IX. Transfer of Powers to the Comptroller of the Currency, the Corporation, and the Board of Governors

A. Introduction

On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") into law.[1] Congress passed the Act to restore financial stability following the 2008 credit crisis and enacted "the most sweeping financial regulatory reform . . . since the Great Depression."[2] Among other causes, the housing market's failure contributed to the financial crisis.[3] Public officials were "ill prepared," in part, because of the lack of transparency.[4] Thus, Dodd-Frank aims to improve supervision of the financial services industry, better evaluate systemic risks, enhance consumer protections and anticipate "risky activit[ies]" that could threaten the financial system.[5] Major institutions that failed during the crisis include American International Group ("AIG"), Countrywide, IndyMac and Washington Mutual.[6] The Office of Thrift Supervision ("OTS") regulated these institutions prior to their failure.[7] As a result, commentators have heavily criticized the OTS for facilitating the crisis.[8]

Dodd-Frank Title III, the Enhancing Financial Institution Safety and Soundness Act of 2010,[9] is organized into five subtitles and

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank].
[2] John L. Ropiequet et al., *An Introduction to the Dodd-Frank Act-the New Regulatory Structure for Consumer Finance Emerges*, 29 No. 8 BANKING & FIN. SERVICES POL'Y REP. 1, 1 (Aug. 2010).
[3] FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSE OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xxi (2011) [hereinafter FCIC Final Report].
[4] *Id.*
[5] Ropiequet et al., *supra* note 2, at 1.
[6] Peter Madigan, *OTS pays the price of failure*, RISK MAG., Jul. 29, 2010, *available at* http://www.risk.net/risk-magazine/feature/1725246/ots-pays-price-failure.
[7] *Id.*
[8] *See, e.g.*, Robert Cyran, *The Downfall of a Regulator*, N.Y. TIMES, Apr. 8, 2009 (arguing that "[f]inancial regulators engaged in a race to the bottom" and that the OTC "deserves to be shuttered").
[9] Dodd-Frank, *supra* note 1, at § 300.

eliminates the OTS.[10] Subtitle A, the main focus of this article, transfers the duties of the OTS to the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC") and the Board of Governors of the Federal Reserve Board ("FRB").[11] After the OTS is abolished,[12] the OCC will regulate federally-charted thrifts,[13] the FDIC will regulate state-chartered thrifts[14] and the FRB will regulate thrift holding companies and their non-depository subsidiaries.[15] Subtitle B's transitional provisions involve the OTS's funds, personnel and property.[16] The FRB, FDIC, OCC and OTS published a "Joint Implementation Plan" in January 2011describing how Subtitle B will be implemented.[17] Subtitle C covers deposit insurance and FDIC management.[18] Subtitle D includes branching, insurance of transaction accounts and requires several federal agencies to establish an Office of Minority and Women Inclusion.[19] Finally, Subtitle E contains technical provisions and conforming amendments.[20] Although Title III does address a number of issues, its main intent is to abolish the OTS and redistribute its

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[10] *See generally id.* §§ 301-78.
[11] *Id.* §§ 311-19 .
[12] *Id.* § 313 (abolishing the OTS ninety days after the transfer date).
[13] *Id.* § 312(b)(2)(B).
[14] *Id.* § 312(b)(2)(C).
[15] *Id.* § 312(b)(1)(A).
[16] *Id.* § 321-27.
[17] *Id.* § 327(a) (requiring the submission of a joint implementation plan); *see generally* BD. OF GOVERNORS OF THE FED. RESERVE SYS. ET AL., *Joint Implementation Plan: 301-326 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011), *available at* http://www.occ.gov/publications/publications-by-type/other-publications/pub-other-joint-implementation-plan.pdf [hereinafter *Joint Implementation Plan*]
[18] Dodd-Frank, *supra* note 1, §§ 331-36. This article does not discuss Subtitle C, but Subtitle C contains several noteworthy provisions. *See, e.g., id.* § 335 (increasing deposit and share insurance from $100,000 to $250,000); *Id.* § 331 (redefining assessment base); *Id.* § 332 (eliminating procyclical assessments); *Id.* § 334 (increasing the minimum reserve ratio for estimated deposits and eliminating the ceiling on the maximum reserve ratio).
[19] *Id.* §§ 341-43. This article also does not discuss the Office of Minority and Women Inclusion, but for interesting public comment letters see Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act, http://www.sec.gov/comments/df-title-iii/minority-women-inclusion/minority-women-inclusion.shtml (last visited Mar. 3, 2011).
[20] Dodd-Frank, *supra* note 1 §§ 351-78. This article does not discuss Subtitle E.

authority. Only time will tell whether the new regulatory framework ultimately improved financial institutions' safety and soundness.

