Garn-St Germain: A Harbinger Of Change

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On October 15, 1982, President Reagan signed into law the Garn-St Germain Depository Institutions Act of 1982 ("Garn-St Germain" or the "Act"). Although not as transcendent an achievement as claimed by its champions, Garn-St Germain is nonetheless a most significant piece of legislation. Included within the Act’s myriad provisions, which comprise some 8 separate titles and some 165 different statutory sections, are measures relating to thrift institutions, commercial banks, bank and savings and loan (S&L) holding companies, and both federal regulatory agencies and deposit insurance corporations. Indeed, one provision of the Act, directing the expeditious establishment of an account for depository institutions “directly equivalent to and competitive with money market mutual funds,” has proved both an immediate boon to consumers and a source of significant short-run cash flow to hard-pressed thrift institutions.

When the excitement generated by these money market deposit accounts and “Super NOW” accounts subsides, however, it will become apparent that Garn-St Germain is but one small step in the transition rapidly
taking place in the financial sector of the country. The swift and momentous changes now wracking the industry, from increased competition between banks and securities and investment banking firms to the burgeoning development of electronic funds transfer technology, are blurring traditional legal, regulatory, and economic distinctions among the various segments of the industry and laying the groundwork for future change. Garn-St Germain, in short, is neither all the regulatory reform that is needed nor all the reform that is desirable in the financial services industry.

As originally introduced by Senator Garn, the Act would have modified significantly the regulatory framework first established during the Great Depression. The Garn bill, for example, would have liberalized the permissible securities activities of commercial banks under the Glass-Steagall Act. A more pressing and politically volatile crisis in the thrift industry, however, moved Congress to act swiftly on a far narrower range of issues. This crisis of net worth and liquidity in the thrift industry, the industry charged traditionally with the task of providing mortgage capital for residential housing, was the true motivating force behind the Act. The explosive rise in market interest rates during 1980 and 1981 had made thrifts the Achilles' heel of the financial services industry. Regulation initially designed to protect thrifts and ensure their "safety and soundness" threatened instead to strangle thrifts by preventing these institutions from adapting to fundamental economic and technological changes. Ironically, just as in the 1930s, when the basic regulatory framework was first established, Congress in 1982 also acted out of a perception of crisis. In 1982, however, regulation was more the cause of, rather than the solution to, a near collapse.

By permitting market interest rate accounts and granting more expansive asset powers to thrift institutions, Garn-St Germain somewhat stemmed the immediate crisis and "bought" time during which the thrift industry began restructuring itself. Nonetheless, the significance of the Act is broader than a simple bail-out of the industry. Garn-St Germain follows closely upon the heels of similar and also widely heralded regulatory reform in the trucking, airline, and railroad industries. Indeed, regulatory reform of financial services began with the Depository

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Institutions Deregulation and Monetary Control Act of 1980. This strongly suggests that we are now belatedly witnessing a fundamental shift that transcends administrations, in the American approach to industrial regulation. Regulation cannot manage markets or control underlying economic and technological change. Although regulation has an important role in appropriate circumstances, the primary "regulator" responsible for the efficient allocation of resources and risk, is the competitive dynamic of the marketplace. Regulatory reform in this sense is not more than an affirmation of the same values embodied in the federal antitrust laws.10

The substitution of competition for regulation, however, creates new risks as well as new opportunities. While Garn-St Germain avoids the spectre of massive defaults among thrift institutions by removing the yoke of restrictive regulation, the Act also creates new challenges and hazards for both thrift institutions and commercial banks. Whether depository institutions can weather these hazards successfully well may depend upon how quickly Congress recognizes that the economic and technological changes that will continue, and likely accelerate, in the next few years necessitate more fundamental regulatory reform of financial services.

This article explores the dual status of the Garn-St Germain Act as a reaction to past change and a harbinger of future change. Section I of this article reviews the regulatory structure, still largely intact, that has governed the financial services industry since the 1930s. Section I also examines the distortions engendered by the regulatory framework, distortions that, when coupled with unprecedented trends in the financial markets, precipitated the thrift industry crisis of the early 1980s. Section II reviews the Garn-St Germain Act and analyzes the Act's likely impact on thrift institutions and on competition within and among the various segments of the financial services industry. Section III discusses two specific areas of regulatory reform not addressed by the Act, the restrictions on interstate bank expansion and barriers to cross-industry competition, and concludes with a more general analysis of some of the legal and regulatory problems likely to arise in the wake of the Act.

I. THE THRIFT INDUSTRY CRISIS

During 1981, thrift institutions found themselves in the depths of a significant financial crisis. The thrift industry experienced record operating

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10 See, e.g., 2 P. AREEDA & D. TURNER, ANTITRUST LAW § 401, at 267-68 (1978) ("The central thrust of the antitrust laws is preserving competition in those markets where competitive policy has not been displaced by direct governmental regulation or exemption. . . . But it is reasonably clear that an important, if not the principal, underpinning of antitrust is that competition makes a substantial contribution to economic performance. . . . ").
losses, a net deposit outflow of twenty-five billion dollars, and the lowest level of mortgage lending since 1974. With interest rates hovering near twenty percent, the retained earnings and net worth of thrift institutions declined for the first time since 1940, the housing market faced its worst recession since World War II. A significant number of thrifts avoided default only through mergers with financially stronger institutions. Legislation introduced in the House and reported by the House Banking Committee called for federal loan guarantees totalling at least eight and one-half billion dollars.

