded to five members, three of whom were directly appointed by the President, with Senate advice and consent.[18] The remaining two members serve by virtue of their offices, i.e., the Comptroller of the Currency and the Director of the newly created Office of Thrift Supervision.[19]

The FDIC was given the responsibility of insuring deposits of savings associations.[20] It now administers a Bank Insurance Fund ("BIF"), formerly the Permanent Insurance Fund with respect to deposits of insured banks,[21] and a Savings Association Insurance Fund ("SAIF"), replacing the functions of the Federal Savings and Loan Insurance Corporation ("FSLIC").[22] In addition, to wrap up the affairs of the FSLIC, an FSLIC Resolution Fund was established. This fund is to be managed and separately maintained by the FDIC and consists of assets and liabilities transferred from the FSLIC.[23] The FSLIC Resolution Fund was to be dissolved upon the satisfaction of all debts and liabilities and sale of all assets.[24]

The FDIC's powers as conservator or receiver were also expanded to include appointment as receiver for any insured depository institu-

16. For purposes of FDIA, the term "depository institution" is defined to mean any "bank or savings association." FIRREA, 12 U.S.C. § 1813(c)(1). On the new generic term "savings association," see *supra* note 12. On the concept of the "depository institution" as a technical term of art, see 1 Malloy, Banking Law and Regulation, *supra* note 1, § 1.2.1.

17. FIRREA, 12 U.S.C. § 1815 note; *see also id.* § 1816 (listing factors to be considered in insurance applications and referring to "depository institution" rather than "bank"); *id.* § 1819 (listing corporate powers of FDIC and referring to "depository institution"); *id.* § 1822 (naming FDIC as receiver and referring to "depository institution").

18. *Id.* § 1812(a)(1)(C).

19. *Id.* § 1812(a)(1)(A)-(B). On the Director of the Office of Thrift Supervision, see *infra* notes 30-31 and accompanying text.

20. FIRREA, 12 U.S.C. § 1814(a); *see id.* § 1437 note (giving procedure for differences in deposit insurance coverage between FDIC and abolished FSLIC). The procedures for termination of FDIC deposit insurance were also extensively revised. *See id.* § 1818(a).

21. *Id.* § 1821(a)(4)-(5). On the investment of funds held in the BIF, see *id.* § 1823(a). For a discussion of the BIF, see David A. Segal, Note, *A Note to Congress and the FDIC: After FIRREA, Where's the BIF?*, 59 Fordham L. Rev. S411 (1991).

22. FIRREA, 12 U.S.C. § 1821(a)(4), (6). On the investment of funds held in the SAIF, see *id.* § 1823 (a). For a discussion of the SAIF, see Anne M. Taylor, Note, *The FDIC's Enhanced Powers over Savings Associations: Does FIRREA Make It "SAIF"?*, 59 Fordham L. Rev. S381 (1991).

23. FIRREA, 12 U.S.C. § 1821a(a).

24. *Id.* § 1821a(f).

tion.[25] Likewise, provisions concerning the use of FDIC funds with respect to insured banks that are closed or are in danger of closing were correspondingly amended. The provisions now cover the authority of the FDIC to respond to the problem of insured depository institutions in default.[26]

By far the most dramatic aspect of structural realignment under FIRREA was the immediate abolition of the FSLIC[27] and, effective sixty days after enactment of FIRREA, the abolition of both the Federal Home Loan Bank Board ("FHLBB") and the position of Chairman of the FHLBB.[28] In addition, the Home Owners' Loan Act ("HOLA")[29] was completely revised by FIRREA. The Office of Thrift Supervision ("OTS") was established within the Treasury Department,[30] and the Director of the Office of Thrift Supervision ("DOTS")[31] effectively replaced the FHLBB and the Chairman of the FHLBB,[32] except to the extent that any powers of the FHLBB or the Chairman were transferred to other agencies.[33] The DOTS was to be appointed by the President, with the advice and consent of the Senate, for a term of five years.[34] Despite the virtual collapse of the thrift industry during the pendency of his tenure, FIRREA designated the former Chairman of the FHLBB to serve as the DOTS, without renewed advice and consent of the Senate, through the remainder of the period when he would have served as Chairman of the FHLBB.[35]

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25. *See id.* § 1821(c)-(*l*) (discussing appointment of FDIC as conservator or receiver), § 1822 (discussing FDIC as receiver).

26. *See id.* § 1823(c)-(f), (i), (k). 12 U.S.C. § 1823(i) was repealed by Pub. L. No. 97-320, § 206, 96 Stat. 1496 (1982).

27. FIRREA § 401(a)(1), 103 Stat. at 354; *see id.* § 401(b), 103 Stat. at 354 (discussing disposition and winding up of affairs of the FSLIC and FHLBB), § 401(c), 103 Stat. at 355 (discussing transitional authority and status of FHLBB Chairman), § 401(d), 103 Stat. at 355 (discussing status of employees), § 401(e), 103 Stat. at 355-56 (discussing continuation of services), § 401(f), 103 Stat. at 356 (discussing savings provisions relating to FSLIC), § 401(h)-(i), 103 Stat. at 357 (discussing continuation of orders, resolutions, determinations, and regulations of FSLIC and FHLBB), § 402(a)-(b), 103 Stat. at 357-58 (discussing continuation and coordination of certain regulations).

28. *Id.* § 401(a)(2), 103 Stat. at 354.

29. FIRREA, 12 U.S.C. §§ 1461-1468c (amending HOLA, 12 U.S.C. §§ 1461 et seq.).

30. 12 U.S.C. § 1462a(a).

31. *See id.* § 1462a(b) (establishing position of DOTS). *See generally* Franklin Sav. Assn v. Director of the Office of Thrift Supervision, 740 F. Supp. 1535 (D. Kan. 1990) (upholding appointment of conservator of failing savings association by interim director); Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183 (D.D.C.) (discussing succession and appointment of DOTS), *appeal dismissed*, 903 F.2d 837 (D.C. Cir. 1990)

32. 12 U.S.C. § 1462a(e)(1).

33. *Id.* § 1462a(e)(2).

34. *Id.* § 1462a(c)(1)-(2).

35. *Id.* § 1462a(c)(5). This appointee resigned shortly thereafter. *See* Nathaniel C. Nash, *Top Savings Regulator Resigns and Strikes Back at His Critics*, N.Y. Times, Dec.

The DOTS is now included in the FDIA definition as the "appropriate Federal banking agency" with respect to any savings association or any savings and loan holding company ("SLHC").[36] The DOTS has the authority to charter federal savings associations[37] and is responsible for the examination, safe and sound operation and regulation of such entities.[38] As to chartering and permitting activities of federally chartered savings associations under section 5 of HOLA, the DOTS has statutory authority to enforce that section, as well as the authority under the general enforcement provisions of section 8 of FDIA,[39] and regulations promulgated thereunder.[40] The DOTS is also authorized to issue regulations as he or she determines to be appropriate to carry out statutory responsibilities.[41] Moreover, the DOTS is also charged with the responsibility of prescribing by regulation uniform accounting and disclosure standards for savings associations.[42]

The DOTS was given exclusive jurisdiction to appoint conservators and receivers for federally chartered savings associations.[43] In addition, the DOTS was given the authority to promulgate regulations for the reorganization, consolidation, liquidation, and dissolution of savings associations, for mergers between insured savings associations, and for savings associations in conservatorship or receivership.[44] Under statutorily specified grounds, the DOTS also has the power to appoint conservators and receivers for insured state-chartered savings associations.[45]

5, 1989, at A1. *See generally Olympic Federal*, 732 F. Supp. at 1197 (discussing appointment of director under FIRREA without Senate advice and consent).

36. FIRREA, 12 U.S.C. § 1813(q)(4).

37. 12 U.S.C. § 1464(a).

38. *Id.* § 1463(a)(1). On examinations of savings associations, see *id.* § 1464(d)(1)(B). As to safety and soundness supervision, the amended HOLA specifies that "[a]ll regulations and policies of the [DOTS] governing the safe and sound operation of savings associations . . . shall be no less stringent than those established by the Comptroller of the Currency for national banks." *Id.* § 1463(c).

39. *Id.* § 1818. For an analysis of these general enforcement powers, see generally Malloy, *Nothing to Fear*, *supra* note 1.

40. 12 U.S.C. § 1464(d)(1)(A).

41. *Id.* § 1463(a)(2).

42. *Id.* § 1463(b)(1).

43. *Id.* § 1464(d)(2)(B). On the grounds for appointment of a conservator or receiver for a federally chartered savings association, see *id.* § 1464(d)(2)(A) (stating mandatory grounds), § 1464(d)(2)(B) (providing additional grounds, including consent of the association, or removal from membership in a federal home loan bank or from status as insured institution).

44. *Id.* § 1464(d)(3)(A). In cases where the FDIC or the RTC is the conservator or receiver, DOTS regulations are required to be consistent with regulations prescribed by the FDIC. *Id.* § 1464(d)(3)(B). On the RTC, see *infra* notes 60-67 and accompanying text.

45. 12 U.S.C. § 1464(d)(2)(A). Written approval of the state official with jurisdiction over the insured association, indicating that one or more of the statutory grounds exists, is generally necessary for the exercise of this authority by the DOTS. *Id.* § 1464(d)(2)(E)(i). *But see id.* § 1464(d)(2)(E)(ii) (discussing authority of DOTS to proceed with appointment under certain circumstances).

Establishment or acquisition of a subsidiary by a savings association, or the initiation of a new activity through an existing subsidiary, requires thirty day prior notification to both the FDIC and the DOTS.[46] The conduct of any such subsidiaries was made subject to regulations and orders of the DOTS.[47] Both the FDIC and the DOTS, however, were given authority under the general enforcement provisions of FDIA[48] with respect to subsidiaries of savings associations.[49] The DOTS, on the other hand, was also given divestiture power with respect to such subsidiaries.[50]

In addition, FIRREA gave the FDIC the authority to determine, by regulation or order, if any specific activity of a savings association posed a serious threat to the SAIF and to order that no SAIF member engage directly in any such activity.[51] This authority did not limit the authority of the DOTS to issue safety and soundness regulations generally or to enforce compliance with other applicable laws.[52]

With respect to permissible activities of savings associations, which were newly subject to the general limitations under FDIA,[53] equity investments, whether by a state or federally chartered savings association,[54] were limited to those investments permissible for federal savings associations.[55] The FDIC was given the authority to require divestiture of impermissible equity investments "as quickly as can be prudently done, and in any event not later than July 1, 1994."[56] Similarly, savings associations were generally prohibited from acquiring or retaining, directly or through a subsidiary, any corporate debt security not of investment grade.[57]

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46. *Id.* § 1828(m)(1)(A). This provision does not apply to federal savings banks chartered prior to October 15, 1982, to state-chartered savings banks, or to savings associations that acquired their principal assets from institutions chartered prior to October 15, 1982, as state-chartered savings banks ("grandfathered institutions"). *Id.* § 1828(m)(5).

47. *Id.* § 1828(m)(1)(B). This provision does not apply to grandfathered institutions under § 1828(m)(5)(A)-(B). *See supra* note 46.

48. *See supra* note 39.

49. 12 U.S.C. § 1828(m)(2)(A).

50. *Id.* § 1828(m)(2)(B).

51. *Id.* § 1828(m)(3)(A); *see also id.* § 1828(m)(3)(C) (vesting additional authority in the FDIC to prevent serious risks to SAIF and BIF).

52. *Id.* § 1828(m)(3)(B).

53. *See id.* § 1831e(a)-(b). These provisions did not require divestiture by a savings association of any assets acquired prior to the enactment of FIRREA. *Id.* § 1831e(g)(2).

54. *See id.* § 1831e(c)(1).

55. *Id.* An exception from this limitation was provided for service corporations. *Id.* § 1831e(c)(2).

56. *Id.* § 1831e(c)(3)(A). For the treatment of noncompliance during the divestment process, see *id.* § 1831e(c)(3)(B).

57. *Id.* § 1831e(d)(1). For these purposes, the term "corporate debt security not of investment grade" did not include obligations issued or guaranteed by a corporation that could be held by a federal savings association under the newly amended HOLA. *Id.* § 1831e(d)(4)(C); *see id.* § 1464(c)(1)(D)-(F). The term "investment grade" was

FIRREA also transformed the Federal Home Loan Bank System. With the abolition of the FHLBB, a new Federal Housing Finance Board ("FHFB") was established.[58] Among other things, the FHFB was intended to supervise the federal home loan banks ("FHLBs") in carrying out their housing finance mission.[59]

To "resolve" all cases involving FSLIC-insured institutions placed in conservatorship or receivership between January 1, 1989 and the date of enactment of FIRREA, or to be so placed within the three year period following its enactment, three new regulatory entities were created. The Resolution Trust Corporation ("RTC") was established,[60] among other things, for the express purpose of managing and resolving such cases.[61] The RTC, originally under the exclusive management of the FDIC,[62] is now managed by its own chief executive officer.[63] FIRREA also established an Oversight Board[64] to oversee and be accountable for the RTC.[65] Finally, FIRREA established the Resolution Funding Corporation ("REFCO")[66] as the mechanism for providing funds to the RTC.[67]

B. *Organization of New Depository Institutions*

Another important feature of FIRREA was the organization of new depository institutions. FIRREA gave the FDIC the authority to organize any "new bank," i.e., a new national bank in the same community as a bank in default, which would assume the insured deposits of the latter and would perform temporarily functions specified in FIRREA.[68] New banks require authorization of the Comptroller to trans-

defined for these purposes to mean a security that, "when acquired by the savings association or subsidiary, was rated in one of the 4 highest rating categories by at least one nationally recognized statistical rating organization." *Id.* § 1831e(d)(4)(A). For an exception from this prohibition for debt securities held by a "qualified affiliate" of a savings association, see *id.* § 1831e(d)(2). On the definition of "qualified affiliate" for these purposes, see *id.* § 1831e(d)(4)(B). Under certain circumstances, with the approval of the DOTS, ineligible corporate debt securities could be transferred in exchange for "qualified notes." *See id.* § 1831e(e).

58. *Id.* § 1422a(a)(1).

59. *Id.* §§ 1422a(a)(3)(B), 1422b(a)(1) (describing general powers and duties of FHFB); *see also id.* § 1431 (enumerating powers and duties of FHLBs).

60. *Id.* § 1441a(b)(1).

61. *Id.* § 1441a(b)(3)(A).

62. *Id.* § 1441a(b)(1)(C).

63. Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, 12 U.S.C. § 1441a(b)(8)(C).

64. FIRREA, 12 U.S.C. § 1441a(a)(1).

65. *Id.* § 1441a(a)(2).

66. *Id.* § 1441b(b).

67. *See id.* § 1441b(d). On the exempt status of REFCO debt obligations under the Securities Act of 1933, 15 U.S.C. § 77a-77d, see Securities Act Release No. 33-6844, Sept. 8, 1989, *reprinted in* 1989 SEC Lexis 1757. On the exemption of such securities under the Securities Exchange Act of 1934, 15 U.S.C. § 78a, see 17 C.F.R. § 240.3a12-10 (1994).

68. 12 U.S.C. § 1821(m)(1).

act any other business.[69] In addition, when one or more insured banks are in default, or when the FDIC anticipates that they may come into default, the FDIC has the authority to organize, and the Comptroller to charter, "bridge banks" to assume deposits of such insured banks.[70]

Under FIRREA, federal chartering of savings associations[71] is within the authority of the DOTS, under such regulations as the DOTS may provide, "giving primary consideration to the best practices of thrift institutions in the United States."[72] A federal savings association may act as a trustee, executor, administrator, guardian, or in any other fiduciary capacity in which a state bank, trust company, or other corporation that competes with federal savings associations is permitted to act. It must do so, however, under the laws of the state in which the federal savings association is located, and upon the issuance of a special permit by the DOTS.[73]

C. *Management of Depository Institutions*

Changes have also been made with respect to the management of depository institutions. Consistent with recommendations made by the Administrative Conference of the United States ("ACUS"),[74] FIRREA generally mandated the publication and availability to the public of final orders issued with respect to administrative enforcement proceedings initiated by these agencies against depository institutions and their institutions' insiders.[75] FIRREA also required that the federal regulators jointly establish their own pool of administrative law judges for formal adjudications[76] and develop a set of uniform rules and procedures for administrative hearings, including provisions for "summary judgment" rulings against management where there are no disputes as to material facts of the case.[77] On the other hand, FIRREA created significant authority for the federal regulators to disapprove in certain specified circumstances the proposed addition of any

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69. *Id.* § 1821(m)(9).

70. *Id.* § 1821(n)(1). To the extent that a bridge bank assumes any insured deposits of a failing bank, all insured deposits of the failing bank must be assumed by the bridge bank or another insured depository institution. *Id.* § 1821(n)(1)(B)(i).