B. Title III's Purposes

Congress enacted Title III with four purposes: (1) to ensure that the banking system operates "safe[ly] and sound[ly];"[21] (2) "to preserve and protect the dual system of Federal and State-chartered depository institutions;"[22] (3) to make sure depository institution supervision is "fair and appropriate;"[23] and (4) to "streamline and rationalize" depository institution supervision.[24] These purposes further Dodd-Frank's overarching goal of promoting financial stability.

C. Why Congress Created the OTS and What Led to Its Failure

1. Congress Created the OTS in Response to the Savings and Loan Crisis

During the early 1980s, thrifts lobbied Congress and federal regulators to deregulate the savings and loan industry in order to make them more competitive with other financial institutions.[25] Two major pieces of legislation emerged. First, Congress passed the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA") in 1980, repealing several regulatory constraints on thrifts.[26] However, DIDMCA did not reduce the heavy competition they faced.[27] Second, two years later, Congress passed the Garn-St. Germain Depository Institutions Act and expanded the range of loans and investments they would be able to offer.[28] Amid a real estate

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[21] *Id.* § 301(1).
[22] *Id.* § 301(2).
[23] *Id.* § 301(3).
[24] *Id.* § 301(4).
[25] *See* FCIC Final Report, *supra* note 3, at 34-37 (discussing the pressure on regulars prior to the Savings and Loan Crisis).
[26] *Id.* at 34.
[27] *Id.*
[28] *Id.*

bubble and the deregulation of financial markets, thrifts began to offer higher-risk loans during this decade.[29]

The bubble burst and the Savings and Loan Crisis began.[30] During the crisis, approximately 3,000 commercial banks and thrifts failed, over "1,000 bank and [thrift] executives were convicted of felonies" and the government spent more than $160 billion on "cleanup."[31] Following the crisis, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").[32] FIRREA eliminated the Federal Home Loan Bank Board[33] and amended the Home Owners' Loan Act of 1933 to create the OTS, which would regulate thrifts going forward.[34]

2. Congress Eliminated the OTS Following the Failure of Major OTS-Regulated Institutions

Commentators have argued that Congress ought to eliminate the OTS, characterizing the move as "long overdue" and the agency as unnecessary.[35] Former OTS Senior Deputy Chief Counsel William Black claimed that "[b]y 1989, there was no reason to have a separate savings and loan industry, and there was certainly no good reason to have a separate regulatory body in the form of the OTS."[36] Black stated that the OCC or FDIC could have regulated thrifts and that thrifts pushed for creating the OTS to have "weaker rules relative to other financial institutions."[37] The number of OTS-regulated thrifts steadily declined from 2,359 in 1990 to 863 in 2005;

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[29] *Id.* at 35.
[30] *Id.* at 36.
[31] *Id.* (internal citations omitted); *see also* Kim Noble, *Demise of A Wonderful Life: The Rise and Fall of Franklin Savings and Loan*, 60 UMKC L. REV. 363, 368-76 (1991) (discussing the Savings and Loan Crisis).
[32] Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) [hereinafter FIRREA]; *see also* H.R. REP. 101-54, at 294 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 90 (listing several factors that caused the Savings and Loan Crisis).
[33] FIRREA, *supra* note 32, at § 401.
[34] *Id.* § 301 (codified at 12 U.S.C.A. § 1462a(d)(2)).
[35] Madigan, *supra* note 6.
[36] *Id.* (internal quotation omitted).
[37] *Id.* (internal quotation marks omitted).