In context of this crisis, the relatively comprehensive deregulation initially proposed by Senate Banking Committee Chairman Garn was tabled in favor of a more targeted effort to stabilize the thrift industry. However, the necessity for such crisis reform stemmed largely from the New Deal regulatory structure Congress had established to rescue the industry after the collapse of the Great Depression. To understand the crisis spurring passage of the Garn-St Germain Act, therefore, it is necessary to understand how regulation, coupled with adverse economic conditions, spawned that financial crisis.

A. The Regulatory Framework

The regulatory structure governing the financial services industry is exceedingly complex, involving a mixture of federal legislative restrictions, regulatory agency rules, and state legal and regulatory policies. This section necessarily presents only an overview of the patchwork of measures that long has protected each segment of the industry from competition with other segments and sister institutions.

Depository institutions have been subject to regulatory constraints and protection primarily in the areas of pricing, products and services, and expansion into new geographic markets. These three general forms

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12 Id.
13 See infra note 53 and accompanying text.
16 Depository institutions are those financial organizations that accept “deposit” accounts, including savings, time, and transaction (checking or demand) accounts. Generally, depository institutions include S&Ls, commercial banks, mutual and stock savings banks, and credit unions. For purposes of this article, the differences among various types of depository institutions, except differences between commercial banks and thrift institutions, are somewhat less important than the differences between depository institutions and non-depository financial institutions, such as securities firms like Merrill Lynch Pierce Fenner & Smith, Inc. Even many of these differences are often more of legal than of practical significance. For example, Merrill Lynch’s “Cash Management Account” combines many of the attributes of traditional demand and savings deposit accounts, but is not legally a deposit account. See Mayer, Merrill Lynch Quacks Like a Bank, Fortune, October 20, 1980, at 135.
of regulation have been applied somewhat differently to commercial banks and thrift institutions, the two basic types of depository institutions. In addition, regulation of depository institutions varies depending on whether an institution is state or federally chartered, and on whether a state chartered institution is a member of the Federal Reserve System (member bank) or is insured by either of the federal depository insurance corporations.

Although its boundaries have not remained airtight, regulatory framework has significantly limited competition within the financial services industry by designating specific roles for the various types of financial institutions. Commercial banks traditionally have been granted the exclusive right to offer demand deposit services and to make commercial loans. Thrift institutions have been permitted to offer savings accounts and make residential home mortgage loans. Brokerage houses and investment banking firms, in turn, have been precluded from engaging in the business of commercial banking while permitted to underwrite and distribute debt and equity securities. These distinctions have been

17 See, e.g., infra notes 31-38 and accompanying text (discussing differences in deposit rate ceilings applicable to commercial banks and thrift institutions).

18 The two federal depository insurance corporations are the Federal Deposit Insurance Corporation (FDIC) and the Federal Savings and Loan Insurance Corporation (FSLIC). The Federal Reserve Board regulates bank holding companies as well as state banks that are members of the federal reserve system. "National" banks, or federally-chartered commercial banks, are regulated by the Comptroller of the Currency and insured by the FDIC. State-chartered savings banks, both stock and mutually owned, are regulated and insured by the FDIC. Federally-chartered S&Ls are regulated by the Federal Home Loan Bank Board (FHLBB) and insured by the FSLIC, as are state-chartered S&Ls that are members of the Federal Home Loan Bank Board System. However, state-chartered S&Ls that are not members of the Federal Home Loan Bank Board system are nonetheless regulated by the Bank Board if insured by the FSLIC. As of year end 1980, only 611 state-chartered S&Ls, representing 1.8% of total S&L assets and located in Maryland, Massachusetts, North Carolina and Ohio, were not FSLIC-insured. Fed. Home Loan Bank Bd., Savings and Loan Activity in July, Table 5 (August 28, 1981).

19 The division between commercial and investment banking stems from the Glass-Steagall Act, which generally prohibits commercial banks from engaging in the investment banking business, i.e., underwriting and distributing corporate securities. See 12 U.S.C. § 24 (1976) (Glass-Steagall Act). While the Glass-Steagall Act is a statutory barrier against competition between commercial and investment banks, competition between commercial banks and thrift institutions has been restricted by the regulatory policy of the Federal Reserve Board. With some limited exceptions, the Federal Reserve Board consistently has ruled that bank holding companies may not acquire thrift institutions. See, e.g., Interstate Fin. Corp., 68 Fed. Res. Bull. 316 (1982) (permitting acquisition of failing thrift by bank holding company); First Financial Group, 66 Fed. Res. Bull. 594 (1980); D.H. Baldwin & Co., 63 Fed. Res. Bull. 270 (1977). The Board's rationale has been that thrifts are not a "proper incident" to banking within the meaning of section 4(c)(8) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843 (c)(8) (1976). Section 4(c)(8) provides that bank holding company affiliates only may engage in those activities that are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." Quite obviously, this provision of the Bank Holding Company Act, and the Federal Reserve Board's implementation of Regulation Y, also restrict competition between bank holding companies and non-financial institutions. See 12 C.F.R. § 225.4 (1983) (Regulation Y).
complemented by other regulatory preferences. For example, the role of thrift institutions as primary providers of residential housing capital has been reinforced by the Internal Revenue Code, which provides favorable tax treatment to thrift institutions with assets consisting predominantly of residential property loans.20