71. On the definition of "savings association" for these purposes, see *id.* § 1462(4) (referring to 12 U.S.C. § 1813).

72. *Id.* § 1464(a)(2).

73. *Id.* § 1464(n)(1).

74. *See* 1 C.F.R. § 305.87-12 (1994).

75. FIRREA, 12 U.S.C. §§ 1818(u)(1), 1786(s)(1).

76. *Id.* § 1818 note; *see* Michael P. Malloy, *Balancing Public Confidence and Confidentiality: Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, 61 Temple L. Rev. 723, 795-97 (1988) [hereinafter Malloy, *Balancing the Public Confidence*] (discussing the ACUS recommendation leading to the FIRREA requirement).

77. FIRREA, 12 U.S.C. § 1818 note; *see* Malloy, *Balancing Public Confidence*, *supra* note 76, at 793-94.

individual to the board of directors or the employment of any individual as a senior executive officer of a depository institution.[78]

FIRREA also undertook a significant expansion and enhancement of regulatory enforcement and criminal liability provisions with respect to depository institutions.[79] Among other things, it gave express authority to the FDIC to take enforcement action against savings associations in the absence of action by the DOTS and in accordance with FDIC recommendations.[80]

In addition, the categories of individuals subject to the general enforcement authority of the federal regulators was expanded. The generic concept of "institution-affiliated party" was substituted for such specific concepts as director, officer, employee, agent, or "other person participat[ing] in the conduct of the affairs" of an institution.[81] The enforcement provisions of FDIA were also expanded to cover not only "banks" but all "depository institutions."[82]

Furthermore, FIRREA's expansion of the cease-and-desist and temporary cease-and-desist authority of the regulatory enforcement provisions[83] contained an apparent repudiation of *Larimore v. Conover*.[84] FIRREA now expressly authorizes—contrary to the Seventh Circuit's decision in *Larimore*—orders requiring restitution or reimbursement, indemnification or guarantee against loss in certain specified circumstances.[85] In addition, removal and prohibition authority is now merged in the regulatory enforcement provisions.[86] Express authority is granted for industry-wide imposition of removal, suspension, and prohibition orders.[87] Under certain specified circumstances, express authority is also granted to institute regulatory enforcement proceedings against institution-affiliated parties who have resigned, been terminated, or otherwise have separated from the institution,[88] con-

78. *See* FIRREA, 12 U.S.C. § 1818 note.

79. *See generally* Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S&L Crisis*, 59 Fordham L. Rev. S155 (1991) (discussing FIRREA's criminal penalties).

80. FIRREA, 12 U.S.C. § 1818(t).

81. *See, e.g.*, *id.* §§ 1786(r), 1813(u) (defining "institution-affiliated party" for purposes of the Federal Credit Union Act ("FCUA") and FDIA, respectively); *see also id.* §§ 1786(e)(1), (f), (i)(1), (3), (j)(2), (o), 1818(b)(1), (c), (e)(4)-(f), (g)(1), (3), (h)(2), (*l*), (m) (all utilizing new terminology in NCUA and FDIA).

82. *See id.* § 1818(a)(1).

83. *See id.* §§ 1786(f)(1), 1818(b).

84. 789 F.2d 1244, 1256 (7th Cir. 1986) (rejecting Comptroller's order requiring reimbursement by bank insider of loss to the bank).

85. *See, e.g.*, 12 U.S.C. § 1818(b)(6)(A)(i)-(ii) (requiring restitution in cases of unjust enrichment or reckless disregard for the law).

86. *See, e.g.*, *id.* § 1818(e)(1) (defining authority to issue removal and prohibition orders).

87. *See, e.g.*, *id.* § 1818(e)(7) (defining authority to impose industry-wide prohibition upon removed or suspended officials).

88. *See id.* § 1818(i)(3). To similar effect is FIRREA's amendment of the National Bank Act enforcement provision. *See id.* § 93(b).

trary to the D.C. Circuit's decision in *Stoddard v. Board of Governors*.[89]

FIRREA also expanded the removal powers under the general regulatory enforcement provisions to include state criminal proceedings as a ground for removal.[90] Federal criminal penalties for knowing participation in any institution's affairs in violation of a removal or prohibition order were clarified,[91] and criminal penalties for knowing unauthorized participation by a convicted person have been increased.[92] In addition, civil money penalties were expanded and increased.[93]

D. *Exercise of Control*

FIRREA amended the Change in Bank Control Act ("CBCA")[94] to indicate expressly that, under certain specified circumstances, the resignation, termination of employment or participation, divestiture of control, or separation of or by an institution-affiliated party did not affect the jurisdiction and authority of the appropriate federal banking agency to proceed against such a party under the CBCA.[95] Civil money penalties for violations of the CBCA were expanded and increased.[96]

E. *Capital Adequacy Supervision*

Another important feature of FIRREA is the increased supervision of capital adequacy. The amended HOLA directed the DOTS, consistent with the purposes of section 908 of the International Lending Supervision Act of 1983[97] and the capital requirements established thereunder by the federal banking regulators, to require all savings associations to achieve and maintain adequate capital by establishing minimum capital levels and by using other methods as determined to be appropriate by the DOTS.[98] Consistent with provisions concerning capital standards,[99] the DOTS may establish minimum capital levels on a case-by-case basis, by amount or at a capital-to-assets ratio.[100] Failure by a savings association to maintain capital at or above the

89. 868 F.2d 1308 (D.C. Cir. 1989).
90. *See, e.g.*, FIRREA, 12 U.S.C. § 1818(g)(1) (striking requirement of authorization by a U.S. attorney).
91. *See id.* §§ 1786(*l*), 1818(j).
92. *See, e.g.*, *id.* § 1829 (establishing minimum 10-year prohibition period and monetary penalties).
93. *See, e.g.*, *id.* § 1818(i)(2) (establishing three tiers of civil money penalties).
94. *Id.* § 1817(j).
95. *Id.* § 1817(j)(15).
96. *Id.* § 1817(j)(16).
97. 12 U.S.C. § 3907.
98. FIRREA, 12 U.S.C. § 1464(s)(1)(A)-(B).
99. *See id.* § 1464(t); *see also infra* notes 106-12 and accompanying text (discussing capital standards).
100. 12 U.S.C. § 1464(s)(2).

minimum level may be treated by the DOTS as an unsafe or unsound practice.[101] The DOTS was also authorized to issue capital directives[102] and to enforce directives and capital plans approved thereunder in the same manner as outstanding, final orders issued under the general enforcement provisions of FDIA.[103] Progress in complying with any capital plan could be taken into account by the DOTS in considering any other proposal by a savings association or affiliate that would have the effect of diverting earnings, diminishing capital, or otherwise impeding progress with respect to the capital plan.[104] Such a proposal could be disapproved if the DOTS determined that it would adversely affect the ability of the association to comply with a capital plan.[105]

The amended HOLA also required the DOTS to prescribe by regulation and maintain uniformly applicable capital standards for savings associations.[106] The prescribed capital standards were required to include (1) a leverage limit of core capital[107] in an amount not less than three percent of a savings association's total assets;[108] (2) a tangible capital[109] requirement in an amount not less than 1.5% of a savings association's total assets;[110] and (3) a risk-based capital requirement.[111] The prescribed standards were to be no less stringent than those applicable to national banks.[112]

F. *Holding Company Supervision*

FIRREA drew the provisions governing the regulation of S&L holding companies into HOLA itself.[113] For these purposes, a "sav-

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101. *Id.* § 1464(s)(3).
102. *Id.* § 1464(s)(4)(A).
103. *Id.* § 1464(s)(4)(B); *see also id.* § 1818 (providing FDIA enforcement provision).
104. *Id.* § 1464(s)(5)(A).
105. *Id.* § 1464(s)(5)(B).
106. *Id.* § 1464(t)(1)(A).
107. *Id.* § 1464(t)(1)(A)(i). On the definition of "core capital" for these purposes, see *id.* § 1464(t)(9)(A).
108. *Id.* § 1464(t)(2)(A).
109. *Id.* § 1464(t)(1)(A)(ii). The term "tangible capital" was defined for these purposes to mean core capital less any intangible assets. *Id.* § 1464(t)(9)(C). *But see id.* § 1464(t)(3) (stating transition rule permitting inclusion of "qualifying supervisory goodwill" in calculation of core capital of certain eligible savings associations through December 31, 1994); § 1464(t)(3)(B) (giving meaning of "eligible savings association"), 1464(t)(9)(B) (providing definition of "qualifying supervisory goodwill").
110. *Id.* § 1464(t)(2)(B).
111. *Id.* § 1464(t)(1)(A)(iii), (2)(C). A savings association would not be in compliance with the statutory capital standards unless it complied with all three prescribed standards. *Id.* § 1464(t)(1)(B). On the legal consequences of a failure to comply with the capital standards, see *id.* § 1464(t)(6)-(7).
112. *Id.* § 1464(t)(1)(C).
113. *See generally id.* § 1461-1470 (enacting new HOLA § 10, 12 U.S.C. § 1467a, concerning the regulation of S&L holding companies).

ings and loan holding company" was defined to mean any company[114] that directly or indirectly controls a savings association[115] or that controls any other company which is a savings and loan holding company.[116]

FIRREA also amended section 4 of the Bank Holding Company Act ("BHCA")[117] expressly to facilitate thrift acquisitions by bank holding companies,[118] such that they were no longer limited to acquisitions of failing thrifts. In addition, FIRREA indicated that the Board of Governors of the Federal Reserve System (the "Fed") was not to impose any special restrictions beyond those generally applicable on transactions between acquired institutions and their holding company affiliates.[119] The Fed was also required to remove any such restrictions on pre-FIRREA thrift acquisitions.[120]

G. *Mergers and Acquisitions*

FIRREA also amended the Bank Merger Act ("BMA")[121] in light of the significant changes in the federal regulatory structure. The newly created DOTS was identified as the "responsible agency" for approval with respect to covered mergers and acquisitions "if the acquiring, assuming, or resulting institution is to be a savings association."[122] This was the first time savings associations were covered by the BMA.

H. *Conversions*

Under FIRREA, conversion of a state-chartered savings association that is eligible to become a member of an FHL Bank into a federal savings association, and any accompanying conversion from mutual to stock or stock to mutual form,[123] are subject to regulations prescribed by the DOTS.[124] Further, any federal savings association could change its designation from a federal savings association to a federal savings bank, or vice versa.[125] A federal savings association could

114. On the definition of "company" for these purposes, see *id.* § 1467a(a)(1)(C).
115. On the meaning of the term "savings association" for these purposes, see *id.* § 1467a(a)(1)(A).
116. *Id.* § 1467a(a)(1)(D).
117. *Id.* § 1843.
118. *Id.* § 1843(i)(1).
119. *Id.* § 1843(i)(2).
120. *Id.* § 1843(i)(2).
121. *Id.* § 1828(c).
122. *Id.* § 1828(c)(2)(D).
123. Conversion of any savings association from mutual to stock or stock to mutual form was prohibited except in accordance with regulations promulgated by the DOTS. *Id.* § 1464(i)(2)(A).
124. *Id.* § 1464(i)(1); *see* Michael P. Malloy, *Seeing the Light: Savings Associations Conversions and Federal Regulatory Realignment*, 10 Ann. Rev. Banking L. 189, 198-211 (1991) (analyzing the OTS regulations governing mutual-to-stock conversions).
125. FIRREA, 12 U.S.C. § 1464(i)(2)(C).

convert into a state savings association or savings bank, organized under the laws of the state in which the principal office of the association is located, on certain specified conditions.[126]

Conversion of a state savings bank that is a member of the BIF into a federal savings bank is permitted, subject to the provisions of the amended HOLA[127] and pursuant to regulations promulgated by the DOTS.[128] The DOTS was authorized to provide for the organization, incorporation, operation, examination, and regulation of such converted savings banks.[129] A converted savings bank continued to be a BIF member until such time as it changed its status to a SAIF member.[130]

Consistent with the purposes of HOLA, the DOTS was also authorized, notwithstanding any other provision of law: (1) to approve or (in the case of a federal savings association) to require conversion of a mutual savings association or an FDIC-insured federal mutual savings bank into a federal stock savings association or federal stock savings bank; (2) to charter a federal stock savings association or federal stock savings bank to acquire the assets of such a mutual institution; or, (3) to charter a federal stock savings association or federal stock savings bank to merge with such a mutual institution.[131] Such conversions

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126. *Id.* § 1464(i)(3)(A)(i)-(vi). This provision conditioned these conversions on the following:

> (i) The State permits conversion of any savings associations or savings banks of such State into a Federal savings associations;
> (ii) such conversion must be approved by the requisite vote, in person or by proxy, of members or stockholders of the association in accordance with state law, but in no event by less than 51 percent of the votes cast at the members' or stockholders' meeting, and in compliance with any other requirements reciprocally equivalent to the requirements of state law for conversion of a state chartered institution into a federal savings association.
> (iii) The requisite notice of the meeting must be given.

Id. For the notice requirements, see *id.* § 1464(i)(3)(A)(iii). The conditions further included:

> (iv) If the converted institution is mutual in form, upon dissolution after conversion the members or shareholders must share in the assets of the association in exact proportion to there relative share or account credits.
> (v) If the converted institution is stock in form, upon dissolution after conversion the stock holders must share on an equitable basis in the assets of the association.
> (vi) The conversion must be effective on the date that all provisions of the HOLA have been fully complied with, and upon the issuance of the new charter by the state in which the association is located.

Id. 12 U.S.C. § 1464(i)(A)(iv)-(vi).

127. *See id.* § 1464(o)(2)(B)-(E).

128. *Id.* § 1464(o)(1).

129. *Id.*

130. *Id.* § 1464(o)(2)(A).

131. *Id.* § 1464(p)(1). For a case upholding the DOTS authority under § 1464(p), see Smallwood v. Office of Thrift Supervision, 925 F.2d 894 (6th Cir. 1991); *see also* Michael P. Malloy, The Regulation of Banking 215-17 (1992) [hereinafter Regulation of Banking] (discussing forced conversions under § 1464(p)).

were authorized only if a condition specified under FIRREA was met.[132]

A federal savings bank chartered under these provisions would have the same authority and be subject to the same restrictions as would apply if it had been chartered as a federal savings bank under any other provision of HOLA.[133] In addition, it could engage in any investment, activity, or operation that the acquired institution was engaged in, if the latter was a federal savings bank, or would have been authorized to engage in if it had converted to a federal charter.[134]

II. Double or Nothing: FDICIA and Bank Supervision

This part discusses the events leading up to the passage of FDICIA and identifies its important features. The FDICIA was intended to reinforce efforts to improve the safety and soundness of the financial services system after the wave of depository institution failures in the 1980s.

A. *The Treasury Modernization Study and the State of Play in Bank Regulatory Policy*

Although FIRREA has had both immediate and long-term consequences for the regulation of depository institutions in the United States, ultimately it neither resolved the crisis over failures nor returned the depository institutions to a safe and competitive condition. This situation was underscored by a 1991 Treasury report ("Treasury Modernization Study")[135] based upon an eighteen-month interagency consultation and study mandated by FIRREA itself.[136] The legislative recommendations contained in the Treasury Modernization Study received congressional consideration,[137] but eventually a much narrower bill was enacted as FDICIA. Nevertheless, the proposals contained in

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132. *See* FIRREA, 12 U.S.C. § 1464(p)(2)(A)-(C), which identifies the following alternative conditions:

> (i) The DOTS determined that severe financial conditions existed that threatened the stability of the association to be converted, and that the conversion was likely to improve the financial condition of the association.
> (ii) The FDIC had contracted to provide assistance to the association under 12 U.S.C. § 1823.
> (iii) The conversion was intended to assist an institution in receivership.

Id.

133. *Id.* § 1464(p)(3).

134. *Id.*

135. U.S. Treas. Dep't, Modernizing the Financial System: Recommendations for Safer, More Competitive Banks (1991), *reprinted in* Fed. Banking L. Rep. (CCH) No. 1377, pt. II (Feb. 14, 1991) [hereinafter Treasury Modernization Study]. For a critique of the study from a state regulatory perspective, see generally Jill M. Considine, *A State's Response to the United States Treasury Department Proposals to Modernize the Nation's Banking System*, 59 Fordham L. Rev. S243 (1991).

136. FIRREA, 12 U.S.C. § 1811.

137. *See* S. 713, 102d Cong., 1st Sess., 137 Cong. Rec. S3739 (daily ed. March 20, 1991).

the study may contribute to the shape of future reform efforts, and so some analysis of those proposals is warranted here.

1. The Crisis in the Bank Regulatory System

A review of the concerns raised by the Treasury suggests the seriousness of the situation confronting any such efforts.[138] Against this background, the study made a number of dramatic recommendations for legislative reform of the financial services system.