[38] however, the net income of OTS-regulated thrifts ballooned from a loss of $3.82 billion in 1990 to a record gain of $16.40 billion in 2005.[39] The real estate boom in the mid-1990s and the enactment of the Gramm-Leach-Blilely Act in 1999 ("GLBA") helped spur this rapid increase.[40] The real estate boom helped the thrift industry to grow because more people demanded loans, and the GLBA helped the thrift industry to grow because investment banks, commercial banks and insurance companies could acquire OTS-regulated thrift charters.[41] In 2007, the industry reported a loss of $649 million, its first loss since 1990, and in 2008 it incurred its largest loss ever of $15.81 billion.[42] The industry recovered in 2010 and recorded its first profitable year since the crisis began in 2006.[43]

Black argued that during the 1990s the OTS treated thrifts as "the agency's customers" and during the early 2000s the "primary business of the OTS became attracting new entrants to the OTS charter, all the while keeping existing industry members as thrifts."[44] For example, in the year 2000 forty-one new entrants chose the OTS as their regulator, including AIG.[45] This was the largest number of new entrants recorded between 1991 and 2009.[46] The OTS also initiated an "outreach effort" in the middle of 2005 to promote charter conversion.[47] However, commentators disagree about the OTS's intentions and claimed the regulator focused on "assessment income rather than [an] entity's business activities."[48] The OTS has

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[38] OFFICE OF THRIFT SUPERVISION, 2009 FACT BOOK: A STATISTICAL PROFILE OF THE THRIFT INDUSTRY 6 (2010), *available at* http://www.ots.treas.gov/_files/ 481165.pdf [hereinafter OTS 2009 FACT BOOK].
[39] *Id*.
[40] Madigan, *supra* note 6.
[41] *Id*.
[42] OTS 2009 FACT BOOK, *supra* note 38, at 6.
[43] Press Release, Office of Thrift Supervision, OTS 11-005—Thrift Industry Reports First Annual Profit Since Financial Crisis Began (Mar. 1, 2011), *available at* http://www.ots.treas.gov/?p=PressReleases&Content Record_id=7222723c-cf18-bbac-f533-8c7c981d77a7&ContentType_id=4c12f337-b5b6-4c87-b45c-838958422bf3.
[44] Madigan, *supra* note 6; *see also* Cyran, *supra* note 8 (suggesting the OTS sided with thrifts).
[45] OTS 2009 FACT BOOK, *supra* note 38, at 41; Madigan, *supra* note 6.
[46] OTS 2009 FACT BOOK, *supra* note 38, at 41.
[47] FCIC Final Report, *supra* note 3, at 173.
[48] Madigan, *supra* note 6 (citing a former OTS examiner).

since been criticized for encouraging regulatory arbitrage and engaging in regulatory capture.[49]

Several factors militate in favor of eliminating the OTS. First, financial institutions and commentators perceived the OTS as a more lenient regulator.[50] Second, the OTS regulated some of the largest institutions that failed during the crisis, like Washington Mutual and AIG.[51] The OTS later admitted that it failed to successfully regulate AIG.[52] Third, the OTS allowed institutions, such as IndyMac that later failed, to backdate capital injections to meet reserve requirements.[53] Finally, the OTS unnecessarily complicates the overall financial regulatory framework.[54]

D. Powers Transferred to the OCC, FDIC and FRB

Title III's primary objective is to eliminate the OTS and transfer its duties to the OCC, FDIC and FRB. Unless the transfer and effective date is extended, these regulators will assume their new duties on July 21, 2011.[55] The Title requires that the OTS be abolished ninety days after the transfer date.[56] Subtitle B contains transitional provisions and requires the OTS, OCC, FDIC and FRB

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[49] *E.g.*, *id.* (reporting that "some observers" believe that eliminating a system where institutions can switch from regulator to another would mitigate systemic risk); *see also* Cyran, *supra* note 8.
[50] *E.g.*, FCIC Final Report, *supra* note 3, at 173-74 (quoting an internal July 2006 Countrywide briefing paper that claimed the OTS is a less stringent regulator than the FRB); *see also* Dan Freed, *Thrift Regulator Going Out With a Bang*, http://www.thestreet.com/story/10988313/1/thrift-regulator-going-out-with-a-bang.html (Jan. 28, 2011, 07:00 EST).
[51] *E.g.,* Madigan, *supra* note 6; *see also* Freed, *supra* note 50.
[52] FCIC Final Report, *supra* note 3, at 351 (quoting Former OTS Director John Reich's testimony that OTS regulation of AIG and all of its subsidiaries was "totally impractical and unrealistic").
[53] *E.g.,* John Poirier & Patrick Rucker, *UPDATE 3-US regulator "blessed" backdating at OTS—official* (Mar. 28, 2009), *available at* http://in.reuters.com/article/2009/03/27/financial-thrifts-investigation-idINN2734045020090327; *see also* Ylan Q. Mui, *SEC charges former IndyMac executives with fraud,* WASH. POST, Feb. 11, 2011.
[54] Madigan, *supra* note 6.
[55] Dodd-Frank, *supra* note 1, at §§ 312(a), 311(b) (permitting the transfer date to be extended for additional six months).
[56] *Id.* § 313.