Even more significant are the restrictions on interstate expansion, through branching or acquisition, by depository institutions. The McFadden Act21 generally prohibits interstate branching by federally chartered commercial banks. Similarly, the Douglas Amendment to the Bank Holding Company Act22 prohibits bank holding companies from acquiring banks located outside of the state in which the holding company has its principal place of business, unless permitted by state law. Until recently,23 no state permitted the establishment of banks owned by out-of-state holding companies. Thrift institutions which are not "banks,"24 are not subject to the McFadden Act. Geographic expansion by thrifts, however, was circumscribed by Federal Home Loan Bank Board (FHLBB) regulations that, for many years,25 generally limited S&L expansion to within 100 miles of an institution's home office.26 Moreover, section 408 of the National Housing Act prohibits interstate expansion by S&L holding companies. Depository institutions have been most creative in devising indirect methods of avoiding these restrictions on interstate expansion, from loan production offices and Edge Act corporations to interstate non-

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23 Some states, most notably New York, have established "reciprocal banking" statutes, permitting the establishment of bank subsidiaries by out-of-state holding companies if the holding company's state also permits out-of-state entry. See infra note 136. However, most states continue to prohibit entry by out-of-state commercial bank holding companies.
24 The Bank Holding Company Act defines "banks" as those institutions accepting demand deposits and making commercial loans. See 12 U.S.C. § 1841(c) (1976). As discussed below, the liberalized investment powers granted thrift institutions by the Garn-St Germain Act necessitated an amendment to the Bank Holding Company Act declaring that, notwithstanding this two-pronged definition, thrift institutions are not "banks." See infra text accompanying notes 156-58.
25 In 1981 the FHLBB began to permit S&Ls to branch on a statewide basis, but cautioned that the FHLBB "generally will approve the establishment of a branch only in the state in which the home office is located." 12 C.F.R. § 556.5(a)(2), (3)(i)(1983).
26 See 12 C.F.R. § 556.5(b)(3) (1979) (repealed).
banking subsidiaries and "nonbank banks." Nonetheless, geographic limitations continue to restrict effective regional competition between depository institutions, particularly in retail banking and the provision of commercial banking services to customers who are limited in their banking alternatives.

The last type of regulation, and the most important in terms of the origins of the Garn-St Germain Act, is regulation of interest rates. Pricing regulation was designed to hold the cost of funds to depository institutions below the market rate of interest. Beginning in 1933, the Federal Reserve Board's Regulation Q set the maximum rates that commercial banks were permitted to pay on time and savings deposits. Gradually, however, rising market interest rates raised concerns about the ability of thrift institutions to remain the principal source of residential mortgage capital while paying increasing interest on deposits. In 1966 a fundamental change in policy occurred. Congress extended deposit interest rate ceilings to thrift institutions and established a differential, permitting thrifts to pay slightly higher rates on deposits than the rates paid by commercial banks. Despite periodic increases, the deposit interest ceilings generally have remained below market rates of interest.

The major effect of the deposit interest ceilings was to reduce depository institutions' cost of funds. In connection with the general bar against commercial lending by thrift institutions, Regulation Q reinforced

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29 See United States v. Citizen & Southern Bank, 422 U.S. 86, 118-19 & n.30 (1975). ("Anti-branching laws... are now widely recognized as a simple device to protect outlying unit banks from the rigor of regional competition").
30 See United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (discussing scope of geographic competition in commercial banking). Retail banking is the provision of financial services, such as savings and time deposits and transaction accounts, to individual, as opposed to business customers.
31 The cost of funds to depository institutions is the interest rate paid to depositors. Since deposits are accounted for as liabilities, the cost of funds is sometimes referred to in this article as the "cost of liabilities."
32 The payment of interest on commercial bank demand deposits traditionally has been prohibited. The Act reinforces this by specifying that although thrift institutions are permitted to offer demand accounts, they "may not pay interest on a demand account." Garn-St Germain Act, title III, § 312 (to be codified at 12 U.S.C. § 1464(b)(1)(B)).
34 See Carron, The Plight of the Thrift Institutions 5, Figure 1-1 (1981). Coupled with the fact that the interest deposit ceilings have provided a "focal point" for price competition, the gap between the interior ceilings and market rates of interest generally resulted in institutions paying the highest interest rate permitted on any given class of deposits. See Carron, The Plight of the Thrift Institutions 5, Figure 1-1 (1981).
35 In addition, another significant effect of pricing regulation was to encourage sometimes excessive non-price competition, such as the establishment of a large number of full-service branches and the payment of "implicit interest" in the form of "free" gifts and services. See infra notes 40-41 and accompanying text.
product and services regulation and created a protected niche for thrift institutions, by allowing the use of short-term liabilities\textsuperscript{36} to finance investment in long-term assets.\textsuperscript{37} The system worked smoothly so long as the return on assets exceeded the cost of liabilities by a sufficient margin to cover operating expenses. During the late 1960s and 1970s, the spread between mortgage interest rates and regulated deposit interest rates provided thrifs with a "comfortable operating margin."\textsuperscript{38}