Among these were proposals for the reorganization of the federal regulatory structure with respect to depository institutions. In keeping with the recommendations of the 1984 Task Group Report,[139] the Treasury Modernization Study recommended the replacement of the "four federal regulator banking model"[140] with a two-regulator approach, in which the same regulator would be responsible for a holding company and its bank subsidiary.[141] Under this approach, the Fed would be responsible for all state-chartered banks and their holding companies.[142] The Office of the Comptroller of the Currency ("OCC") (and eventually the OTS as well) would be replaced by a new Federal Banking Agency ("FBA"), which would be responsible for all national banks and all federal and state-chartered savings associations,[143] as well as the holding companies of each.[144] The FDIC would be refocused on its insurance and resolution functions,[145] and its present supervisory functions with respect to state-chartered nonmember banks would be transferred to the Fed.[146]

138. Treasury Modernization Study, *supra* note 135, at 9-10 (discussing serious problems in the structure and condition of the U.S. banking system). Among other things, the study recommended the recapitalization of the BIF. *See id.* at 65-69. A capital infusion was effected by the legislation eventually enacted. *See* FDICIA, 12 U.S.C. § 1817(b)(1)(A), (C) (providing assessment rate changes and rules for recapitalization of BIF); *see also id.* § 1824(d) (allowing borrowing for BIF from BIF members).

139. *See* 1 Malloy, Banking Law and Regulation, *supra* note 1, § 1.4.2 (discussing 1984 Task Group Report); *see also* Treasury Modernization Study, *supra* note 135, at XIX-1 to XIX-14 (discussing reform of regulatory structure and reflecting public and agency comments from participating in the consultation of the study).

140. Treasury Modernization Study, *supra* note 135, at 63. The four regulators referred to are: the Comptroller, the Fed, the FDIC and the OTS. *See id.*

141. *Id.*

142. *Id.* The current regulatory functions of the FDIC would thus be transferred to the Fed. *Id.*

143. *Id.*

144. *Id.* If a holding company controlled both state-chartered banks (regulated by the Fed) and national banks (regulated by the FBA), responsibility for the holding company would be placed with the regulator of the larger bank. *Id.* The study anticipated that the Fed and the FBA would "mutually agree on [holding company] regulatory policies and practices." *Id.*

145. *Id.* at 65.

146. *Id.* at 63.

The study also recommended that the NCUA be reorganized to include a representative from the proposed FBA.[147]

2. The Deposit Insurance System

The Treasury Modernization Study took the position that deposit insurance coverage was overextended and was the potential source of serious future problems in the regulatory system. In that light, the study advanced a number of recommendations aimed at reforming the deposit insurance system.

First, the study recommended the assessment of deposit insurance premiums on the basis of risk.[148] This risk was to be measured on the basis of a bank's risk-based capital level.[149]

Second, the study recommended the reduction of coverage for multiple insured accounts.[150] In this regard, individual coverage would have been limited to $100,000 per institution, eliminating coverage of, for example, a second $100,000 held jointly with another individual in the same institution.[151] Retirement savings (such as Keogh accounts, IRAs, and pension fund accounts) would have had a separate $100,000 coverage beyond the individual limitation per institution.[152] In addition, the study set as a long-term goal the limitation of deposit insurance to $100,000 per individual system-wide.[153] The FDIC, however, had voiced opposition to this recommendation,[154] and so the study recommended that the FDIC carry out an eighteen-month cost-benefit analysis with respect to the recommendation.[155]

Third, the study recommended the elimination of coverage of certain "pass-through" accounts.[156] The recommendation specifically included defined benefit plans and defined contribution plans (except for self-directed plans),[157] and bank investment contracts ("BICs").[158]

147. *Id.* at 60.
148. *Id.* at 33.
149. *Id.*; *see also id.* at 43-45 (discussing risk-based deposit insurance recommendations), VIII-1 to VIII-20 (discussing risk-related premiums and reflecting public comments and agency comments from participating in the consultation for the study).
150. *Id.* at 35-38.
151. *Id.* at 37. This change would have taken place over a two-year transitional period. *Id.*
152. *Id.*
153. *Id.*
154. *See id.*
155. *Id.* at 37-38.
156. *Id.* at 38-39; *see id.* V-1 to V-18 (discussing "pass-through" insurance and reflecting public comments and agency comments from participating in the consultation for the study). For these purposes, the study defines "pass-through" insurance as involving a situation in which a fiduciary deposits funds for a large number of beneficiaries, with $100,000 of deposit insurance "passing through" to each of the beneficiaries. *Id.* at 38.
157. *Id.* at 38-39.
158. *Id.* at 39. A BIC is a bank-sponsored product in which a retirement fund investor is permitted to deposit funds with the bank over time, with a guaranteed inter-

Fourth, the study recommended the elimination of deposit insurance coverage for brokered deposits.[159] This recommendation would have been phased in over a two-year transitional period.[160] The elimination would not have applied to brokered deposits at institutions in conservatorship with the RTC or the FDIC[161] so that these agencies could continue temporarily to "use government-guaranteed credit for liquidity purposes if the practice would lower resolution costs for the taxpayer."[162]

Fifth, the study called for a continuation of the current FDIC policy of not protecting general, subordinated, and holding company creditors in situations in which a subject bank is failing.[163] Thus, non-deposit creditors would have been left to their normal pro rata bankruptcy losses, even if the FDIC decided to make whole the uninsured depositors of the bank.[164]

At the same time, however, the study urged that protection of uninsured depositors of failing banks be more limited in practice.[165] In this regard, FDIC resolution of a failing bank situation should involve the least expensive method,[166] except where the Treasury Department and the Fed determined that "systemic risk" required the use of a relatively more expensive method.[167] In any event, the study urged improved liquidity mechanisms for situations of pro rata payouts to uninsured depositors and other nondeposit creditors.[168] These recommendations with respect to uninsured depositors were intended to be phased in over a three year period.[169]

Furthermore, while recognizing that foreign deposits of U.S. banks have generally been included by the FDIC in the resolution of failing U.S. banks, the study affirmed that these deposits should not be sub-

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est rate for the term of the contract. *See id.* The interest rate risk to the bank "can be effectively managed through contract limitations and hedging strategies." *Id.* The existence of BICs places insurance companies offering similar "Government Investment Contracts" without the deposit insurance feature at a competitive disadvantage. *Id.*

159. *Id.* at 39; *see id.* IV-1 to IV-10 (discussing brokered insured deposits and reflecting public comments and agency comments from participating in the consultation for the study).

160. *Id.* at 39.

161. *Id.*

162. *Id.*

163. *Id.* at 40.

164. *Id.*

165. *Id.*

166. *See id.* at 40-41.

167. *Id.* at 40. On this "systemic risk" exception, see *id.* at 41. On suggested methods to reduce systemic risk, see *id.* at 42.

168. *See id.* at 41-42. *See generally id.* III-1 to III-43 (discussing scope of deposit insurance and reflecting public comments and comments by agencies participating in the consultation and study).

169. *Id.* at 42.

ject to deposit insurance assessment.[170] The trade-off in this regard was that the study anticipated that foreign deposits of U.S. banks would be included in the reduction of protection accorded all uninsured deposits, whether domestic or foreign.[171]

3. Increased Supervision of Management of Depository Institutions

The Treasury Modernization Study recommended increased supervision of management of depository institutions through improvements in the techniques and tools of supervision, primarily through an increased focus on capital.[172] In the context of supervision generally, the study stressed prompt corrective action as a central theme.[173] Any action should be attuned to the relative capital strength of a subject bank (ranging from "Zone 1" for the most capitalized to "Zone 5" for failing institutions).[174] These changes in the supervisory system were expected to take place over a three-year transitional period.[175] As a crucial aid to improved supervision, the study also stressed the need for annual on-site examination[176] and improved reporting from independent auditors.[177]

4. Increased Supervision of Capital as a Source of Strength

In addition, the Treasury Modernization Study took the position that capital was "[t]he single most powerful tool to make banks safer."[178] In this regard, it took a very traditional view of the role of capital in corporate governance and regulatory oversight of depository institutions:

> [Capital] is an "up-front" cushion to absorb losses ahead of the taxpayer, and banks are less likely to take excessive risk when they have substantial amounts of their own money at stake. Yet the [deposit insurance] safety net has permitted banks to have lower capital ratios than other financial companies. The bank regulatory

170. *Id.* at 42-43; *see id.* VI-1 to VI-10 (discussing insurance treatment of foreign deposits and reflecting public comments and agency comments from participating in the consultation for study).

171. *Id.* at 42.

172. *See id.* at 46; *cf. id.* IX-1 to IX-21 (discussing risk management techniques and reflecting public comments as well as agency comments derived from consulting on the study), *id.* X-1 to X-22 (discussing the need for prompt corrective action and reflecting public comments as well as agency comments derived from consulting on the study).

173. *See id.* at 46.

174. *Id.* at 46-48.

175. *Id.* at 48.

176. *Id.*

177. *Id.* at 49-50.

178. *Id.* at 29.

system is not adequately focused on the crucial importance of capital.[179]

Significantly, the study did not recommend that capital standards be raised, but rather, that the role of capital be strengthened.[180] It may seem anomalous to speak of "strengthening" the role of capital without raising capital standards, but the Treasury Modernization Study detailed a series of recommendations that gave substance to this position.[181]

First, it recommended that the bank regulatory system give greater emphasis to the relative capital level of a bank as an indicator of the degree of supervision that should be exercised by its regulator.[182] It should be noted, however, that the notion of using capital levels in this manner is already a recognized element of bank supervision.[183] Nevertheless, increased emphasis on relative capital levels for supervisory purposes doubtless would be an advance over current practices.

Second, the study recommended the assessment of deposit insurance premiums on the basis of risk.[184] In this regard, risk would be measured on the basis of a bank's risk-based capital level.[185]

Third, the study recommended that "financial services holding companies" ("FSHCs")[186] with well-capitalized bank subsidiaries be permitted to engage in a range of financial activities through nonbanking affiliates.[187] Apparently, the expectation was that the promise of a broader range of activities would encourage banks to build and maintain capital and would also enhance market prospects for new issues made by previously undercapitalized banks.[188]

Fourth, the study noted that the current risk-based capital standards did not focus significantly on interest rate risk in evaluating the relative risk of bank assets.[189] It urged the development of methods to monitor interest rate risk and adjust risk-based capital ratios accordingly, to avoid "banks . . . shift[ing] into assets that are more sensitive to interest rate risk."[190]

179. *Id.* For a detailed treatment of capital and capital adequacy, see *id.* II-1 to II-28.

180. *Id.* at 29.

181. *See id.*

182. *Id.* at 33; *see also id.* at 45-49 (discussing capital-based supervision as an element of improved supervision).

183. *See, e.g.*, 2 Malloy, Banking Law and Regulation, *supra* note 1, § 5.3.3.4 (noting that Fed regulations require a higher degree of oversight for banks with relatively low capital ratios).

184. Treasury Modernization Study, *supra* note 135, at 33.

185. *See* 2 Malloy, Banking Law and Regulation, *supra* note 1, § 5.3.3.4 (discussing risk-based capital measurement).

186. On the proposed FSHC, see *infra* note 207 and accompanying text.

187. Treasury Modernization Study, *supra* note 135, at 33.

188. *Id.*

189. *See id.*

190. *Id.*

Fifth, the study called for an increased focus on capital-based supervision.[191] In particular, it looked to improved capital measurement[192] as the primary means of improving supervision of banks.

5. Securities Activities of Depository Institutions

The Treasury Modernization Study recommended that well capitalized banks be permitted to have financial affiliates engaging in, *inter alia*, full-service securities activities and mutual fund activities.[193] This grant of authority would be subject to a number of significant safeguards.[194]

The study also called for the prohibition of certain direct investment activities of state-chartered banks.[195] As to other activities not permitted for national banks, the study recommended that state-chartered banks be required to comply with two conditions before engaging in such activities: satisfaction of capital adequacy require-

191. *See id.* at 45-49.

192. *Id.* at 48-49.

193. *Id.* at 56; *see also id.* XVIII-1 to XVIII-32 (discussing financial services modernization and reflecting public comments as well as agency comments derived from consulting on the study).

194. These safeguards would include: (1) the authority would only be available to well-capitalized banks and their "financial services holding companies" (FSHCs); (2) only the bank affiliate of the FSHC would have access to the federal "safety net," consisting of deposit insurance, the Fed's discount window, and the federal payments system; (3) strict regulation would be focused on the bank affiliate, and the principal regulatory objective would be protection of the bank, not its holding company; (4) the newly authorized activities would be required to be carried out in separately capitalized nonbanking affiliates; (5) the activities would be subject to the principle of "functional regulation" requiring, for example, that securities activities be regulated by the Securities and Exchange Commission rather than by the bank regulators; (6) funding and disclosure firewalls would be required, separating the bank affiliate from its holding company and nonbanking affiliates; and (7) "umbrella oversight" of the FSHC would be required, to ensure the safety of the bank affiliate. *Id.* at 57-59.

The oversight by the bank regulator would include the authority to examine the FSHC, the bank, and any nonbanking affiliate posing a risk to the bank affiliate. Reciprocal examination rights would exist for the regulator, if any, of the nonbanking affiliate. *Id.* at 59. The regulator could also require the sale of any nonbanking affiliate posing a "clear threat" to the bank affiliate. *Id.* In addition, the regulator could require the FSHC to act as a "source of strength" for any bank affiliate that falls below minimum capital standards. *Id.* The study, however, emphasized that the FSHC would generally not be subject to any "cumbersome, bank-like regulation." *Id.*

195. *Id.* at 50-51. Specifically, the study recommended the prohibition of direct equity investment of insured deposit funds in commercial real estate and other commercial enterprises, both for reasons of competitive parity and risk avoidance. As the study noted:

> National banks are not permitted to make [such investments,] . . . although some states permit state-chartered banks to conduct such activities. While state[ ] banks have been more limited and prudent about this authority than state thrifts, direct equity investment remains a greater risk to the federal deposit insurance fund than traditional bank loans that have a more senior claim on assets.

Id. at 51.

ments[196] and determination by the FDIC that the activity would not create a significant risk of loss to the insurance fund.[197] These new federal restrictions would not have applied to "riskless" agency activities authorized for state-chartered banks by their state regulators.[198]

6. Holding Company Activities

The Treasury Modernization Study advanced a number of recommendations that would have affected in significant ways the regulation and formation of holding companies. Primary regulatory responsibility for holding companies would have been divided between the Fed, charged with responsibility for the holding companies of all state-chartered banks,[199] and the new FBA,[200] charged with responsibility for the holding companies of all national banks and all federal and state-chartered thrift institutions.[201] In the case of any holding company controlling both a state-chartered bank, to be regulated by the Fed,[202] and a national bank, to be regulated by the FBA,[203] responsibility for the holding company regulation would be assumed by the regulator of whichever bank was larger.[204] The Fed and the FBA would be required to reach mutual agreement on holding company regulatory policies and practices.[205]

As was previously mentioned,[206] the study also raised the possibility of a new variety of holding company, the FSHC. This truly diversified financial services enterprise would be authorized to engage in a range of financial activities through nonbanking affiliates of the FSHC.[207]

B. *FDICIA's Narrow Response*

In December 1991, President Bush signed into law two pieces of legislation intended to reform certain aspects of federal bank regulation: the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 ("RTCIA")[208] and FDICIA. This sec-

196. *Id.*; *cf.* 2 Malloy, Banking Law and Regulation, *supra* note 1, § 5.4.2 (discussing the increased emphasis on capital supervision in bank regulation).

197. Treasury Modernization Study, *supra* note 135, at 51.

198. *Id.*

199. *Id.* at 63.

200. On the FBA, see *supra* notes 143-44 and accompanying text.

201. Treasury Modernization Study, *supra* note 135, at 63.

202. *See supra* note 142 and accompanying text.

203. *See supra* note 143 and accompanying text.

204. Treasury Modernization Study, *supra* note 135, at 63.

205. *Id.*

206. *See supra* notes 186-87 and accompanying text (discussing proposals for FSHCs under the Study); *see also supra* note 187 (discussing use of FSHCs as a safeguard in nonbanking activities).

207. *See* Treasury Modernization Study, *supra* note 135, at 53-59.