to submit a plan to implement the transition.[57] The plan was published in January 2011.[58] At the time of this paper the Inspector General of the Treasury Department, FDIC and FRB were currently reviewing the plan and will submit subsequent Implementation Reports until the plan is completely implemented.[59] Title III also amends the Federal Deposit Insurance Act ("FDIA") to reflect the transfer of the OTS's duties and provide regulators with the appropriate enforcement powers.[60]

1. The OCC Will Regulate Federally-Charted Thrifts

In addition to regulating national banking associations and foreign bank federal branches or agencies, the OCC also acts as the appropriate federal banking agency for federal saving associations.[61] To help carry out its new mission, the OCC must appoint a Deputy Comptroller to supervise and examine federal saving associations.[62] Except for functions relating to thrift holding companies, the OCC will supervise all federal savings associations and will have "all rule-making authority of the [OTS] . . . relating to savings associations."[63] In addition, the OCC will inherit "all powers, authorities, rights, and duties that were vested in the [OTS]" relating to federal savings associations prior to the transfer.[64] Thus, the Title limits the OCC's regulatory authority to federally-charted thrifts, but grants rule-making authority over federal and state-chartered thrifts.[65] Conse-

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[57] *Id.* § 321-27; *see also* M. MAUREEN MURPHY, CONG. RESEARCH SERV., R41339, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: TITLES III AND VI, REGULATION OF DEPOSITORY INSTITUTIONS AND DEPOSITORY INSTITUTION HOLDING COMPANIES 3 (2010), *available at* http://www.llsdc.org/attachments/files/225CRS-R41339.pdf.
[58] *Joint Implementation Plan*, *supra* note 17, at 4.
[59] Dodd-Frank at § 327(b)-(c).
[60] *Id.* § 312(c) (codified as amended 12 U.S.C. § 1813); *see also* WILLIAM F. KROENER III, DODD-FRANK FINANCIAL REFORM AND ITS IMPACT ON THE BANKING INDUSTRY: BANKING REFORMS 277, 279 (A.L.I.-A.B.A. Course of Study, No. SS038, 2010).
[61] Dodd-Frank at § 312(c).
[62] *Id.* § 314(b) (codified as amended 12 U.S.C. § 4b).
[63] *Id.* § 312(b)(2)(B)(i).
[64] *Id.* § 312(b)(2)(B)(ii); *see also* Ropiequet et al., *supra* note 2, at 6 (discussing the distribution of the OTS's functions).
[65] *Joint Implementation Plan*, *supra* note 17, at 13.

quently, a majority of the OTS's staff and resources will likely be transferred to the OCC because these functions constitute a large portion of the OTS's operations.[66]

The Joint Implementation Plan submitted in January establishes twelve principles to guide the transition period.[67] Some of these principles include building a sustainable staffing structure, "quickly integrat[ing] thrifts and OTS staff into the OCC supervision model," maintaining a flat organizational structure with single Deputy Comptrollers for clear leadership and ensuring that managers have a "reasonable span of control . . . with the additional thrift supervision workload."[68] The OCC plans to create new management positions to support Deputy Comptrollers with their increased responsibilities.[69] In addition, the OCC and OTS are reviewing their training and certification programs to make sure bank and thrift examiners can access national and federal savings associations.[70] The OCC is also reviewing OTS regulations for savings associations, which will likely continue after the transfer date.[71]

2. The FDIC Will Regulate State-Chartered Thrifts

In addition to regulating state non-member insured banks and insured branches of foreign banks, the FDIC now will act as the appropriate federal regulator for state savings associations.[72] The FDIC will have "all powers, authorities, rights, and duties that were vested in the [OTS]" relating to state savings associations prior to the transfer.[73] The FDIC and OCC have established procedures to facilitate the transition, but the FDIC does not plan to transfer any of the OTS's supervisory systems.[74] The OTS, FDIC and OCC are working together to determine the number of examiners necessary to

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[66] *See id.*
[67] *Id.* at 13-14.
[68] *Id.*
[69] *Id.* at 14-15 (creating Associate Deputy Comptrollers and Senior Thrift Advisors to support Deputy Comptrollers).
[70] *Id.* at 16.
[71] *Id.*
[72] Dodd-Frank, *supra* note 1, at § 312(c).
[73] *Id.* § 312(b)(2)(C).
[74] *Joint Implementation Plan*, *supra* note 17, at 17.