B. The Effects of Regulatory Distortions

Regulation by definition creates distortions in otherwise competitive markets. Some competitive distortions, like lower productivity associated with pollution control regulation, are deemed beneficial although they may reduce economic efficiency. Other competitive distortions are the intended result of regulation designed to suppress competition and protect a favored industry from the vagaries of the marketplace. In the long run, however, regulatory restraints cannot eliminate competition. Technological development and marketing ingenuity create new forms of competition that make the regulatory "protection" increasingly ephemeral. In many instances, regulatory protectionism ultimately may place the protected industry at a competitive disadvantage. Only when this simple fact becomes obvious to policy-makers is regulatory reform a realistic consequence.\textsuperscript{39}

These general observations can be illustrated by the impact of priceregulation on thrift institutions. As market interest rates rose above the deposit interest ceilings mandated by Regulation Q, price competition among depository institutions was eliminated. Non-price competition in personalized services and other forms of implicit interest, such as "free" gifts for new accounts\textsuperscript{40} and numerous, fully staffed branches,\textsuperscript{41} were

\textsuperscript{36} In the rubric of financial institutions, deposit accounts, which represent funds owed, are "liabilities." "Assets" are loans and other investments for which the financial institution is the creditor.

\textsuperscript{37} These short-term thrift liabilities were interest regulated savings and time deposits. Long-term thrift assets were, and still are, predominantly fixed rate residential housing mortgages.

\textsuperscript{38} Carron, supra note 34, at 11. Both the lower rate ceilings for banks, and the lack of bank regulatory constraints on assets and tax incentives to compete for mortgage loans, limited competition between banks and thrifts for savings deposits. Id.


\textsuperscript{40} One of the first actions of the Depository Institutions Deregulation Committee, established by the Depository Institution Deregulation and Monetary Control Act of 1980, was to place restrictions on the distribution of "free" gifts by depository institutions. See 12 C.F.R. § 1204.109(a) (1983). Of course, these gifts were never "free" because the depositor paid the difference between the lost interest resulting from the deposit rate ceilings and the value of the gift. Moreover, institutions generally required a minimum deposit for a customer to receive a gift. Thus, the gifts were "free" only in that small depositors were subsidizing larger depositors. Recently, the DIDC voted to phase out minimum balance requirements for all deposit accounts by January 1, 1986. Panel on Bank and Thrift Accounts Votes to Phase Out Rules on Minimum Balances, Wall Street J., Oct. 3, 1983, at 6, col. 1.

\textsuperscript{41} To this extent, deposit interest ceilings may have slowed the advent of electronic
substituted in its place. Moreover, rising interest rates encouraged investment in alternative financial instruments paying market rates, directly reduced the aggregate amount of new deposits available to depository institutions, and restricted their ability to compete with non-depository financial institutions.

The combination of product restrictions and rate regulation forced thrifts into a precarious situation. Deposit interest ceilings, fixed under Regulation Q in the face of rising market interest rates, led to "disintermediation," or deposit outflow, that became a recurring problem at peaks of the interest rate cycle. The traditional maturity imbalance between smaller, short-term liabilities and larger, long-term fixed rate assets exacerbated the disintermediation and placed increasing pressure on thrift earnings. Thrifts, in short, were exposed fully to interest rate risk, lacking the ability to adjust their liabilities or their asset portfolios to market changes. In response, during the 1970s regulators implemented a series of stop-gap measures. These measures included a revision of Regulation Q permitting higher interest rates on large denomination "time," or extended-maturity, deposits, and experimental introduction of negotiable order of withdrawal (NOW) accounts in New England, which permitted the payment of interest on de facto demand deposits. In addition, the regulators authorized the introduction of money market certificates of six-month maturities linked to Treasury bill rates and, in 1979, implemented the authorization for small savers' certificates, designed to constrain disintermediation of smaller deposits.

Congress intervened in 1980 as market interest rates continued to rise. The Depository Institutions Deregulation and Monetary Control Act of 1980 (1980 Act) created the Depository Institutions Deregulation Committee (DIDC) to oversee an orderly phase-out of interest rate ceilings

funds transfer (EFT) technology to the banking and thrift industries. In cases which automation reduces transaction costs, human tellers represent a form of implicit interest. From this perspective the distortions caused by regulation create another unintended consequence, namely the distortion of demand through the acceptance of long-standing forms of implicit interest as a "right" of customers. See Carron, supra note 34, at 46 (although cost-based pricing "is inherently more efficient than cross-subsidization, consumer acceptance may be difficult to achieve"). For example, in early 1983 Citibank instituted a policy of limiting access to human tellers for small depositors. Intensely negative consumer reaction caused a rapid reversal of this policy.

42 "Intermediation" is the profit associated with a maturity imbalance, i.e., the result of charging a higher rate on loans than that paid on deposits. "Disintermediation," roughly the converse, is the deposit outflow caused by individuals seeking a greater return on funds in non-depository financial instruments carrying market rates of interest.


45 The members of the DIDC are the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the Board of Directors of the FDIC, the Chairman of the FHLBB, and the Chairman of the National Credit Union Administration Board. The Comptroller of the Currency is a nonvoting member of the DIDC. Id. § 203(b) (codified at 12 U.S.C. § 3502(b)).
by 1986. The Act also liberalized the asset powers of thrifts by permitting consumer loans, credit cards, the issuance of corporate debt and expanded activities for S&L service corporations. The DIDC began to act swiftly. For example, in January 1981, the DIDC authorized NOW accounts nationwide in implementation of the Act.