208. Pub. L. No. 102-233, 105 Stat. 1761 (Dec. 12, 1991) (codified at scattered sections of 12 U.S.C.) [hereinafter RTCIA].

tion summarizes some of the principal features of the two acts and highlights their effects on issues covered by this Article.[209]

1. FDIC and RTC Resources

The two acts increased the resources available to the FDIC insurance funds[210] and the RTC.[211] FDICIA increased the borrowing authority of the FDIC from $5 billion to $30 billion[212] and mandated recapitalization of the BIF under specified circumstances.[213] RTCIA authorized Treasury to provide an increase in funding to the RTC in an amount not to exceed $25 billion.[214] RTICIA also terminated the borrowing authority of the REFCO after the date of enactment of the new legislation (December 12, 1991).[215]

2. Improved Supervision

FDICIA included a series of provisions intended to improve the supervision of insured depository institutions. It adopted a general rule requiring annual on-site examinations of all insured depository institutions,[216] effective one year after its enactment on December 19, 1991.[217] In addition, the federal bank regulatory agencies, acting through the Federal Financial Institutions Examination Council, were required to establish a "comparable examination improvement program"[218] meeting certain specified requirements.[219] As a general rule, FDICIA also required independent audits of insured depository institutions.[220]

209. For analytical tables identifying the effects of the provisions of FDICIA on existing codified law, and a chart identifying regulatory issuances intended to implement the FDICIA, see 1 Malloy, Banking Law and Regulation, *supra* note 1, figs. 1.17-1.19, at 1.280-1.362.

210. On the FDIC insurance funds, see *supra* notes 20-22 and accompanying text.

211. On the RTC, see *supra* notes 60-63 and accompanying text.

212. FDICIA, 12 U.S.C. § 1824(a); *see also id.* §§ 1817(b), 1824(c) (establishing repayment schedules for borrowing and permitting emergency assessments on insured depository institutions); *cf. id.* § 1825(c)(5)-(6) (limiting outstanding borrowing of FDIC insurance funds).

213. *Id.* § 1817(b)(1)(A), (C) (instituting assessment rate changes and establishing rules for recapitalizing the BIF); *see also id.* § 1824(d) (establishing rules governing borrowing for BIF from BIF members).

214. RTCIA, 12 U.S.C. § 1441a(i)(3).

215. *Id.* § 1441(e)(2).

216. FDICIA, 12 U.S.C. § 1820(d)(1)-(3). Certain specified small institutions (well-capitalized and well-managed institutions with total assets of less than $100 million with no recent change in control) are to be examined every 18 months. *Id.* § 1820(d)(4). *But see id.* § 1820 note (providing transition rule); *cf.* CDRIA § 306 (easing annual examination rule for certain institutions).

217. FDICIA, 12 U.S.C. § 1820.

218. *Id.* § 1820(d)(1).

219. *See id.* § 1820(d)(2).

220. *Id.* § 1831m(a).

Assessments to insured depository institutions were authorized to cover the costs of conducting FDIC examinations.[221] In the case of an institution's affiliate that refuses or fails to pay such an assessment, the institution itself could be assessed such costs.[222] Civil money penalties against the affiliate were also authorized.[223] Similar rules applied to the Comptroller's examination and supervision of national banks[224] and to OTS examination and supervision of savings associations.[225]

FDIC insurance of deposits of any depository institution now requires a specific application to and approval by the FDIC.[226] Specific application and approval was not required, however, in the case of an interim depository institution chartered by the appropriate federal bank regulatory agency,[227] a previously insured depository institution whose insured status was continued under 12 U.S.C. § 1814,[228] a previously insured depository institution that was newly admitted to membership in the Federal Reserve System,[229] or a previously insured state bank that converted into a national bank.[230] New rules also applied to depository institutions that were not insured by the FDIC.[231]

FDICIA established specific accounting objectives, standards, and requirements generally applicable to all insured depository institutions.[232] These included uniform standards for accounting of capital.[233]

FDICIA generally required prompt regulatory action in terms of "corrective action"[234] intended to "resolve the problems of insured depository institutions at the least possible long-term loss to the deposit insurance fund."[235] Such action included the implementation of

221. *Id.* § 1820(e).
222. *Id.* § 1820(e)(3).
223. *Id.* § 1820(e)(4).
224. *Id.* §§ 481-482.
225. *Id.* § 1467(a)-(b), (k).
226. *Id.* § 1815(a).
227. *Id.* § 1815(a)(2).
228. *Id.* § 1815(a)(3).
229. *Id.* § 1814(b).
230. *Id.*
231. *See id.* § 1831t (requiring, *inter alia*, annual independent audits of private deposit insurers).
232. *Id.* § 1831n.
233. *Id.* § 1831n(b).
234. *Id.* § 1831*o*(a)(2).
235. *Id.* § 1831*o*(a)(1); *see also* FDIC, Statement of Policy on Assistance to Operating Insured Depository Institutions, *reprinted in* 57 Fed. Reg. 60,203 (1992) (covering the FDIC policy concerning statutory cost test for FDIC-assisted resolutions and requirements for FDIC assistance to operating institutions prior to appointment of conservator or receiver); *cf.* FDICIA, 12 U.S.C. § 1823(c)(4), (8), (11) (mandating least-cost resolution of failing institution problems). On the principles of early resolution, see FDICIA, 12 U.S.C. § 1823; *see also* FDICIA, 12 U.S.C. § 1821(d)(5)(D) (authorizing disallowance by receiver of secured claims in excess of collateral);12 U.S.C. §§ 347a, 347b(a)-(b), (n) (limiting Federal Reserve discount window advances); 58 Fed. Reg. 68,509 (1993) (codified at 12 C.F.R. pt. 201) (Fed implementing § 12 and

capital standards.[236] Final regulations implementing these provisions were to be promulgated not later than nine months after enactment of FDICIA on December 19, 1991,[237] with an effective date not later than one year after that date.[238] A related provision amended the conservatorship and receivership provisions of FDIA,[239] the National Bank Act,[240] the Bank Conservation Act,[241] HOLA,[242] and the Federal Reserve Act[243] to facilitate prompt regulatory action.

FDICIA also focused on the safety and soundness of insured depository institutions in several ways. It authorized federal bank regulatory agencies to impose more stringent treatment of capital of institutions that were determined to be in an unsafe and unsound condition or to be engaged in an unsafe and unsound practice.[244] It also required the creation by the federal bank regulatory agencies of detailed standards for safety and soundness of insured depository institutions and their holding companies,[245] in specified areas of concern such as operational and managerial standards,[246] asset quality, earnings and stock valuation standards,[247] and compensation standards.[248]

FDICIA also made one significant change in the federal deposit insurance system related to concerns over the supervision of depository institutions. It required the establishment of a risk-based assessment system for federal deposit insurance.[249]

As to the activities of depository institutions, FDICIA generally required, with certain specified exceptions, that insured state banks not engage in any type of activity not permissible for national banks.[250] It

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revising rules to discourage advances to "undercapitalized" and "critically undercapitalized" depository institutions).

236. FDICIA, 12 U.S.C. § 1831*o*(c)-(f), (h)-(i), (k), (n). These rules do not apply to depository institutions in conservatorship, or to bridge banks the stock of which is owned only by the FDIC or RTC. *Id.* § 1831*o*(j). FDICIA also contains provisions requiring the periodic review and improvement of applicable capital standards. *See id.* § 1828(p).

237. *Id.* § 1831*o*.

238. *Id.*; *see, e.g.*, 58 Fed. Reg. 8210 (1993) (codified at 12 C.F.R. pts. 303, 325) (discussing the implementation of FDIC prompt corrective action rules).

239. FDICIA, 12 U.S.C. § 1821(c)(5), (9)-(13).

240. *Id.* § 191.

241. *Id.* § 203(a).

242. *Id.* § 1464(d)(2)(A)-(F).

243. *Id.* § 248(o).

244. *Id.* § 1831*o*(g).

245. *Id.* § 1831s; *see* 58 Fed. Reg. 60,802 (1993) (to be codified at 12 C.F.R. pts. 30, 208, 225, 263, 303, 308, 364, 570) (listing OCC, Fed, FDIC, and OTS proposed rules establishing safety and soundness standards).

246. FDICIA, 12 U.S.C. § 1831s(a).

247. *Id.* § 1831s(b).

248. *Id.* § 1831s(c).

249. *Id.* § 1817(b); *see* 58 Fed. Reg. 29,952 (1993) (codified at 12 C.F.R. pt. 330) (listing FDIC insurance coverage rules).

250. FDICIA, 12 U.S.C. § 1831a; *see* 12 C.F.R. pt. 303, *amended by* 58 Fed. Reg. 64,455 (1993). For the corresponding rules applicable to SAIF-insured savings associations, see 12 C.F.R. pt. 333, *amended by* 58 Fed. Reg. 64,460 (1993).

also required the agencies to adopt uniform regulations restricting real estate lending by prescribing standards for such extensions of credit in accordance with certain general principles specified in the act.[251] FDICIA also recodified the statutory provisions restricting extensions of credit to insiders of depository institutions.[252] Existing transactions were not affected by these new rules.[253]

3. Supervision of Failing Institutions

RTCIA made certain structural and substantive changes intended to affect the supervision of failing institutions subject to RTC oversight. For example, the OTS was required to appoint the RTC as receiver for failed thrift institutions through September 30, 1993, rather than the August 9, 1992, date specified in FIRREA.[254]

The structure of the RTC was realigned. Among other things, the RTC was now to be managed by its own chief executive officer, rather than by the FDIC.[255] A restructured Oversight Board, now officially known as the Thrift Depositor Protection Oversight Board,[256] was charged with the duty, *inter alia*, of "monitoring" rather than being "accountable for" the RTC.[257]

4. Mergers and Acquisitions

FDICIA also contained a series of provisions amending certain statutory rules with respect to mergers and acquisitions. FDICIA amended the rule with respect to a five-year moratorium on conversions previously imposed by FIRREA.[258] FDICIA permitted conversions meeting statutorily specified conditions to take place with the prior written approval of the responsible agency.[259]

FDICIA authorized mergers, consolidations, and other acquisitions by or involving savings associations[260] or national banks[261] with any

251. FDICIA, 12 U.S.C. § 1828(o); *see also id.* § 371(a) (stating conforming amendment to Federal Reserve Act).

252. *Id.* § 375b. Restrictions on transactions with affiliates and insiders apply to insured nonmember banks as well as member banks. *See id.* § 1828(j). Corresponding rules apply to savings associations. *See id.* §§ 1468(b)(1), 1972(2)(H)(i).

253. *Id.* § 375b.

254. RTCIA, 12 U.S.C. § 1441a(b)(3)(A)(ii).

255. *Id.* § 1441a(b)(8)(C). On other structural changes within the RTC, see *id.* § 1441a(b)(1)(C), (3)(B), (9)(A), (9)(C), (10)(E) (striking § 1441a(b)(8) and renumbering § 1441a(b)(9)-(14) as (8)-(13)).

256. *Id.* § 1441a(a)(1), *amended by* 12 U.S.C. § 1441a(a)(1) (Supp. V 1994). On restructuring the Oversight Board, see *id.* § 1441a(a)(3)(A), (E).

257. *Id.* § 1441a(a)(2). On other changes in the duties and authorities of the Oversight Board, see *id.* § 1441a(a)(6)(A)-(C), (8)(A), *amended by* 12 U.S.C. § 1441a(a)(6), (8) (Supp. V 1994).

258. *See* FIRREA, 12 U.S.C. § 1815(d)(2)(A).

259. FDICIA, 12 U.S.C. § 1815(d)(3).

260. *Id.* § 1467a(t).

261. *Id.* § 215c.

other insured depository institution. Such transactions were made generally subject to the approval or disapproval of the Director of the OTS[262] or the Comptroller of the Currency,[263] respectively, within sixty days of the filing of an application for approval of the transaction.

III. Doubling Up: Interstate Banking

On September 29, 1994, President Clinton signed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("IBBEA")[264] into law. When fully effective, the provisions of IBBEA will permit geographic expansion by banks without regard to artificial barriers to interstate expansion heretofore imposed by the Douglas Amendment[265] to the Bank Holding Company Act ("BHCA")[266] and the branching provisions of state law and the National Bank Act ("NBA").[267]

A. *Interstate Banking Through Holding Company Acquisition*

Among other things, IBBEA permitted the acquisition of out-of-state banks. These provisions, however, are limited in certain situations by state laws and regulations.

1. Amending the Douglas Amendment

Beginning one year after the enactment of IBBEA,[268] the Fed is authorized to approve BHCA applications for acquisition of control[269] of out-of-state banks[270] "without regard to whether such transaction is

262. *Id.* § 1467a(s)(2).
263. *Id.* § 215c(b)(1).
264. IBBEA, Pub. L. No. 103-328, 1994 U.S.C.C.A.N. (108) Stat. 2338.
265. 12 U.S.C. § 1842(d) (1988). On the Douglas Amendment, see 3 Malloy, Banking Law and Regulation, *supra* note 1, § 8.23-.24.
266. 12 U.S.C. §§ 1841-1850 (1988), *amended by* 12 U.S.C. §§ 1841-1848 (Supp. V 1994).
267. *See, e.g., id.* § 36(c) (NBA provision limiting branching by national banks to branching permitted to state banks in same state). *See generally* First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122 (1969) (giving meaning of "branch" for purposes of § 36(c)); First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966) (construing § 36(c)).
268. IBBEA, 12 U.S.C.A. § 1842 note (stating effective date provision).
269. "Acquisition of control" means "to acquire control of, or acquire all or substantially all of the assets of." *See id.* § 1842(d)(1)(A).
270. "Out-of-state bank" means "a bank located in a State other than the home State of [the acquiring] bank holding company." *Id.*; *see also id.* § 1841(o)(6) (IBBEA definition). For these purposes, IBBEA defines "home State" to mean:

> (A) with respect to a national bank, the State in which the main office of the bank is located;
> (B) with respect to a State bank, the State by which the bank is chartered; and

prohibited under the law of any State."[271] This authority is limited to acquisitions by banks that are adequately capitalized and adequately managed.[272] Permitted "acquisitions" would include acquisition of a de novo bank that was chartered for purposes of establishing a presence of the acquiring bank holding company within the target state.[273]

Certain state law restrictions affecting interstate acquisitions will continue to have effect. The Fed is generally not permitted to approve an acquisition that would contravene applicable state statutory law requiring a bank to be in existence for a minimum period of time before acquisition.[274] The Fed, however, may approve such an acquisition if the target bank has been in existence for at least five years, notwithstanding any longer minimum period specified under the statutory law of the host state.[275]

State law requirements that a portion of the assets of a target bank be held available for call by a state-sponsored housing entity remain applicable to such acquisitions if four conditions are met. First, the state law must not have the effect of discriminating against out-of-state banks, BHCs, and their subsidiaries.[276] Second, the state law

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> (C) with respect to a bank holding company, the State in which the total deposits of all banking subsidiaries of such company are the largest on the later of —
>
> (i) July 1, 1966; or
>
> (ii) the date on which the company becomes a bank holding company under [the BHCA].

Id. § 1841(o)(4)(A)-(C).

271. *Id.* § 1842(d)(1)(A).

272. *Id.* For these purposes, the term "adequately capitalized" is defined to mean "a level of capitalization [that] meets or exceeds all applicable Federal regulatory capital standards." *Id.* § 1841(o)(1). The term "adequately managed" is undefined by IBBEA. On federal capital adequacy standards, see 2 Malloy, Banking Law and Regulation, *supra* note 1, § 5.97-.118.

273. *See, e.g.*, IBBEA, 12 U.S.C.A. § 1842(d)(1)(A), (C) (acquisitions of "shell banks" included within new rules).

274. *Id.* § 1842(d)(1)(B)(i). For these purposes, a "shell" or "phantom" bank, created to be controlled by the acquiring BHC and to receive an existing target bank, is deemed to have been in existence for as long as the target bank has been. *Id.* § 1842(d)(1)(C).

275. *Id.* § 1842(d)(1)(B)(i). For these purposes, IBBEA defines the term "host state" to mean:

> (A) with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch; and
>
> (B) with respect to a bank holding company, a State, other than the home State of the company, in which the company controls, or seeks to control, a bank subsidiary.

Id. § 1841(o)(5). On the meaning of the term "home State," see *supra* note 270.

276. *Id.* § 1842(d)(1)(D)(i). On the meaning of the term "out-of-State bank," see *supra* note 270. The term "out-of-State bank holding company" is defined to mean "with respect to any State, a bank holding company whose home State is another State." *Id.* § 1841(o)(7). On the meaning of the term "home State," see *supra* note 270.

must have been in effect prior to September 29, 1994.[277] Third, the FDIC has not made a determination that compliance with the state law would result in an unacceptable risk to the BIF or SAIF.[278] Fourth, the "appropriate Federal banking agency"[279] of the target bank has not made a determination that compliance with the state law would place the bank in an unsafe or unsound condition.[280]

In addition, certain nationwide and statewide concentration limits apply to the newly authorized interstate BHC acquisitions. First, the Fed is not permitted to approve an interstate acquisition if the applicant[281] controls, or would control upon consummation of the acquisition, more than ten percent of the total amount of deposits of insured depository institutions in the United States.[282] Second, as to acquisitions other than initial entry into the target state, the Fed is not permitted to approve an acquisition if: (1) immediately before the proposed acquisition, the applicant[283] controls an insured depository institution or any branch of such an institution in the home state of the target bank, or in any host state in which the target bank maintains a branch; and, (2) upon consummation of the proposed acquisition the applicant would control thirty percent or more of the total amount of deposits of insured depository institutions in any such state.[284] The nationwide and statewide concentration provisions do not affect the

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277. IBBEA, 12 U.S.C.A. § 1842(d)(1)(D)(ii).