handle the FDIC's new workload.[75] All OTC accredited examiners who transfer to the FDIC will be treated as commissioned FDIC examiners, and the FDIC will address any training gaps that become apparent.[76]

3. The FRB Will Regulate Thrift Holding Companies and Their Non-depository Subsidiaries

In addition to the various institutions the FRB regulated prior to Dodd-Frank, the FRB now will act as the appropriate federal banking agency for savings and loan holding companies ("SLHC") and their non-depository subsidiaries.[77] The FRB going forward must supervise and issue orders for SLHCs and their subsidiaries, excluding depository institutions.[78] The FRB also will have rule-making authority and receive "all powers, authorities, rights, and duties that were vested in the [OTS]" for SLHCs prior to the transfer[79] and will inherit the OTS's rulemaking authority under the Home Owners' Loan Act regarding affiliate transactions, extensions of credit to insiders and tying arrangements.[80] The FRB plans to supervise SLHCs on a comprehensive consolidated basis.[81] The FRB regulates bank holding companies using the same program, which includes "understanding the structure of holding companies and activities . . . ; evaluating risks posed by non-banking activities . . . ; imposing prudential standards on a consolidated basis; and assessing the consumer compliance risk profile for holding companies."[82] Additionally, a working group is comparing OTS and FRB regulations to identify any gaps.[83] The FRB also determines which regulations are amended after the transfer date.[84]

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[75] *Id.* at 17-18.
[76] *Id.* at 18.
[77] Dodd-Frank, *supra* note 1, at § 312(c).
[78] *Id.* § 312(b)(1)(A)(i).
[79] *Id.* § 312(b)(1)(A)(ii)-(b)(1)(B).
[80] *Id.* § 312(b)(2)(A).
[81] *Joint Implementation Plan*, *supra* note 17, at 18.
[82] *Id.*
[83] *Id.* at 19.
[84] *Id.*

E. Conclusion and Future Implications

Eliminating the OTS will likely achieve Title III's purpose to "streamline and rationalize" depository institution supervision by creating a simpler regulatory structure with fewer regulators.[85] Consequently, thrift charters will likely remain in name only and thrift institutions will be supervised like banks.[86] Title III's liberal branching provisions are also likely to contribute to a reduction in future thrift charters.[87] Nonetheless, whether Title III and eliminating the OTS will substantially improve banking regulation is yet to be seen.[88] The OTS contends that the new regulatory framework "[does] not solve the problems that caused the current financial crisis—and might cause such a crisis in the future."[89] Moreover, the transfer of

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[85] Dodd-Frank at § 301(4); Madigan, *supra* note 6.

[86] Cheyenne Hopkins, *Report on OTS Dissolution Forecasts Bank-Like Future for Thrifts*, AM. BANKER, Feb. 4 2011, http://www.americanbanker.com/issues/176_24/ots-occ-thrifts-1032404-1.html (quoting Former Comptroller of the Currency Robert Clarke); *see generally Joint Implementation Plan*, *supra* note 17 (discussing how the FDIC will regulate thrifts within its current supervision framework).

[87] *See* Dodd-Frank, *supra* note 1, at § 341 (permitting a saving association that becomes a bank to "(1) continue to operate any branch or agency [it] operated immediately before . . . [becoming] a bank; and (2) establish, acquire, and operate additional branches and agencies at any location within any State in which [it] operated a branch immediately before . . . [becoming] a bank . . . ."); John E. Bowman, Acting Director, Office of Thrift Supervision, Remarks at the 21st Special Seminar on International Finance Continuity and Change Management—The "New Normal" in Banking (Nov. 17, 2010) (suggesting that thrift charters will be less desirable under Dodd-Frank because the Act erodes the charter's benefits, "while retaining the charter's limitations").

[88] *See* Madigan, *supra* note 6 ("[M]erging the OTS and OCC will only marginally improve prudential banking regulation in the US.").