"It was clear at the time of passage, however, that the Act was not a panacea." Expanded thrift asset powers could not immediately deal with the large portfolios of long-term, fixed-rate, low interest bearing mortgages which were the thrift's inherent weakness. The best form of assistance would have been a sustained drop in market interest rates, giving breathing room in which thrifts could exercise their new asset powers and, over the long-run, reduce the average maturity and raise the average rate-of-return of their asset portfolios. Unfortunately, the credit markets never provided this assistance.

Throughout 1980 and most of 1981, market interest rates rose to unprecedented levels, at times over twenty percent. The result was a precipitous decline in the market value of thrift institution assets that threw many institutions into technical insolvency. Money market mutual funds, in existence but not highly popular throughout much of the 1970s, induced massive disintermediation as investors flocked to these highly liquid, no-minimum maturity market rate instruments. The disintermediation created severe liquidity problems for thrift institutions and produced some of the largest operating losses in history. These operating losses, in turn, caused a rapid deterioration of net worth as thrift institutions dipped into reserves to cover operating expenses. Without the ability to offer price-competitive financial instruments or to adjust their asset portfolios closer to market rates, the thrift industry was hemorrhaging equity in an attempt to remain solvent.

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46 Id. §§ 204(a), 207(b). Congress expressly found that "limitations on the interest rates which are payable on deposits and accounts ... impede the ability of depository institutions to compete for funds, and have not achieved their purpose of providing an even flow of funds for home mortgage lending." Id. § 202(a)(1) (codified at 12 U.S.C. § 3501(a)(1)).


48 Id.

49 Like bonds, which also bear fixed rates of interest, the market value of fixed-rate mortgages varies inversely with the market rate of interest.

50 Money market mutual funds increased their assets from $60.9 billion in March 1980, to $203.3 billion in June 1982, an increase of more than 230% in just over two years. S. REP. No. 97-536, 97th Cong., 2d Sess. 18 (1982) [hereinafter cited as SENATE REPORT].

51 In 1982, for example, seven of the ten largest publicly owned thrift institutions posted net per share losses, ranging from $0.70 per share (H.F. Ahmanson & Co.) to $4.30 per share (Imperial Corp. of America). Mulgahy, Stock S&Ls are Travelling a High Road Back, AMERICAN BANKER, March 2, 1983, at 3, col. 2.

52 Carron, supra note 34, at 27. Aggregate S&L net worth decreased $7.5 billion, from $32.2 billion to $24.7 billion, between January 1, 1981 and June 30, 1982. SENATE REPORT, supra note 50, at 4.
II. THE CONGRESSIONAL RESPONSE

The situation faced by Congress in 1981 was thus critical. The 1980 Act had moved in the right direction, but the limited asset powers the Act provided were insufficient, and the six-year phase-out of Regulation Q was too long to counteract effectively the sustained increase in market rates of interest. Between January 1981, and January 1982, 609 S&Ls, most of which were financially unstable, voluntarily were merged out of existence, 166 supervisory mergers were arranged by the FSLIC, and 26 commercial banks and 9 mutual savings banks were closed by the FDIC. Predictions that thrift institution closings would rival those of the Depression were not greatly exaggerated. Politically, the collapse of the housing market, a result of decreased demand for and supply of mortgage capital in the face of record interest rates, gave Congress even more reason to move decisively.

Indeed, for all its significance as a regulatory reform measure, the Garn-St Germain Act had a much more limited focus. Congress never reached the more basic deregulation proposals of Senator Garn. The basic thrust of the Act was to preserve the role of thrifts as the primary source of residential housing capital by granting new flexibility that would enable the regulators to ensure the long-run survival of the industry. As the Conference Committee wrote in the preamble to its report, the purpose of the Act was "to revitalize the housing industry by strengthening the financial stability of home mortgage lending institutions and ensuring the availability of home mortgage loans." The means chosen by Congress to further this objective, however, include some significant reforms of financial services regulation.

Those reforms are sufficiently wide-ranging that succinct summarization of the Act is difficult. To take only two examples, the Act included provisions authorizing the organization of so-called "bankers' banks," and

[53] Senate Report, supra note 50 at 4. As of March 31, 1983, the number of S&Ls and mutual savings banks had decreased from 5,147 in 1979 to 4,148 or by nearly 20%. Finally Off the Critical List, Time, May 23, 1983, at 38.

[54] S. Rep. No. 97-641, 97th Cong. 2d Sess. 1 (1982) [hereinafter cited as Conference Report. This was the preamble to the bill originally introduced in House by Representative St Germain. H.R. 6267, 97th Cong., 2d Sess. (1982). In contrast, Senator Garn's bill recited that the bill's purpose was "[t]o enhance the competitiveness of depository institutions, to expand the range of services provided by such institutions, to protect depositors and creditors of such institutions, and for other purposes." S. 1720, 97th Cong., 1st Sess. (1981).

[55] Act § 404(a). Such "bankers' banks," which are to be regulated by the Comptroller of the Currency, are "owned exclusively . . . by other depository institutions and are organized to engage exclusively in providing services for other depository institutions and their officers, directors, and employees." Id. § 404(a)(2). Because the Act permits the joint ownership of bankers' banks by any number of depository institutions, § 404(a) of the Act well may enable smaller depository institutions, not affiliated with bank holding companies or S&L holding companies, to supply for themselves services previously purchased from a bank, or S&L, service corporation.
provisions liberalizing the restrictions on insider loans by member banks, both of which passed with little discussion and elicited almost no mention in the legislative history. However, for purposes of analysis, the Act conveniently may be divided into two categories: those measures relating to thrift institutions, and those measures relating to commercial banks.