278. *Id.* § 1842(d)(1)(D)(iii).

279. For these purposes, the term "appropriate Federal banking agency" has the same meaning as in § 3 of FDIA, 12 U.S.C. § 1813(q). IBBEA, 12 U.S.C.A. § 1841(n). For a discussion of the term, see 1 Malloy, Banking Law and Regulation, *supra* note 1, § 1.28-.31.

280. IBBEA, 12 U.S.C.A. § 1842(d)(1)(D)(iv).

281. For these purposes, the "applicant" would include all insured depository institutions that are affiliates of the applicant BHC. *Id.* § 1842(d)(2)(A).

282. *Id.* For these purposes, the term "deposit" has the same meaning as in § 3(*l*) of FDIA, 12 U.S.C. § 1813(*l*). 12 U.S.C.A. § 1842(d)(2)(E). *See generally* FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 429-32 (1986) (construing the term "deposit" under § 1813(*l*)). The term "insured depository institution" has the same meaning as in § 3 of the FDIA, 12 U.S.C. § 1813(c)(2). *See* 12 U.S.C.A. § 1841(n). For a discussion of the term "depository institution," see 1 Malloy, Banking Law and Regulation, *supra* note 1, § 1.6-.9.

283. For these purposes, the "applicant" would include any insured depository institution that is an affiliate of the applicant BHC. IBBEA, 12 U.S.C.A. § 1842(d)(2)(B)(i).

284. *Id.* § 1842(d)(2)(B)(i)-(ii); *see id.* § 1841(o)(3) (providing IBBEA definition of "branch" for BHCA purposes). IBBEA provides certain exceptions to the statewide concentration restriction. The acquisition will be permitted if there is state deposit cap limitation (*see infra* note 287 and accompanying text) that permits a bank or BHC and affiliates thereof to control a greater percentage of total deposits in the target state. 12 U.S.C.A. § 1842(d)(2)(D)(i). Alternatively, the acquisition will be permitted if it is approved by the appropriate state bank supervisor of the host state and if the applicable standard of approval does not have the effect of discriminating against out-of-state banks, BHCs, and subsidiaries thereof. *Id.* § 1842(d)(2)(D)(ii). The term "state bank supervisor" has the same meaning as in § 3 of FDIA, 12 U.S.C. § 1813. 12 U.S.C. § 1841(n).

authority of any state to limit, by statute, regulation, or order, the percentage of the total amount of deposits of insured depository institutions in the state held or controlled by a bank, BHC, and subsidiaries thereof.[285]

2. Compliance with Other Laws

Approval of interstate acquisitions are fully subject to compliance with the Community Reinvestment Act ("CRA").[286] The Fed must also take into account the record of the applicant BHC in complying with applicable state community reinvestment laws.[287]

Similarly, approval of interstate acquisitions are fully subject to applicable antitrust laws.[288] The Fed must also take into account the applicability of any similar state anticompetitive laws.[289]

3. Banks in Default or in Danger of Default

An exception exists for acquisitions of banks in default or in danger of default.[290] Notwithstanding the restrictions discussed above, the Fed may approve an interstate acquisition of one or more banks in default or in danger of default,[291] or an interstate acquisition as to which financial assistance is provided by the FDIC under section 13(c) of FDIA.[292]

4. General State Authority over BHCs

Prior to the enactment of IBBEA, the provisions of the BHCA generally did not affect the authority of states to regulate banks and BHCs subject to their jurisdiction.[293] Aside from the explicit limitations on state authority contained in IBBEA, the BHCA not only confirms this authority, but also explicitly provides that nothing in the act is to be construed as affecting the authority of states and their political

285. IBBEA, 12 U.S.C.A. § 1842(d)(2)(C). These state deposit caps are given effect so long as they do not discriminate against out-of-state banks, BHCs, and subsidiaries thereof. *Id.*

286. *Id.* § 1842(d)(3)(A); *see id.* §§ 2901-2905 (CRA requirements).

287. *Id.* § 1842(d)(3)(B).

288. *Id.* § 1842(d)(4)(A); *cf. id.* § 1841(o)(2) (providing IBBEA definition of "antitrust laws"). On the applicability of antitrust laws to banking enterprises, see 3 Malloy, Banking Law and Regulation, *supra* note 1, § 9.2.4.

289. 12 U.S.C.A. § 1842(d)(4)(B).

290. The terms "default" and "in danger of default" have the same meaning as in § 3 of FDIA, 12 U.S.C. § 1813. IBBEA, 12 U.S.C.A. § 1841(n). For a discussion of these concepts, see 3 Malloy, Banking Law and Regulation, *supra* note 1, § 11.1-.3.

291. IBBEA, 12 U.S.C.A. § 1842(d)(5)(A).

292. *Id.* § 1842(d)(5)(B).

293. *See* 12 U.S.C. § 1846 (1988) (containing pre-IBBEA BHCA provision and preserving state authority). This section was redesignated by IBBEA § 101(b)(1), 12 U.S.C.A. § 1846(a).

subdivisions to subject banks, BHCs, foreign banks, and affiliates thereof to state taxation.[294]

B. *Intracompany Agency Activities*

Pre-IBBEA, questions sometimes arose under state law as to whether or not a depository institution subsidiary of a BHC could undertake transactions as an agent for an affiliate institution.[295] IBBEA seeks to resolve these questions as a natural extension of its authorization of interstate acquisitions by BHCs.

A bank subsidiary is generally permitted to "receive deposits, renew time deposits, close loans, service loans, and receive payments on loans and other obligations as an agent for a depository institution affiliate."[296] A bank acting in this capacity "shall not be considered to be a branch of the affiliate."[297] Any such agency relationship must be consistent with safe and sound banking practices and all applicable regulations of any appropriate federal banking agency.[298]

Similarly, an insured savings association that was an affiliate of a bank on July 1, 1994, is permitted to act as agent for the bank, in the same manner as an insured bank affiliate could act.[299] The agency activities, however, must be conducted only (1) in a state in which the bank is not prohibited from operating a branch,[300] and the savings association maintained an office or branch and conducted business as of July 1;[301] or (2) in a state in which the bank is not expressly prohibited from operating a branch under a state law prohibiting interstate bank mergers,[302] and the savings association maintained a main office

294. 12 U.S.C.A. § 1846(b). This state authority is confirmed "to the extent that such tax or tax method is otherwise permissible by or under the Constitution of the United States or other Federal law." *Id.*; *see also* IBBEA, 12 U.S.C.A. § 1811 note (restating existing law with respect to state taxation of banking enterprises).

295. The issue might involve, for example, whether the institution was, in effect, acting as a branch of its affiliate rather than simply as an agent. *See, e.g.*, Commercial Nat'l Bank of Little Rock v. Board of Governors, 451 F.2d 86, 89-91 (8th Cir. 1971) (discussing use of bank as functional branch of an affiliated bank); *see also Regulation of Banking*, *supra* note 131, at 219-20 (discussing "group banking" as functional equivalent of branching).

296. 12 U.S.C.A. § 1828(r)(1). The question may be raised whether the list of permitted agency activities is intended to be exclusive. According to IBBEA, the list is not to be construed as limiting the authority of the bank to act in such a capacity "under any other provision of law." *Id.* § 1828(r)(4)(A).

297. *Id.* § 1828(r)(2). If, however, the bank acts in an agency capacity under another provision of law (*see infra* note 298), IBBEA does not affect the question of whether or not the bank so acting is to be considered a branch of the principal. *Id.* § 1828(r)(4)(B).

298. *Id.* § 1828(r)(5) (effective Sept. 29, 1994, and amending 12 U.S.C. § 1828).

299. *Id.* § 1828(r)(6).

300. *Id.* § 1828(r)(6)(A)(i).

301. *Id.* § 1828(r)(6)(A)(ii).

302. *Id.* § 1828(r)(6)(B)(i); *see id.* § 1831u(a)(2) (allowing states to elect to prohibit interstate merger transactions); *see also infra* notes 311-12 and accompanying text (discussing permitted state law prohibitions on interstate mergers under IBBEA).

and conducted business as of July 1, 1994.[303] Any such agency relationship must be consistent with safe and sound banking practices and all applicable regulations of any appropriate federal banking agency.[304]

Certain prohibitions apply to agency activities of depository institutions. The institution may not conduct on an agency basis any activity prohibited to it as principal under any applicable federal or state law.[305] By the same token, the institution, as principal, may not authorize an agent to conduct any activity on its behalf that it is prohibited from conducting under applicable federal or state law.[306]

C. *Interstate Bank Mergers*

In addition to allowing for the acquisition of out-of-state banks and opening the door to certain agency activities of depository institutions, recent developments have also eased the process of bank mergers, subject to state law.

1. Bank-Bank Mergers

As of June 1, 1997, the responsible federal agencies are generally permitted to approve interstate merger transactions under the Bank Merger Act ("BMA")[307] between insured banks with different home states, regardless of state law prohibitions.[308] This authority is subject to the election by the home state of a merging bank to enact a law expressly prohibiting merger transactions involving out-of-state

303. 12 U.S.C.A. § 1828(r)(6)(B)(ii).

304. *Id.* § 1828(r)(5).

305. *Id.* § 1828(r)(3)(A).

306. *Id.* § 1828(r)(3)(B).

307. *Id.* § 1828(c). For these purposes, the term "responsible agency" is defined to mean "the agency determined in accordance with [12 U.S.C. § 1828(c)(2)] with respect to a merger transaction." *Id.* § 1831u(f)(10). That is, the responsible agency is for these purposes: (1) with respect to a merger in which a national bank results, the Comptroller of the Currency; (2) with respect to a merger in which a state member bank results, the Board of Governors of the Federal Reserve System; and, (3) with respect to a merger in which an insured state nonmember bank results, the Federal Deposit Insurance Corporation.

In addition, for these purposes the term "interstate merger transaction" is defined to mean "any merger transaction approved pursuant to [12 U.S.C. § 1831u(a)(1)]." *Id.* § 1831u(f)(6). The term "merger transaction" is itself defined to have "the meaning determined under [12 U.S.C. § 1828(c)(3)]," *id.* § 1831u(f)(7), that is, a merger, consolidation, or purchase of substantially all the assets of a target.

308. *Id.* § 1831u(a)(1). For these purposes, the term "home state" is defined to mean:

> (i) with respect to a national bank, the State in which the main office of the bank is located; and
> (ii) with respect to a State bank, the State by which the bank is chartered . . . .

Id. § 1831u(f)(4)(A)(i)-(ii). With respect to a BHC, "home state" has the meaning ascribed to it in the BHCA, as amended by IBBEA. *Id.* § 1831u(f)(4)(B); *see supra* note 272 (quoting BHCA definition).

banks.[309] Any such state law must be applicable to all out-of-state banks.[310] State election has no effect on merger transactions approved before the effective date of the state law.[311]

The responsible federal agency is generally not permitted to approve an interstate merger that would contravene applicable state statutory law requiring a bank to be in existence for a minimum period of time before a merger.[312] The agency, however, may approve such a merger if the target bank has been in existence for at least five years, notwithstanding any longer minimum period specified in the statutory law of the host state.[313]

An interstate merger may be approved by the responsible federal agency prior to June 1, 1997, if the home state of each bank involved in the transaction has already elected to permit interstate mergers.[314] The state law must apply equally to all out-of-state banks,[315] and it must expressly permit such transactions with all out-of-state banks.[316]

In early merger situations, IBBEA permits the host state to impose certain conditions on in-state branches of the resulting bank in an interstate merger transaction.[317] Any such conditions must not have the effect of discriminating against out-of-state banks, BHCs, or subsidiaries thereof.[318] Moreover, the imposition of conditions must not other-

309. 12 U.S.C.A. § 1831u(a)(2)(A)(ii). For these purposes, the term "out-of-state bank" is defined to mean "with respect to any State, a bank whose home State is another State." *Id.* § 1831u(f)(8). On the meaning of "home state" in this regard, see *supra* note 270.

310. *Id.* § 1831u(a)(2)(A)(i).

311. *Id.* § 1831u(a)(2)(B).

312. *Id.* § 1831u(a)(5)(A). For these purposes, a "shell" or "phantom" bank, created to be controlled by the acquiring BHC and to receive an existing target bank, is deemed to have been in existence for as long as the target bank has been. *Id.* § 1831u(a)(6).

313. *Id.* § 1831u(a)(5)(B). For these purposes, the term "host state" is defined to mean "a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch." *Id.* § 1831u(f)(5). On the definition of "home state" for these purposes, see *supra* note 308.

314. 12 U.S.C.A. § 1831u(a)(3)(A).

315. *Id.* § 1831u(a)(3)(A)(i).

316. *Id.* § 1831u(a)(3)(A)(ii).

317. *Id.* § 1831u(a)(3)(B). For purposes of the interstate merger transaction provisions, the term "branch" is defined to mean a domestic branch only. *Id.* § 1831u(f)(3). The term "resulting bank" is defined to mean "a bank that has resulted from an interstate merger transaction under [12 U.S.C. § 1831u]." *Id.* § 1831u(f)(11).

318. *Id.* § 1831u(a)(3)(B)(i). For these purposes, the term "out-of-state bank holding company" is defined to mean "with respect to any State, a bank holding company whose home State is another State." *Id.* § 1831u(f)(9). On the meaning of "home State" in this regard, see *supra* notes 270, 308. The restriction against discriminatory conditions would not apply to a nationwide reciprocal treatment requirement. 12 U.S.C.A. § 1831u(a)(3)(B)(i).

wise be preempted by federal law.[319] Finally, any such conditions must lapse after May 31, 1997.[320]

2. Bank Branch Mergers

An interstate merger transaction may involve the acquisition of a branch[321] of an insured bank without the acquisition of the entire target bank.[322] Such acquisitions will be permitted only if the law of the state in which the target branch is located permits out-of-state banks to acquire a branch without acquisition of the entire target bank.[323]

3. Application and Approval Process

Any interstate merger involving insured depository institutions is subject to the application and approval requirements of the BMA.[324] In addition, IBBEA requires compliance with certain state filing requirements.[325] Material failure to comply with these state filing requirements bars approval of the BMA application.[326] A bank that files a BMA application for an interstate merger transaction must comply with filing requirements of any host state of the resulting bank, to the extent that the requirements do not have the effect of discriminating against out-of-state banks, BHCs, or subsidiaries thereof.[327] The filing requirements must also be similar in effect to any requirement imposed by the host state on out-of-state nonbanking corporations engaging in business in the host state.[328] In addition, the applicant must submit a copy of the BMA application to the state bank supervisor of the host state.[329]

In addition, certain nationwide and statewide concentration limits will apply to interstate merger transactions, except for transactions involving only affiliated banks.[330] First, the responsible federal agency is not permitted to approve an interstate merger transaction if the re-

319. *Id.* § 1831u(a)(3)(B)(ii). On notice requirements for federal bank agency decisions preempting state law, see *id.* § 43.

320. *Id.* § 1831u(a)(3)(B)(iii).

321. Where an interstate transaction involves the acquisition of a branch of an insured bank, without acquisition of the bank itself, the branch will be treated as an insured bank, the home state of which is the state in which the branch is located. *Id.* § 1831u(a)(4)(B).

322. *Id.* § 1831u(a)(4)(A).

323. *Id.*

324. *See id.* § 1828(c)(2).

325. *See id.* § 1831u(b)(1).

326. *Id.* § 1831u(b)(1)(B).

327. *Id.* § 1831u(b)(1)(A)(i)(I).

328. *Id.* § 1831u(b)(1)(A)(i)(II). In other words, the filing requirement applicable to the out-state-bank must essentially be similar to generally applicable corporate law provisions requiring registration of foreign corporations doing business within the state. *See, e.g.*, N.Y. Bus. Corp. Law art. 13 (McKinney 1986) (foreign corporations).

329. 12 U.S.C.A. § 1831u(b)(1)(A)(ii).