[89] Bowman, *supra* note 87; *see also* Barbara A. Rehm, *A Law Born of Crisis Looks Helpless to Prevent Another One*, AM. BANKER, Mar. 3, 2011, http://www.americanbanker.com/issues/176_42/rehm-dodd-frank-turner-hoenig-1033860-1.html?ET=americanbanker:e5987:2281066a:&st=email&utm_source=editorial&utm_medium=email&utm_campaign=AB_Daily_Briefing_030311 (quoting Financial Services Authority Chairman Adair Turner and Federal Reserve Bank of Kansas City President Tom Hoenig).

power from the OTS to the OCC, FDIC and FRB has not been as easy as Congress initially anticipated.[90]

Commentators have placed a significant amount of blame on the OTS for the financial crisis, but some of this criticism may be unjust.[91] One major critique has been that the OTS engaged in regulatory capture by relaxing supervision to encourage institutions to covert to OTS-regulated thrift charters and thereby generate additional fees.[92] Acting OTS Director John Bowman has denied taking such actions and has pointed to the fact that "more financial institutions—and more assets—have converted *away* from OTS supervision in the last 10 years than have converted *to* OTS supervision."[93] However, Director Bowman only considers new entrants versus exits and failures, and does not take into account the total amount of OTS-regulated assets.[94] The total amount of assets under OTS regulation actually increased each year from 1999 to 2007.[95] An increase in total assets of OTS-regulated thrifts with assets of $5 billion or greater likely contributed to the annual increase.[96] Thus, the

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[90] Jon Prior, *OTS, OCC merger going "rockier" than expected*, HOUSINGWIRE, Nov. 8, 2010, 4:31PM, http://www.housingwire.com/2010/11/08/occ-ots-merger-may-be-going-rockier-than-expected.

[91] Bowman, *supra* note 87 ("[T]he OTS did not regulate the largest bank that failed; the OTS regulated the largest bank that was *allowed to fail*."); *Wall Street and the Financial Crisis: The Role of Bank Regulators Before the Permanent Subcomm. on Investigations, Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 5 (2010) (statement of John E. Bowman, Acting Dir., Office of Thrift Supervision).

[92] Cyran, *supra* note 8; *see also* FCIC Final Report, *supra* note 3, at 173-74.

[93] Bowman, *supra* note 87.

[94] *Compare* OTS 2009 FACT BOOK, *supra* note 38, at 41 (showing a net decline each year from 1999 to 2009 in the number of OTS-regulated thrifts, and a net decline in assets in eight of those ten years), *with* OTS 2009 FACT BOOK, *supra* note 38, at 6 (showing a 75 percent increase in total OTS-regulated assets from approximately $863.61 billion in 1999 to over $1.51 trillion in 2007, but declined in 2008 to under $1.20 trillion and declined again in 2009 to $941.71 billion).

[95] OTS 2009 FACT BOOK, *supra* note 38, at 6 (showing OTS-regulated assets grew $644.7 billion from 1999 to 2007).

[96] *Id.* at 8 (breaking down the number of OTS-regulated thrifts into six asset classes and showing a net increase of $672.3 billion in assets from OTS-regulated institutions with assets of $5 billion or greater between 1999 and 2007).

OTS could collect more fees by attracting bigger institutions with greater assessment bases since fees are based on asset size.[97]

Title III addresses regulators' potential conflict of interest by looking to fees for funding, and amends the funding provisions for the OCC, FDIC and FRB.[98] Eliminating the OTS, however, does not mean financial institutions will cease to engage in regulatory arbitrage.[99] Regulators must work hard to uphold one of Title III's other purposes: the "fair and appropriate" depository institution.[100] In addition, the regulators must cope with greater responsibilities[101] and make sure they fully understand the assets of the institutions they regulate to prevent another situation like the OTS's regulation of AIG.[102] Title III's future success is unknown, but the outlook is promising.[103]

Alexander H. Modell[104]

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[97] *See* Cyran, *supra* note 8.

[98] Dodd-Frank, *supra* note 1, at § 318; *see also* KROENER III, *supra* note 60, at 281.

[99] Bowman, *supra* note 87 ("[Dodd-Frank] leaves plenty of opportunity for regulator shopping among 50 states and between federal and state banking charters.").

[100] Dodd-Frank at § 301(3).

[101] *See Joint Implementation Plan*, *supra* note 17, at 14 (stating that each OCC District Deputy Comptroller's responsibilities will increase more than 50 percent under the new regulations).

[102] *See* FCIC Final Report, *supra* note 3, at 351-52.

[103] *E.g., Implementation of the Dodd-Frank Act Before the Comm. on Banking, Housing, and Urban Affairs*, 112th Cong. 5-6 (2011) (statement of Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys.); *see also* Office of Thrift Supervision, *supra* note 43 (stating the thrift industry reported its first annual profit since 2006).

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