A. Thrift Institutions

Congress approached the thrift industry crisis with an array of measures that served two mutually reinforcing objectives. Congress intended to provide more flexibility to federal regulatory agencies to deal with the short-term threat of thrift failures, and to provide more flexibility to thrifts in their day-to-day activities with which to adapt in the long-term to changed economic realities. Although the Act's expansion of the lending and investment powers of thrift institutions goes far to enhance thrifts' long-run competitive position, Congress recognized that the Act's new liability and asset powers would not overnight ameliorate the distortions that resulted from years of restrictive regulation. Thus, Congress added a regulatory mechanism designed to "provide thrifts with the time needed to work out their problems and to take advantage of their new powers while giving federal insurance agencies more flexibility in dealing with troubled institutions."

1. The Regulatory Mechanism

The regulatory mechanism developed to deal with the immediate thrift industry crisis is two-fold. First, the Garn-St Germain Act allows the insuring agencies to assist troubled institutions with either direct or merger-related financial assistance and authorizes "emergency" acquisitions of failing institutions. Second, the Act institutes a three-year program under which the insuring agencies may grant capital assistance to troubled institutions through the purchase of new capital instruments called "net worth certificates."

56 Id. §§ 421-14. "Member banks" are those commercial banks, whether state or federally chartered, that belong to the Federal Reserve System.
57 See, e.g., Senate Report, supra note 50, at 27-29, 33, 60, 63; Conference Report, supra note 54, at 90.
58 The thrift industry’s narrow asset authority is not the only reason for its present plight. Throughout most of the 1970’s, the general economy, the structure of the financial industry, and the relatively low interest [sic] paid on savings accounts have combined in such a way as to encourage many thrifts to expand without proper regard for long-range operating cost controls .... It is unlikely that this problem will disappear as interest rates decline .... Thus, a large segment of the industry will need time not only to restructure their loan portfolios in light of the new asset powers contained in Title III of this bill but also to streamline their existing operating procedures. Senate Report, supra note 50, at 9.
59 Id.
60 Act title I, §§ 101-41, Deposit Insurance Flexibility Act.
61 Id. title II, §§ 201-06, Net Worth Certificate Act.
Title I, which contains largely parallel sections governing the FDIC (banks), the FSLIC (S&Ls) and the National Credit Union Administration (credit unions), liberalizes both how and when the insuring agencies can grant financial assistance to insured institutions. Sections 111 and 122 of the Act permit assistance to "prevent" the closing of an institution, to "restore" a closed institution to "normal" operation, or if "severe financial conditions" exist which significantly threaten the industry's stability. By eliminating existing provisions requiring that the insuring agencies first determine that an insured institution is in danger of closing and that the institution's services are essential to the community, these sections should allow the more timely provisions of assistance to troubled savings banks and S&Ls. Sections 111 and 112 also expand the forms of assistance that may be provided. Added to such traditional forms of assistance, loans, deposits and purchases of assets, is the authority to purchase the securities of, assume the liabilities of, and to make contributions to insured institutions. Finally, sections 111 and 112 permit assistance to be granted to facilitate the merger, acquisition or consolidation of a failed, failing, or unstable institution, and allow assistance to be granted to the acquiring company as well as the insured institution itself.

Title I also allows the insurance agencies to arrange the "extraordinary acquisition" of troubled institutions. Primarily intended to "maximize the resources" of the agencies' funds, Title I permits the FDIC, the FSLIC and the NCUA to arrange the acquisition of closed or failing institutions. The statutory language covering the third situation, clearly intended to cover any "crisis" similar to that faced by the thrift industry in 1981 and 1982, provides in pertinent part:

[W]hen severe financial conditions exist which threaten the stability of a significant number of insured banks or of insured banks possessing significant financial resources, [assistance may be granted if] such action is taken in order to lessen the risk to the Corporation posed by such insured bank under such threat of instability.

The authority to purchase common stock was not included in the forms of assistance that may be provided, thus precluding "emergency" nationalizations. The authority to purchase the securities of, assume the liabilities of, and to make contributions to insured institutions. Finally, sections 111 and 112 permit assistance to be granted to facilitate the merger, acquisition or consolidation of a failed, failing, or unstable institution, and allow assistance to be granted to the acquiring company as well as the insured institution itself.

The FDIC and FSLIC may guarantee the insured institution or the acquiring company against resulting loss to facilitate mergers and consolidations. The Act, in addition, directs the insuring agencies to report annually to Congress on their savings associated with exercise of the powers of assistance.

The FDIC may authorize the extraordinary acquisition of any closed commercial bank with assets of at least $500 million or of any mutual savings bank with assets of at least $500 million that is closed or in danger of closing. The FSLIC may exercise such powers regardless of the size of the thrift and upon a determination that "severe financial conditions" threaten the stability of the thrift industry.
on an interstate and/or cross-industry basis. The Act requires the federal agencies to consult with state regulators and provides that only a unanimous vote of the federal agency's board may override a state objection. The Act establishes a bidding procedure under which bids resulting in the lowest cost to the federal agency are to be accepted. As discussed below, however, a complicated system of bid priorities, linked to the type and geographic location of the acquiring institution, reduces, but does not eliminate, the likelihood that these emergency acquisitions will produce any appreciable interstate and cross-industry expansion. In fact, the Act directs the FDIC and the FSLIC to "give consideration to . . . the maintenance of specialized depository institutions" in determining whether to arrange extraordinary acquisitions.