330. *Id.* § 1831u(b)(2)(E).

sulting bank[331] would control, upon consummation of the transaction, more than ten percent of the total amount of deposits of insured depository institutions in the United States.[332] Second, as to transactions other than initial entry into the host state, the agency is not permitted to approve a transaction if (1) any bank involved in the transaction[333] has a branch in any state in which any other bank involved in the transaction has a branch,[334] and (2) upon consummation of the proposed transaction, the resulting bank would control thirty percent or more of the total amount of deposits of insured depository institutions in any such state.[335] These nationwide and statewide concentration provisions do not affect the authority of any state to limit, by statute, regulation, or order, the percentage of the total amount of deposits of insured depository institutions in the state held or controlled by a bank, BHC, and subsidiaries thereof.[336]

Approval of an application for an interstate merger is subject to specified considerations identified in IBBEA. First, if the merger would give the resulting bank a branch or bank affiliate in a state in which the acquiring bank previously had no branch or bank affiliate, the responsible federal agency would be required to apply the CRA in its consideration of the application.[337] It would also be required to take into account the most recent written CRA evaluation of any bank that would be an affiliate of the resulting bank.[338] The agency must also take into account the record of any applicant bank in complying with applicable state community reinvestment laws.[339]

Second, the responsible federal agency must take into account adequacy of capital and management. The agency is permitted to approve an interstate merger transaction only if each bank involved is adequately capitalized as of the date on which the application is

331. For these purposes, the "applicant" would include all insured depository institutions that are affiliates of the resulting bank. *Id.* § 1831u(b)(2)(A).
332. *Id.*
333. For these purposes, the "bank" would include any insured depository institution that is an affiliate of the bank. *Id.* § 1831u(b)(2)(B)(i).
334. *Id.*
335. *Id.* § 1831u(b)(2)(B)(ii). IBBEA provides certain exceptions to this statewide concentration restriction. The transaction will be permitted if there is state deposit cap limitation (*see infra* note 336 and accompanying text) that permits a bank or BHC and affiliates thereof to control a greater percentage of total deposits in the host state. *Id.* § 1831u(b)(2)(D)(i). Alternatively, the transaction will be permitted if it is approved by the appropriate state bank supervisor of the host state and if the applicable standard of approval does not have the effect of discriminating against out-of-state banks, BHCs, and subsidiaries thereof. *Id.* § 1831u(b)(2)(D)(ii).
336. *Id.* § 1831u(b)(2)(C). These state deposit caps are given effect so long as they do not discriminate against out-of-state banks, BHCs, and subsidiaries thereof. *Id.*
337. *Id.* § 1831u(b)(3)(A).
338. *Id.* § 1831u(b)(3)(B).
339. *Id.* § 1831u(b)(3)(C).

filed.[340] It must also determine that the resulting bank will continue to be adequately capitalized and adequately managed upon consummation of the transaction.[341]

Third, interstate transactions remain fully subject to applicable antitrust laws.[342] The agency must also take into account the applicability of any similar state anticompetitive laws.[343]

4. Banks in Default or in Danger of Default

A general exception exists for interstate merger transactions involving banks in default or in danger of default. Notwithstanding the restrictions discussed above,[344] the responsible federal agency may approve an application for an interstate merger in which one or more banks in default or in danger of default are involved, or as to which financial assistance is provided by the FDIC under section 13(c) of FDIA.[345]

5. Operations of Resulting Bank

If the interstate merger transaction is approved, the charters of all banks involved, except for the resulting bank, must be surrendered, upon request, to the federal or state chartering authority.[346] Subject to the approval of the appropriate federal banking agency, the resulting bank may retain and operate, as a main office or branch, any office that any bank involved in the transaction was operating immediately before the merger transaction.[347] In addition, after consummation of the transaction the resulting bank is permitted to establish, acquire, or

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340. *Id.* § 1831u(b)(4)(A). For these purposes, the term "adequately capitalized" has the same meaning as in 12 U.S.C. § 1831o(b)(1)(B). *See id.* § 1831u(f)(1) (providing IBBEA definition of term).

341. *Id.* § 1831u(b)(4)(B).

342. *Id.* § 1831u(c)(2)(A); *cf. id.* § 1831u(f)(2) (defining "antitrust laws" for these purposes). On the applicability of antitrust laws to banking enterprises, see 3 Malloy, Banking Law and Regulation, *supra* note 1, § 9.2.4.

343. 12 U.S.C.A. § 1831u(c)(2)(B).

344. Specifically, in these situations IBBEA waives the following requirements: (1) state election to prohibit interstate merger transactions (*see supra* notes 311-12 and accompanying text); (2) branch acquisition provisions (*see supra* notes 321-23 and accompanying text); (3) state law provisions concerning required minimum years of existence prior to merger (*see supra* notes 314-15 and accompanying text); (4) compliance with state filing requirements (*see supra* notes 327-29 and accompanying text); (5) concentration limits (*see supra* notes 333-38 and accompanying text); (6) community reinvestment compliance (*see supra* note 339 and accompanying text); and (7) adequacy of capital and management (*see supra* notes 340-41 and accompanying text). 12 U.S.C.A. § 1831u(e).

345. 12 U.S.C.A. § 1831u(e); *see also id.* § 1823(c) (describing financial assistance under FDIA).

346. *Id.* § 1831u(b)(5).

347. *Id.* § 1831u(d)(1). IBBEA, however, has required the federal banking agencies to promulgate regulations, effective June 1, 1997, prohibiting any out-of-state bank from using any authority to engage in interstate branching primarily for the purpose of deposit production. *Id.* § 1835a.

operate additional branches at any location where any involved bank could have done so under federal or state law, if it had not been involved in the transaction.[348]

6. Continuing State Authority

The interstate merger transaction provisions do not affect the authority of any state or political subdivision thereof to adopt, apply, or administer any tax or method of taxation to any bank, BHC, foreign bank, or any affiliate thereof.[349] The tax or tax method, however, must be one that is otherwise permissible under the U.S. Constitution or other federal law.[350] In addition, in the case of an in-state branch of an out-of-state bank resulting from an interstate merger transaction, the value of the bank's shares may be subjected to any bank shares tax of the host state or its political subdivisions, on a proportional basis.[351]

As to supervisory concerns, under IBBEA, the states retain the authority to supervise, regulate, and examine their respective state-chartered banks.[352] Nor does IBBEA limit the right of a state to determine the authority of its state-chartered banks to establish and maintain branches.[353] A host state may also impose notification or reporting requirements on branches of out-of-state banks.[354]

Furthermore, the interposition of IBBEA does not necessarily preempt previously imposed conditions and commitments imposed on out-of-state banks by host states.[355] If, in connection with approval of a pre-IBBEA acquisition of a bank by an out-of-state BHC, the home state of the target bank imposed conditions or the BHC made commitments to the home state, the state may continue to enforce those conditions or commitments.[356] Indeed, the state may enforce the conditions or commitments to the same extent even with respect to an affiliated successor company that controls an in-state bank or branch as a result of an interstate merger transaction.[357]

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348. *Id.* § 1831u(d)(2).

349. *Id.* § 1831u(c)(1)(A); *see also id.* § 1811 note (restating existing law with respect to state taxation of banking enterprises).

350. *Id.* § 1831u(c)(1)(A).

351. *Id.* § 1831u(c)(1)(B).

352. *Id.* § 1831u(c)(3)(B). On the coordination of examination authority among host and home states, see *id.* § 1820(h).

353. *Id.* § 1831u(c)(3)(A).

354. *Id.* § 1831u(c)(4). Such requirements must not discriminate against out-of-state banks or BHCs. *Id.* § 1831u(c)(4)(A). They may be subject to preemption by federal laws other than the IBBEA on the same subject. *See id.* § 1831u(c)(4)(B) (permitting states under IBBEA to impose notification and reporting requirements if "not preempted by any Federal law").

355. *See id.* § 1831u(d)(3) (regarding rules governing prior conditions and commitments). On notice requirements for federal bank agency decisions preempting state law, see *id.* § 43.

356. *Id.* § 1831u(d)(3)(A)-(B).

357. *Id.* § 1831u(d)(3).

7. Related Provisions Concerning Branches

One effect of the interstate merger transaction provisions will be to create new interstate patterns of branch ownership and control. IBBEA therefore includes certain conforming amendments to other provisions of federal law concerning branches.[358]

a. *The National Bank Act*

Domestic branching by national banks is governed by 12 U.S.C. § 36, a provision of the National Bank Act ("NBA"). IBBEA amends this provision of the NBA in several respects.[359]

Under the amended section 36, a national bank that results from an interstate merger transaction is permitted to maintain and operate a branch in a host state, in accordance with the interstate merger transaction provisions.[360] Effective June 1, 1997, a national bank generally may acquire, establish, or operate a branch in a host state (including a host state in which it already has a branch) only if authorized by the amended section 36, the emergency acquisition provisions of FDIA,[361] or the new interstate merger transactions provision.[362] If a national bank relocates its main office from one state to another after May 31, 1997,[363] the bank may retain and operate its branches within its former home state only to the extent that the bank would be authorized to acquire, establish, or commence operation of a branch in such a state.[364]

In general, any host state branch of an out-of-state national bank will be subject to host state laws concerning community reinvestment, consumer protection, fair lending, and establishment of intrastate branches to the same extent as a state-chartered bank would be.[365]

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358. *See id.* § 36(d)-(f).

359. *See id.* § 36(d)-(f) (redesignating former § 36(d)-(h) as § 36(h)-(*l*)).

360. *Id.* § 36(d). IBBEA, however, has required the federal banking agencies to promulgate regulations, effective June 1, 1997, prohibiting any out-of-state bank from using any authority to engage in interstate branching primarily for the purpose of deposit production. *Id.* § 1835a.

361. *See id.* § 1823(f), (k).

362. *Id.* § 36(e)(1).

363. *Cf. id.* § 30(c) (coordinating NBA relocation provision with new § 36(e)(2) governing retention of branches); *see infra* text at note 366 (discussing retention of branch provision).

364. 12 U.S.C.A. § 36(e)(2). In determining whether the national bank would have been authorized "to acquire, establish, or commence to operate" such a branch, the provision contemplates a situation in which:

> (A) the bank had no branches in the former home state [i.e., where it had previously operated only a main office in the former home state]; or
> (B) the branch resulted from either an interstate merger transaction under section 1831u, or a transaction after May 31, 1997, pursuant to which the bank received financial assistance from the FDIC under section 1823(c).

Id. § 36(e)(2)(A)-(B).

365. *Id.* § 36(f)(1)(A). Enforcement of these state laws with respect to national bank branches is the responsibility of the Comptroller of the Currency, not the appli-

This rule, however, does not apply if federal law preempts the application of any such state law to a national bank.[366] The rule also does not apply if the Comptroller of the Currency determines that application of any such state law would have a discriminatory effect on the national bank branch, as compared to its effect on branches of state-chartered banks.[367] All other laws of the host state, except for the application or administration of any tax or method of taxation,[368] apply to the in-state branches of an out-of-state national bank to the same extent such laws would apply if the the in-state branch were itself a national bank with its main office in the host state.[369]

b. *The Federal Deposit Insurance Act*

FDIA has been amended to apply to branches of state nonmember banks in host states rules that correspond to those applicable to branches of national banks in host states.[370] Thus, such state nonmember banks will be subject to corresponding exclusive rules with respect to the acquisition, establishment, and operation of host state branches,[371] retention of branches upon out-of-state relocation of the main office,[372] and applicability of host state law to the activities of the in-state branch.[373] In addition, FDIA has been amended to prohibit an in-state branch of an out-of-state state nonmember bank from conducting any activity that is not permissible for a state-chartered bank in the host state.[374]

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cable state authority. *Id.* § 36(f)(1)(B). Thus, intrastate national bank branching within the host state will presumably be subject to "reference over" to host state laws, much as intrastate national bank branching within the home state is under 12 U.S.C. § 36(c).

366. *Id.* § 36(f)(1)(A)(i). This provision does not affect the generally applicable legal standards with respect to preemption of the application of state law to national banks. *Id.* § 36(f)(3). On notice requirements for federal bank agency decisions preempting state law, see *id.* § 43.

367. *Id.* § 36(f)(1)(A)(ii).

368. On the administration of host state tax law or method of taxation, see *supra* notes 349-51 and accompanying text.

369. 12 U.S.C.A. § 36(f)(2).

370. *See id.* §§ 1828(d)(3), 1831a(j).

371. *Cf. supra* notes 363-64 and accompanying text (discussing the NBA provision). *Compare* IBBEA, 12 U.S.C.A. § 36(e)(1) (NBA provision) *with* § 1828(d)(3)(A) (corresponding FDIA provision applicable to state nonmember banks).

372. *Cf. supra* notes 365-66 and accompanying text (discussing the NBA provision). *Compare* 12 U.S.C.A. § 36(e)(2) (NBA provision) *with* § 1828(d)(3)(B) (applying corresponding FDIA provision to state nonmember banks).

373. *Cf. supra* note 367 and accompanying text (discussing the NBA provision). *Compare* 12 U.S.C.A. § 36(f)(1)(A) (NBA provision) *with* § 1831a(j)(1) (applying corresponding FDIA provision to state nonmember banks). The limitations and exceptions applicable to in-state branches of out-of-state national banks, see *supra* notes 368-71 and accompanying text, have no corresponding provision in FDIA.

374. IBBEA, 12 U.S.C.A. § 1831a(j)(2).

c. *The National Bank Consolidation and Merger Act*

The National Bank Consolidation and Merger Act[375] has been revised in light of the interstate merger transaction provisions. It now provides express authority for a consolidation or merger by a national bank with an out-of-state bank[376] if the consolidation or merger is approved pursuant to the interstate merger transaction provisions.[377] This authority is not available for any consolidation or merger before June 1, 1997, unless the home state[378] of each bank involved in the transaction has an early interstate merger transaction provision.[379]

d. *Home Owners' Loan Act*

IBBEA amends HOLA[380] to preserve state constitutional homestead provisions and to implement statutes that exempt the homestead of any person from foreclosure or forced sale for the payment of debts unrelated to the homestead property.[381] This provision also applies to post-IBBEA amendments to any state constitution or statutory provision in effect on the date of enactment of IBBEA.[382]

D. *State "Opt-in" Provisions Permitting De Novo Interstate Branching*

IBBEA provisions previously discussed have the effect of permitting interstate branching as an indirect effect of an interstate merger, as a result of which the existing branches of an out-of-state target bank would become the interstate branches of the resulting bank. Other IBBEA provisions permit interstate branching directly, through the establishment of de novo interstate branches.[383]

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375. *See id.* §§ 215, 215a-1.

376. For these purposes, the term "out-of-state bank" has the same meaning as in 12 U.S.C.A. § 1831u(f)(8). *Id.* § 215a-1(c); *see supra* note 309 (discussing meaning of term).

377. *Id.* § 215a-1(a).

378. For these purposes, the term "home state" has the same meaning as in *Id.* § 1831u(f)(4)(A)(i)-(ii). *Id.* § 215a-1(c); *see supra* note 308 and accompanying text (discussing meaning of term).

379. 12 U.S.C.A. § 215a-1(b); *see id.* § 1831u(a)(3) (providing state early interstate merger transaction provision); *see also supra* notes 308-13 and accompanying text (discussing provision).

380. IBBEA, 12 U.S.C.A. § 1462a(f) (redesignating former § 1462a(f)-(i) as § 1462a(g)-(j)).

381. *Id.* § 1462a(f).

382. *Id.*

383. *Id.* §§ 36(g), 1828(d)(4). On the coordination of examination authority with respect to branches established under § 36(g) or § 1828(d)(4), see *id.* § 1820(h). IBBEA, however, has required the federal banking agencies to promulgate regulations, effective June 1, 1997, prohibiting any out-of-state bank from using any authority to engage in interstate branching primarily for the purpose of deposit production. *Id.* § 1835a.

1. National Bank Branching

In general, the Comptroller of the Currency has the authority to approve the establishment and operation of a de novo national bank branch[384] in a state other than the home state[385] of the bank in which the bank does not maintain a branch.[386] This authority, however, is available only if the host state[387] has in effect a law that applies equally to all banks and that expressly permits all out-of-state banks to establish de novo branches in the state.[388]

In addition, approval of a de novo interstate national bank branch is subject to certain specified conditions. First, the application is subject to the same requirements and conditions applicable to interstate merger transactions concerning state filing requirements,[389] community reinvestment,[390] and adequacy of capital and management.[391]

Second, as to each de novo interstate national bank branch that is approved under this authority, the branch is subject to state and federal antitrust laws[392] and limitations on the operation of additional branches,[393] as such laws and limitations would apply to a branch resulting from an interstate merger transaction.[394]

2. Insured State Nonmember Bank Branching

FDIA has been amended to authorize the FDIC to approve de novo interstate branches of insured state nonmember banks, subject

384. For these purposes, the term "de novo branch" is defined to mean a national bank branch that:

(i) is originally established by the national bank as a branch; and

(ii) does not become a branch of such bank as a result of—

(I) the acquisition by the bank of an insured depository institution or a branch of an insured depository institution; or

(II) the conversion, merger, or consolidation of any such institution or branch.

Id. § 36(g)(3)(A)(i)-(ii).

385. For these purposes, the term "home state" is defined to mean "the State in which the main office of a national bank is located." *Id.* § 36(g)(3)(B).

386. *Id.* § 36(g)(1).

387. For these purposes, the term "host state" is defined to mean "with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch." *Id.* § 36(g)(3)(C).

388. *Id.* § 36(g)(1)(A)(i)-(ii).

389. *See id.* § 1831u(b)(1); *see also supra* notes 327-31 and accompanying text (discussing state filing requirements).

390. *See* IBBEA, 12 U.S.C.A. § 1831u(b)(3); *see also supra* notes 339-41 and accompanying text (discussing community reinvestment requirements).

391. IBBEA, 12 U.S.C.A. § 36(g)(2)(A); *see id.* § 1831u(b)(4); *see also supra* notes 342-43 (discussing adequacy of capital and management).

392. *See* IBBEA, 12 U.S.C.A. § 1831u(c); *see also supra* notes 342-43 and accompanying text (discussing applicability of antitrust laws).

393. *See* 12 U.S.C.A. § 1831u(d)(2); *see also supra* note 350 and accompanying text (discussing the limitations).

394. 12 U.S.C.A. § 36(g)(2)(B).

to rules that correspond to those applicable to national banks.[395] Thus, approval of such branches will be subject to corresponding rules requiring a state "opt-in" statute expressly permitting such branches.[396] The branches will be subject to compliance with the requirements and conditions applicable to interstate merger transactions concerning state filing requirements, community reinvestment, and adequacy of capital and management.[397] State and federal antitrust laws and limitations on the operation of additional branches will also apply to the approved de novo interstate branch.[398]

E. *Branching by Foreign Banks*

Interstate banking has also been changed with respect to branching by foreign banks. The policy of "national treatment"[399] of foreign banks has been constrained by stricter requirements under both FDICIA and IBBEA.

1. Effect of the 1991 Amendments to the IBA

Federal policy with respect to branching by foreign banks has become a controversial issue in recent years. The International Banking Act of 1978 ("IBA")[400] as originally enacted was intended to implement a policy of "national treatment" for foreign banks seeking entry into the U.S. market. Following the BCCI scandal,[401] however, the IBA was amended in several significant respects by FDICIA.[402] FDICIA had several significant effects on international banking.

First, FDICIA affects the capital supervision rules applicable to foreign banks operating within the United States. FDICIA requires the

395. *See id.* § 1828(d)(4).

396. *Cf. supra* notes 386-88 and accompanying text (discussing the NBA provision). *Compare* IBBEA, 12 U.S.C.A. § 36(g)(1) (NBA provision) *with* § 1828(d)(4)(A) (applying corresponding FDIA provision to de novo interstate branches of insured state nonmember banks).

397. *Cf. supra* notes 389-91 and accompanying text (discussing the NBA provision). *Compare* IBBEA, 12 U.S.C.A. § 36(g)(1)(B), (2)(A) (NBA provision) *with* § 1828(d)(4)(A)(ii), (B)(i) (applying corresponding FDIA provision to de novo interstate branches of insured state nonmember banks).

398. *Cf. supra* notes 392-94 and accompanying text (discussing the NBA provision). *Compare* IBBEA, 12 U.S.C.A. § 36(g)(2)(B) (NBA provision) *with* § 1828(d)(4)(B)(ii) (applying corresponding FDIA provision to approved de novo interstate branches of insured state nonmember banks).

399. *See* Conference of State Bank Supervisors v. Conover, 715 F.2d 604, 606-07 (D.C. Cir. 1983) (discussing the implications of the policy of national treatment under the IBA), *cert. denied*, 466 U.S. 927 (1984); *see also* Regulation of Banking, *supra* note 131, at 841-43 (discussing national treatment).

400. 12 U.S.C. § 3101.

401. *See generally* Raj K. Bhala, Foreign Bank Regulation after BCCI (1994) (discussing the BCCI scandal and its effect on U.S. regulation of international banking); *see also* Daniel M. Laifer, Note, *Putting the Super Back in the Supervision of International Banking, Post-BCCI*, 60 Fordham L. Rev. S467, S471-78 (1992) (discussing effects of FDICIA on U.S. regulation).

402. FDICIA, 12 U.S.C. § 1828 note.

federal banking agencies to revise their risk-based capital standards for insured depository institutions to ensure, among other things, that these standards take account of interest-rate risk, concentration of credit risk, and the risks of nontraditional activities.[403] The agencies are also required to discuss the development of comparable standards with members of the supervisory committee of the Bank for International Settlements ("BIS").[404]

Second, FDICIA prohibited payments on foreign deposits in connection with the resolution of bank failures. FDICIA prohibits the agencies from making, directly or indirectly, any payment or providing any financial assistance in connection with any insured depository institution that would have the direct or indirect effect of satisfying any claim, in whole or in part, against the institution for its obligations on foreign deposits.[405] This prohibition does not apply to "open bank assistance" provided by the FDIC to an institution under 12 U.S.C. § 1823(c).[406] Nor does the prohibition bar a Federal Reserve bank from making advances or other extensions of credit consistent with the Federal Reserve Act (so-called discount window lending).[407]

Third, FDICIA significantly altered the rules governing the establishment and operation of federal branches and agencies of foreign-based banks. Under FDICIA, the Comptroller is required, in considering any application for approval of an initial federal branch or agency, to include any condition imposed by the Fed as a condition for the approval of the application.[408] The Comptroller is also required to coordinate examinations of such branches and agencies with examinations conducted by the Fed, to the extent possible, to participate in any simultaneous examinations of U.S. operations of foreign banks requested by the Fed.[409] Furthermore, in considering any application

403. *Id.*

404. *Id.* § 1828 note. On the BIS and its capital adequacy standards, see Regulation of Banking, *supra* note 131, at 844-45, 850-57. FDICIA also mandates a study and congressional report by the Secretary of the Treasury and the Fed, in consultation with the other federal bank agencies and the Attorney General, that would take into account, among other things, differences in accounting and regulatory practices and the difficulty of assuring that foreign banks meet U.S. capital and management standards and are adequately supervised. FDICIA, 12 U.S.C. § 3102 note. In addition, FDICIA mandated a study and congressional report by the Fed and the Secretary of the Treasury analyzing the BIS capital standards, foreign regulatory capital standards that apply to foreign banks conducting banking operations in the United States, and the relationship of the BIS and foreign standards to risk-based capital and leverage requirements for U.S. banks. 12 U.S.C. § 3105(j)(1). The report is also to establish guidelines for adjustments to be used by the Fed in converting data on the capital of these foreign banks to the equivalent risk-based capital and leverage requirements for U.S. banks for the purpose of determining whether foreign bank capital levels are equivalent to that imposed on U.S. banks. *Id.* § 3105(j)(2).

405. 12 U.S.C.A. § 1831r(a).

406. *Id.* § 1831r(b).

407. *Id.* § 1831r(c).

408. *Id.* § 3102(a)(2).

409. *Id.* § 3102(b).

to establish an additional federal branch or agency of a foreign-based bank, the Comptroller is required to provide the Fed with notice and opportunity for comment on the application.[410]

In this regard, the Fed's supervisory authority was expanded. For the first time, the Fed was given authority (in addition to the Comptroller) to approve the establishment of any branch or agency or the acquisition or control of any commercial lending company by a foreign-based bank.[411] The Fed also has the authority, under specified circumstances, to order the closing of any state-licensed office of a foreign-based bank[412] and to recommend to the Comptroller the termination of the license of any federally-licensed office of a foreign-based bank.[413] FDICIA also gave the Fed broad authority to examine U.S. branches, agencies, and affiliates of foreign-based banks, whether state or federally approved.[414] Of considerable significance to the European Community was the additional provision requiring special examination fees to be paid by foreign bank operations for examinations conducted by the federal banking agencies.[415]

Fourth, FDICIA imposed limitations on the powers of state-licensed branches and agencies of foreign banks. FDICIA prohibits a state licensed branch or agency from engaging in any type of activity that is not permissible for a federally licensed branch, unless the Fed determines that the activity is consistent with sound banking practice, and, in the case of an insured branch, the FDIC determines that the activity would pose no significant risk to the deposit insurance fund.[416] In addition, such branches and agencies are subject to the same limits on lending to a single borrower that apply to federally licensed branches and agencies.[417]

Fifth, FDICIA imposed new requirements on the establishment and supervision of U.S. representative offices of foreign banks.[418] Prior to FDICIA, a foreign bank operating a representative office in the United States was only required to register the office with the Department of the Treasury.[419] Under the FDICIA, establishment of a representative office now requires prior approval of the Fed.[420] The Fed

410. *Id.* § 3102(h)(2).
411. *Id.* § 3105(d)(1), (g).
412. *Id.* § 3105(e)(1)-(4), (g).
413. *Id.* § 3105(e)(5).
414. *Id.* § 3105(b)(1).
415. *Id.* §§ 3105(c)(1)(D), 3107(c).
416. *Id.* § 3105(h)(1).
417. *Id.* § 3105(h)(2). In fact, FDICIA allows the Fed or the state supervisory authority to impose more stringent restrictions than apply to federally licensed branches and agencies. *Id.* § 3105(h)(3).
418. On the limited role and functions of representative offices, see Regulation of Banking, *supra* note 131, at 859.
419. 12 U.S.C. § 3107.
420. *Id.* § 3107(a). Compliance with any applicable state law requirements is still required. *Id.* § 3107(d).

also has the authority to examine representative offices[421] and to terminate the activities of any representative office.[422]

Sixth, FDICIA sought to encourage greater cooperation with foreign supervisors. FDICIA explicitly authorizes disclosure of supervisory information by the federal bank agencies to foreign bank regulatory or supervisory authorities.[423]

Seventh, FDICIA restricted retail deposit-taking by foreign banks. To accept or maintain deposit accounts with balances of less than $100,000, foreign banks are required to establish one or more U.S. banking subsidiaries for that purpose and to obtain federal deposit insurance for any such subsidiary.[424] If the foreign bank had a U.S. branch that was an insured branch prior to FDICIA, however, the branch was permitted to continue to accept or maintain retail deposits.[425]

Eighth, FDICIA created new penalties applicable specifically to U.S. operations of foreign banks. FDICIA established authority for civil money penalties (administrative fines) to be assessed against any foreign bank, and any office or subsidiary of a foreign bank, that violates, and any individual who participates in a violation of, any provision of the IBA, or any regulation prescribed or order issued under the act.[426] In addition, FDICIA established criminal penalties for the knowing violation of any provision of the IBA or any regulation or order issued by a federal banking agency under the act, with the intent to deceive, to gain financially, or to cause financial gain or loss to any person.[427]

The increased burdens placed upon U.S. operations of foreign banks by FDICIA provoked criticism[428] and exacerbated the uncertainty over the question whether U.S. banking regulation was suffi-

421. *Id.* § 3107(c).

422. *Id.* § 3107(b).

423. *Id.* § 3109(a).

424. *Id.* § 3104(d)(1). Thus, any foreign-based bank interested in the U.S. retail deposit market must conduct its U.S. operations through a subsidiary. In this regard, FDICIA also mandated a study and congressional report by the Secretary of the Treasury and the Fed, in consultation with the other federal bank agencies and the Attorney General, to determine whether foreign banks should be required to conduct banking operations in the United States through subsidiaries rather than branches. *Id.* § 3102 note. IBBEA amended this provision to indicate that insured banks in U.S. territories are not subject to the retail deposit-taking rule. *Id.* § 3104(d)(3).

425. IBBEA, 12 U.S.C.A. § 3104(d)(2).

426. *Id.* § 3110.

427. *Id.* § 3111.

428. *See, e.g.*, Cynthia C. Lichtenstein, *U.S. Restructuring Legislation: Revising the International Banking Act of 1978, For the Worse?*, 60 Fordham L. Rev. S37 (1992) (criticizing FDICIA and other legislation which revised the IBA); *see* Bhala, *supra* note 403, at 10.

ciently reciprocal to allow entry by U.S. banks into the European Union's Community-wide banking market.[429]

2. Effect of IBBEA on Interstate Operations of Foreign Banks

It is against this statutory background that IBBEA undertook to amend the IBA. Two objectives may be discerned in the amendment: dealing with the practical implications of the 1991 amendments to the IBA[430] and readjusting the IBA in light of the changes in interstate banking and branching instituted by IBBEA itself.[431]

IBBEA amends the IBA rules governing interstate operations of foreign banks.[432] In general, it subjects the establishment of interstate operations of a federal branch or agency of a foreign bank to the same rules that would apply if the foreign bank were a national bank seeking to branch interstate.[433] Similarly, IBBEA subjects the establishment of interstate operations of a state-licensed branch or agency of a foreign bank to the same rules that would apply if the foreign bank were a state bank seeking to branch interstate.[434] These rules are generally preemptive and exclusive.[435]

Operation of any interstate branch or agency of a foreign bank is subject to the same IBBEA rules governing domestic branches of national and state banks resulting from interstate merger transactions.[436]

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429. *See* Regulation of Banking, *supra* note 131, at 869-70 (discussing the reciprocity requirement).

430. *See, e.g.*, IBBEA, 12 U.S.C.A. § 3105 note (moratorium on examination fees under § 3105(c)(1)(D)); *cf.* note 417 and accompanying text (discussing 1991 imposition of examination fees).

431. *See, e.g.*, IBBEA, 12 U.S.C.A. § 3103(a)(1) (subjecting U.S. interstate branching and agency operations of foreign banks to the rules of 12 U.S.C. §§ 36(g), 1831u).

432. For a discussion of the pre-IBBEA rules under the IBA for interstate operations of foreign banks, see Conference of State Bank Supervisors v. Conover, 715 F.2d 604, 615-17 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 927 (1984); *see also* Regulation of Banking, *supra* note 131, at 904-19 (discussing *Conference* and § 3103).

433. IBBEA, 12 U.S.C.A. § 3103(a)(1); *cf. supra* notes 307-12, 384-94, and accompanying text (discussing interstate branching rules applicable to national banks). On the criteria for determining approval of interstate operations of a foreign bank's federal branch or agency, see 12 U.S.C.A. § 3103(a)(3)(A)-(C).

434. 12 U.S.C.A. § 3103(a)(2); *cf. supra* notes 307-23, 395-98, and accompanying text (discussing interstate branching rules applicable to state banks). On the criteria for determining approval of interstate operations of a foreign bank's state branch or agency, see 12 U.S.C.A. § 3103(a)(3)(A)-(C).

435. *See* 12 U.S.C.A. § 3103(a)(5), which provides: "Except as provided in this section, a foreign bank may not, directly or indirectly, acquire, establish, or operate a branch or agency in any State other than the home State of such bank." *But see id.* § 3103(a)(7)(A)-(B) (providing additional authority for interstate operations of foreign banks where a host state expressly permits the operations, and the branch deposit operations are limited to international or foreign-related deposits). On the definition of "home State" for these purposes, see *id.* § 3103(a)(9). On the rules for determining the home state of a foreign bank for purposes of the interstate branch and agency rules of IBBEA, see *id.* § 3103(c)(1)-(2).

436. *Id.* § 3103(a)(4); *see supra* notes 346-48 and accompanying text (discussing rules governing operation of domestic interstate branches under § 1831u). In addi-

An additional, potentially controversial requirement, however, may apply to foreign banks. FDICIA required foreign banks entering the U.S. retail deposit market to operate through a separately chartered U.S. subsidiary rather than a direct branch.[437] IBBEA extends this requirement, under certain specified circumstances, to interstate operations of any foreign bank.[438] If the Fed or the Comptroller finds that, in light of differing regulatory or accounting standards in a foreign bank's home country, adherence by the bank to applicable U.S. capital requirements could only be verified if the foreign bank's U.S. banking activities were carried out in a separate U.S. subsidiary, the agencies[439] have the authority to require that the foreign bank (or the company controlling the foreign bank) establish a U.S. subsidiary to carry out the interstate operations.[440] This provision potentially moves the United States further away from the original policy of national treatment for foreign bank operations in the United States that underlies the IBA.[441] Because most members of the European Union participate in the BIS capital adequacy guidelines,[442] the degree of potential confrontation with our European allies in this regard may be minimized. In addition, IBBEA grandfathers foreign bank operations in place on the day before the enactment of IBBEA.[443] Nevertheless,

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tion, a U.S. branch or agency of a foreign bank is not permitted to manage, through a managed or controlled office located outside the United States, any type of activity not permitted to be managed by a domestic bank through a branch or subsidiary located outside the United States. 12 U.S.C.A. § 3105(k)(1). This prohibition is effective 180 days after the enactment of IBBEA. 12 U.S.C.A. § 3105 note.

437. *See supra* notes 424-25 and accompanying text.