Title II authorizes the FDIC and the FSLIC to utilize their respective insurance funds to "provide capital assistance to depository institutions that have suffered earnings and capital losses primarily as a result of their mortgage lending activities." Under this capital assistance program, qualified federally-insured institutions may issue capital instruments (net worth certificates) for purchase by the insuring agencies with promissory notes. Title II is the result of a Conference Committee compromise, in which the House discarded its guarantee concept for mortgage lenders in return for provisions prohibiting the insuring agencies from conditioning the purchase of net worth certificates on the institution's execution of a merger resolution or on changes in the insured institution's management. To qualify for net worth assistance, the institution must have, inter alia, a net worth equal to or less than three percent of assets, incurred losses during the previous two quarters, and residential mortgages totaling at least twenty percent of all loans. Title II authorizes a sliding scale of assistance, although this may be altered by rule so long as the insured agencies do not purchase certificates covering an institution's entire operating loss. Finally, net worth certificates may also be purchased from non-insured institutions if the applicable state insurance fund agrees to indemnify the federal insurance agency.

2. The Market Mechanism

While the emergency powers granted to the regulators are designed

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67 The Act also permits emergency acquisitions of thrifts by bank holding companies, reducing the regulatory delay typically associated with holding company acquisitions of non-banks under the Bank Holding Company Act. The Act provides that, with the concurrence of the "primary federal regulator," the Federal Reserve Board may dispense with the normal notice and hearing requirements attendant to nonbanking activity applications under § 4(c)(8) of the Bank Holding Company Act, upon a finding by the Board that "an emergency exists which requires the Board to act immediately on any application . . . involving a thrift institution . . . ." Act § 118(a) (to be codified at 12 U.S.C. § 1843(c)(8)). See supra note 19 (explanation of 4(c)(8)).


69 CONFERENCE REPORT, supra note 54, at 86.

to provide short-term relief to the thrift industry, Garn-St Germain also includes measures designed to improve the long-term competitive position of thrifts. The Act's deregulation of thrift assets and liabilities powers relies on a market-oriented approach similar to the approach applied to regulatory reform in the airline and trucking industries. As thrift institutions gradually implement these new powers, deposit disintermediation and asset portfolio rigidity, the basic regulatory distortions that led to the recent net worth crisis, should in the long-run be reduced significantly.

These asset and liabilities reforms, contained largely in Title III of the Act, the "Thrift Institution Restructuring Act," are quite varied. Garn-St Germain directed the DIDC to establish an account for thrifts and other depository institutions competitive with money market mutual funds. The DIDC responded by authorizing two new accounts, the "money market deposit account" and the "Super NOW" account, and requesting public comment on a proposed third account, the so-called "super money market deposit account." Garn-St Germain also allows thrifts to offer NOW accounts to federal, state, and local government, to accept demand deposits from persons who have a "business, corporate, commercial, or agricultural loan relationship" with the institution, and to issue securities,
Both thrifts and commercial banks benefit to some extent from the Act’s provisions widening sources of funds. The new money market deposit account, for example, may be offered by all depository institutions. In revising asset powers, Congress also included some minor relief for commercial banks, but again focused primarily on thrift institutions. On the asset side, the Garn-St Germain Act for the first time authorizes federally chartered S&Ls and savings banks to make overdraft loans, to invest in the accounts of other insured depository institutions, and to make secured or unsecured commercial loans. The Act enhances the powers of federally chartered thrifts to invest in the securities of state agencies and corporations, to make nonresidential real estate loans, and to make consumer and educational loans. The Act also adds some asset authority for state-chartered institutions. First, the Act conclusively ends the legal controversy surrounding the “due-on-sale” clause by preempting all state due-on-sale clauses. Both federal and state thrifts should now be able to accelerate the turnover of their residential mortgage portfolios. Second, the Act permits non-federally chartered depository institutions, including state-chartered commercial banks, to offer adjustable-rate or other “alternative” mortgages, thus bringing these non-federally chartered institutions’ powers in line with those previously granted federally chartered institutions by regulation.

B. Commercial Banks

Included within the regulatory and market-oriented measures discussed above are provisions that affect commercial banks, such as money

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Bank, 374 U.S. 321, 356 (1963) ("Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category").

78 Id. (to be codified at 12 U.S.C. § 1464(b)(2)). Both the authority to issue securities and the demand deposit authorization are, for jurisdictional reasons, limited to federally chartered institutions.

79 Id. § 401 (to be codified at 12 U.S.C. § 84). Section 401 raises slightly the lending limits applicable to national banks. Id.

80 Id. § 321 (to be codified at 12 U.S.C. §1464(c)(1)(A)).

81 Id. § 323 (to be codified at 12 U.S.C. § 1464(c)(1)(B)).

82 Id. § 325 (to be codified at 12 U.S.C. § 1464(c)(1)(R)).

83 Id. § 324 (to be codified at 12 U.S.C. § 1464(c)(1)(H)).

84 Id. § 322 (to be codified at 12 U.S.C. § 1464(c)(1)(B)).

85 Section 329 of the Act authorizes loans "reasonably incident to" the provision of consumer credit and raises the investment limit on such loans to 30% of an institution’s assets. Act § 329 (to be codified at 12 U.S.C. § 1464(c)(2)(B)).