438. 12 U.S.C.A. § 3103(a)(6). IBBEA, however, clarifies the impact of the new rules in several respects. A foreign bank that has a U.S. bank subsidiary is still eligible to establish a direct federal or state branch or agency, in accordance with the IBBEA rules. *Id.* § 3103(d)(1). Similarly, a U.S. bank that is a subsidiary of a foreign bank with a direct federal or state branch or agency is itself still eligible to establish a federal or state branch or agency, in accordance with IBBEA rules. *Id.* § 3103(d)(2).

439. If the foreign bank intended to carry out interstate branching or agency activities under a federal license, both the Fed and the Comptroller would have the authority to make the finding. *Id.* § 3103(a)(6). If the foreign bank intended to carry out interstate branching or agency activities under a state license, the Fed alone would have the authority to make the finding. *Id.*

440. *Id.*

441. This movement away from the policy of national treatment is underscored by IBBEA provisions requiring the agencies to "pursue the objective of affording equal competitive opportunities to foreign and United States banking organizations in their United States operations, [and] ensur[ing] that foreign banking organizations do not receive an unfair competitive advantage over United States banking organizations." *Id.* § 3104(a) (directive to Comptroller and FDIC under IBA as amended by IBBEA); *see also* 12 U.S.C.A. § 3104 note (requiring review of regulations by federal banking agencies and revision of regulations under § 3104 to equalize competitive opportunities for U.S. and foreign banks). IBBEA also clarifies that domestic consumer protection laws apply to foreign banks with U.S. operations. 12 U.S.C.A. § 3106a(b)(1)(A), (2)(A).

442. *See* Regulation of Banking, *supra* note 131, at 850-57 (discussing the BIS guidelines).

443. IBBEA, 12 U.S.C.A. § 3103(b).

depending upon the U.S. agency practice that emerges under this provision, the United States banking market may become significantly less transparent to foreign banks.

It should be kept in mind, however, that IBBEA is not intended to be a purely confrontational exercise with respect to foreign bank operations in the United States. One salutary effect of the act is its moratorium on the examination fee provisions included in the IBA by the FDICIA amendments.[444] During a three-year period beginning July 25, 1994, the examination fee provisions of FDICIA will not apply to examinations of U.S. branches, agencies, or affiliates of foreign banks,[445] or to examinations of U.S. representative offices of foreign banks.[446]

F. *Increased Oversight of Community Involvement by Interstate Banking Enterprises*

An increasingly controversial issue in banking regulation is the degree to which banking enterprises should be required to involve themselves in the economic well-being and development of local communities served by their operations. Some of these concerns are addressed by the recently enacted CDRIA.[447] Among other things, the act is intended "to create a Community Development Financial Institutions Fund to promote economic revitalization and community development through investment in and assistance to Community Development Financial Institutions."[448] These private institutions will focus on financial activities and transactions intended to promote community development.[449] Such legislative efforts, however, are relatively specialized, and they avoid rather than resolve the underlying controversy. Namely, if banking enterprises enjoy a relatively exclusive advantage in aggregating credit and lendable resources, to what extent should they be required to serve their local communities? In this regard, IBBEA presents a number of limited responses.

1. Branch Closures

It is not unreasonable to assume that, following an acquisition or other transaction resulting in the creation of an interstate banking or branching operation under IBBEA, the enterprise may consider consolidating or retrenching its operations to eliminate unnecessary or unprofitable branches. What would be the effect on a low or moder-

444. *See id.* §§ 3105 note, 3107 note (Moratorium on Examination Fees Under this Chapter). On the FDICIA amendment, see *supra* note 417 and accompanying text.
445. IBBEA, 12 U.S.C.A. § 3105 note.
446. *Id.* § 3107 note.
447. 12 U.S.C. §§ 4701-4750.
448. *Id.* §§ 4703-4704, 4707-4708, 4712-4713.
449. *See id.* § 4702(5).

ate income area[450] served by such a branch? IBBEA subjects interstate banks[451] to the branch closure notice requirements of FDIA.[452] If a person from the affected area submits a written request relating to the closing to the appropriate federal banking agency, including a statement of specific reasons for the request and a discussion of the adverse effect of the closing on the availability of banking services in the area,[453] and "the agency concludes that the request is not frivolous,"[454] the agency is required to consult and meet with community leaders and other appropriate parties "to explore the feasibility of obtaining adequate alternative facilities and services for the affected area, including the establishment of a new branch by another depository institution, . . . or the establishment of a community development credit union, following the closing of the branch."[455]

Whatever the outcome of this process of consultation, no action by the agency affects the authority of the interstate bank to close the branch, so long as the bank meets the generally applicable provisions with respect to branch closure notice.[456] This includes the bank's control over the timing of the closing.[457]

2. Credit Needs of Communities Served by Interstate Banking Enterprises

IBBEA requires the federal banking agencies to promulgate implementing regulations[458] that would include guidelines intended to ensure that interstate branches of an out-of-state bank reasonably help to meet the credit needs of the communities within the host state where the branches are located.[459] The regulations must also require

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450. For these purposes, the term "low- or moderate-income area" means a census tract for which the median family income is—

> (i) less than 80% of the median family income for the metropolitan statistical area (as designated by the Director of the Office of Management and Budget) in which the census tract is located; or
> (ii) in the case of a census tract which is not located in a metropolitan statistical area, less than 80% of the median family income for the State in which the census tract is located, as determined without taking into account family income in metropolitan statistical areas in such State.

12 U.S.C.A. § 1831r-1(d)(4)(B)(i)-(ii).

451. For these purposes, the term "interstate bank" is defined to mean "a bank which maintains branches in more than 1 State." *Id.* § 1831r-1(d)(4)(A).

452. IBBEA § 106, 12 U.S.C.A. § 1831r-1(d)(1) (subjecting interstate banks to the notice requirement of § 1831r-1(b)(2)).

453. 12 U.S.C.A. § 1831r-1(d)(2)(A)(i)-(ii).

454. *Id.* § 1831r-1(d)(2)(B).

455. *Id.* § 1831r-1(d)(2).

456. *Id.* § 1831r-1(d)(3).

457. *Id.*

458. *See supra* note 347 (discussing the regulatory mandate).

459. IBBEA, 12 U.S.C.A. § 1835a(b). On the meaning of the term "host state" for these purposes, see *id.* § 1835a(e)(3). For these purposes, "out-of-state bank" includes a foreign bank whose U.S.-situs "home state" is other than the host state of the branch. *Id.* § 1835a(e)(5).

that, not later than one year after establishment or acquisition of an interstate branch in a host state, the branch must be appreciably serving the credit needs of its local community.[460] If the appropriate federal banking agency determines that the bank's level of lending in the host state[461] is less than half the average of total loans in the host state relative to total deposits for all banks for which the interstate bank's host state is the home state, the agency must then review the loan portfolio of the bank to determine if it is reasonably helping to meet the credit needs of the communities served in the host state.[462] If the agency determines that the bank is not, it may order that the interstate branch be closed, unless the bank provides reasonable assurances, to the agency's satisfaction, that it has an acceptable plan reasonably to help the credit needs of the local community.[463] In addition, the bank is prohibited from opening any new interstate branch in the host state, unless it provides such reasonable assurances.[464]

3. Community Reinvestment Act Concerns

The approaches taken by the CDRIA, by the interstate bank branch closure requirements, and by the community credit needs provisions represent relatively new responses to the problem of ensuring community involvement by banking enterprises. The traditional response has been to condition approval of bank regulatory applications

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460. *Id.* § 1835a(c)(1).

461. The level of lending is to be determined "from available information including the agency's sampling of the bank's loan files during an examination or such data as is otherwise available." *Id.*

462. *Id.* § 1835a(c)(1)(A). For the meaning of the term "home state" for these purposes, see *id.* § 1835a(e)(2). In making the determination whether the interstate bank is reasonably helping to meet credit needs, the agency must consider the following factors:

> (A) whether the interstate branch or branches of the out-of-State bank were formerly part of a failed or failing depository institution;
>
> (B) whether the interstate branch was acquired under circumstances where there was a low loan-to-deposit ratio because of the nature of the acquired institution's business or loan portfolio;
>
> (C) whether the interstate branch or branches of the out-of-State bank have a higher concentration of commercial or credit card lending, trust services, or other specialized activities;
>
> (D) the ratings received by the out-of-State bank under the Community Reinvestment Act of 1977;
>
> (E) economic conditions, including the level of loan demand, within the communities served by the interstate branch or branches of the out-of-State bank; and
>
> (F) the safe and sound operation and condition of the out-of-State bank.

Id. § 1835a(c)(2)(A)-(F).

463. *Id.* § 1835a(c)(1)(B)(i). For the procedures applicable to the closing of an interstate branch under these circumstances, see *id.* § 1835a(c)(3).

464. *Id.* § 1835a(c)(1)(B)(ii).

on adequate performance by the applicant under the CRA.[465] This response has not been ignored or superseded by IBBEA.

a. *Community Credit Needs and Foreign Bank Operations*

IBBEA imposes a continuing requirement on foreign banks with U.S. operations to meet community credit needs, after their initial entry by acquisition in the interstate market.[466] If a foreign bank acquires a U.S. bank or branch in a state where the foreign bank does not maintain a branch, and the bank is a "regulated financial institution" under the CRA,[467] the CRA continues to apply to each branch of the foreign bank that results from the acquisition.[468]

b. *CRA Evaluation of Banks with Interstate Branches*

IBBEA also amends the CRA to provide specifically for CRA evaluation of banks with interstate branches.[469] A bank with domestic branches in two or more states must be evaluated by its federal regulator under the CRA not only on its entire record of performance,[470] but also on a state-by-state basis,[471] and on a separate basis, for each multistate metropolitan area served by branches in different states within the area.[472]

IV. Doubling Back: Conclusions

At mid-decade, we have already seen the enactment of four major pieces of bank regulatory legislation. FIRREA ushered us into the nineties with a dramatic attempt to restructure a regulatory system that had begun to collapse into itself after more than fifty years of relatively successful operation. FDICIA attempted to stitch together an interim solution to the problem that arose because the regulatory system was still not adequately responsive to the challenges of life in

465. 12 U.S.C. §§ 2901-07 (1988 & Supp. 1993), *amended by* 12 U.S.C.A. §§ 2903(a)-(b), 2906(a)-(c), 2907(a)-(b) (West Supp. 1995).
466. IBBEA, 12 U.S.C.A. § 3103(a)(8) (West Supp. 1995).
467. 12 U.S.C. § 2902(2).
468. IBBEA, 12 U.S.C.A. § 3103(a)(8)(A). This requirement does not apply to any resulting branch that is limited to international- or foreign-related deposits. *Id.* § 3103(a)(8)(B).
469. *Id.* § 2906(d)-(e).
470. *See id.* § 2906(d)(1)(A).
471. *Id.* § 2906(d)(1)(B). For the required content of such state-by-state evaluations, see *id.* § 2906(d)(3).
472. *Id.* § 2906(d)(2); *cf. id.* § 2906(b)(1)(B) (requiring separate presentations for each metropolitan area in which a regulated depository institution maintains a domestic branch). For these purposes, the term "metropolitan area" is defined to mean: "any primary metropolitan statistical area, metropolitan statistical area, or consolidated metropolitan statistical area, as defined by the Director of the Office of Management and Budget, with a population of 250,000 or more, and any other area designated as such by the appropriate Federal financial supervisory agency." *Id.* § 2906(e)(2).

an increasingly competitive, and increasingly internationalized, decade. CDRIA focused upon the counter trend that the decade's dynamic was neglecting the traditional goal of the regulatory system to ensure access to credit for local communities. Finally, IBBEA has sought to turn its attention to one of the perennial problems of bank regulatory law and policy, the establishment of an interstate system of banking. Obviously, many challenges are waiting to be met over the remainder of the present decade and beyond.

One clear challenge is simply whether the latest bank regulatory initiatives will be successful. Will CDRIA result in improved access to credit by local communities? It has two potential vulnerabilities that must be monitored. First, it relies on the incentive of federal funds to encourage the creation of and to support the operations of community development financial institutions. In a decade of challenging fiscal constraints, this reliance may fail. Second, its centripetal objective, the creation of a network of local-oriented credit institutions appears to be contrary to the centrifugal forces of interstate and international banking. A balance will be difficult to maintain, but such a balance is probably essential for the maintenance of broad public confidence in the banking system in this country.

Will IBBEA achieve its destiny, and create a viable system of interstate banking, without defeating the competing goal of maintaining responsiveness to local community credit needs? The machinery appears to be available within the provisions of IBBEA to strike this balance. It is also possible that the tension between these centripetal and centrifugal forces could tear apart the system, resulting in a banking system that to some significant degree fails of these twin purposes or dissipates broad public confidence in the system.

We must also be mindful of the fact that many equally significant regulatory objectives remain as yet unaddressed or unfulfilled. Two examples may suffice to illustrate the dimensions of the unresolved issues outstanding. First, the regulation of bank securities and securities activities remains subject to a set of policy choices made over sixty years ago, in the enactment of the Glass-Steagall Act,[473] the Securities Act of 1933,[474] and the Securities Exchange Act of 1934.[475] Proposals

473. 12 U.S.C. §§ 24, 78, 377, 378. *See generally* 2 Malloy, Banking Law and Regulation, *supra* note 1, § 7.2-.2.4 (discussing the Glass-Steagall Act and its current application).

474. 15 U.S.C. § 77a-bbbb (1988 & Supp. V 1993), *amended by* 15 U.S.C.A. § 77b-77zzz (West Supp. 1995). *See generally* 2 Malloy, Banking Law and Regulation, *supra* note 1, at §§ 5.2-5.2.4, 5.3.3.1 (discussing the 1933 Act and current regulation of public offerings by depository institutions).

475. 15 U.S.C. § 78a-*lll* (1988 & Supp. V 1993), *amended by* 15 U.S.C.A. § 78c-78*lll* (West Supp. 1995). *See generally* 2 Malloy, Banking Law and Regulation, *supra* note 1, § 6.2-.2.6 (discussing the 1934 Act and its current application to depository institutions).

to reform and modernize this area of bank regulatory policy have frequently been made[476] and just as frequently ignored or rebuffed.

Second, the problem of resolving the large pool of failed savings associations, and the relatively modest pool of failed commercial banks lingers, well past the enactment of provisions in FIRREA[477] and FDICIA[478] intended to address the problem. In this regard, the most that IBBEA has directly contributed to this situation is a provision extending the viability of certain intentional tort claims involving substantial loss to failed commercial banks[479] or to failed savings associations[480] now in conservatorship or receivership. It is a very real possibility that failed depository institutions, like the poor, shall always be with us. The hope seems to be that we shall regulate our way out of this dire situation, by creating a competitive market environment more conducive to growth and success for depository institutions.

In a sense, we seem fated to continue without end to replay one version or another of the fundamental controversy that flared up between Hamilton and Jefferson some two hundred years ago over the proper role of the federal government in the regulation of the credit function in the United States.[481] One sees the reflection of this controversy in the policy tensions within IBBEA, and between IBBEA and CDRIA. On the one hand, with Hamilton, we seem to believe

476. *See, e.g.*, 2 Malloy, Banking Law and Regulation, *supra* note 1, §§ 5.4.1, 6.4-.4.2 (discussing reform proposals).

477. *See supra* notes 60-70 and accompanying text (discussing FIRREA provisions addressing resolution of failed depository institutions).

478. *See supra* notes 213-17, 216-20, and accompanying text (discussing FDICIA provisions addressing resolution of failed depository institutions).

479. IBBEA, 12 U.S.C.A. § 1821(d)(14)(C)(i)-(ii), which provides as follows:

> (i) In General.—In the case of any tort claim described in clause (ii) for which the statute of limitation applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the [FDIC] as conservator or receiver, the [FDIC] may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.
>
> (ii) Claims Described.—A tort claim referred to in clause (i) is a claim arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the institution.

Id.

480. *Id.* § 1441a(b)(14)(E), which provides as follows:

> (E) Revival of Expired State Causes of Action —In the case of any tort claim described in subparagraph (A)(ii) for which the statute of limitation applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Corporation as conservator or receiver, the Corporation may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.

Id.

481. *See, e.g.*, Regulation of Banking, *supra* note 131, at 8-15 (excerpting and discussing the 1790-1791 exchange of views between Hamilton and Jefferson over the establishment of the first Bank of the United States).

that the economic well-being of the country is tied to the aggressive and expansive development of the banking system, responsible for the "augmentation of the active or productive capital of [the] country."[482] On the other hand, with Jefferson, we seem to entertain a suspicion that these matters are better left to local-oriented state banks, and that "it does not follow, from [the] superior conveniency [of a system of strong national banking], . . . that the world may not go on very well without it."[483] Perhaps inevitably, therefore, we persist in attempting to maintain the precarious balance between the centrifugal necessity of a competitive banking system and the centripetal demand for a banking system responsive to local community credit needs.

482. *Id.* at 8.
483. *Id.* at 13.