86 Id. § 341. In Fidelity Savings & Loan Ass’n v. Cuesta, 101 S. Ct. 3014 (1982), the Supreme Court previously had upheld the use of due-on-sales clauses by federally chartered institutions.


market deposit accounts, FDIC assistance for closed or failing banks, and "extraordinary acquisitions" of closed commercial banks without regard to the Douglas Amendment. The Act assists commercial banks in other ways as well. Section 326 requires that the interest rate differential imposed by Regulation Q, which made commercial bank savings accounts competitively disadvantageous for many potential customers, be phased out on or before January 1, 1984. Section 401(a) raises the lending limits for commercial banks, which had restricted lending as inflation raised nominal capital demands. Revisions to the banking affiliates provisions of the Federal Reserve Act, among other things, liberalize existing restrictions on financial transactions between bank affiliates of multibank holding companies. Finally, section 411 exempts the first two million dollars of "reservable liabilities" of member banks from the Federal Reserve Board's reserve requirements.

C. Legislative Compromises

The immediate impact of the Garn-St Germain Act has been significant. For example, in just the first three months of their existence, the newly authorized money market accounts attracted over $300 billion in deposits. Even discounting the wisdom bestowed only with hindsight, however, criticism of the Act is justified nonetheless. In some respects, the Act is a fairly lukewarm effort at deregulation of depository institutions. In other respects, the Act is at loggerheads with the concept of regulatory reform itself.
1. The "Deregulatory Imbalance"

As discussed previously, the maturity imbalance imposed on thrift institutions by the traditional regulatory framework, which kept the cost of funds and operating expenses above the fixed yields on assets, was a major cause of the thrift industry's net worth crisis. Yet one effect, however, of the Garn-St Germain Act is to continue a transitional imbalance, begun with the Depository Institutions Deregulation and Monetary Control Act, between the cost of funds and the return on assets. In the short run, Garn-St Germain will raise markedly the cost of liabilities for thrift institutions, which are already paying competitive interest rates on a substantial portion of their deposits. Only over a much longer time period will thrifts be able to utilize their new asset powers to diversify their loan portfolios away from below-market fixed rate mortgages. Indeed, if present trends are any indication, thrifts may exercise their asset powers so cautiously in the new competitive environment that raising their rate-of-return on assets may take longer than anticipated.

The basic problem is that deregulation of asset powers should have preceded deregulation of interest rates. Thrift assets cannot be immediately "written up" to market value. Viewed in this light, the Act may be seen as the final coup de grace for smaller and weaker thrifts. After years of regulatory sheltering, these institutions now face a market environment of price competition in which only the efficient will survive.

Of course, with thrift net worth declining precipitously Congress did not have the luxury of deregulating only assets. If Congress had not checked disintermediation, the net worth crisis likely would have worsened. Congress, in fact, recognized that the plight of the thrift industry was so severe that the restructuring of the most unstable institutions would have to take the form of direct "net worth" assistance and federally encouraged mergers. Nonetheless, in the next several years this transi-

58 The liabilities of thrift institutions, because they are primarily short-term instruments, adjust more quickly to changing interest rates than do asset portfolios. Carron, supra note 34, at 13.

99 See, e.g., Noble, Thrift Units: Caurious Rivals, New York Times, May 23, 1983, at D1, col. 1 ("Despite clamoring for the additional powers, most savings and loan associations and mutual savings banks are moving gingerly into the riskier—and potentially more profitable—arena of commercial banking"); Horvitz, Thrift Institutions and Commercial Lending, AMERICAN BANKER, April 5, 1983, at 4, col. 1 ("Commercial lending authority is irrelevant to most savings and loans. These associations are in markets without much potential for such activity or in which the market is already highly competitive").

On the other hand, the influx of new funds has helped to cut operating losses dramatically. During the last six months of 1982, federally insured thrifts experienced operating losses of $994 million, down from $3.3 billion in the first half of the year. See "Washington Business," Washington Post, July 4, 1983, at 3.

100 See Carron, supra note 34, at 42 ("Proper concern for transition problems would have argued for deregulation of long-term liabilities and the asset side well before lifting rate ceilings on short-term deposits, because the return on the mortgage portfolio adjusts more slowly").

101 See SENATE REPORT, supra note 50, at 12. As the Federal Reserve Bank of Chicago has stated:
tional imbalance may exacerbate the financial positions of many institutions by raising, rather than reducing, costs. If interest rates remain at their current relatively low level, the net worth certificate program and the emergency regulatory powers may prove adequate to meet the immediate thrift industry crisis and buy time for long-run readjustment. Ironically, therefore, the Garn-St Germain Act gambles on the same market risk that accompanied the 1980 Act. If interest rates skyrocket again, the new powers will not have sufficient time to raise thrifts' earnings and restore their competitiveness. The eventual success or failure of the Garn-St Germain Act, which owes its existence largely to a period of sustained high interest rates, could well depend on an even longer period of sustained low interest rates.

2. Protectionist Measures

Market conditions facing Congress in 1982 may not have permitted comprehensive reform of the financial services industry. Nevertheless, even if time were of the essence, the degree to which several provisions of the Act depart from current notions of what "deregulation" entails is striking. In at least three areas the Garn-St Germain Act epitomizes the adage that legislation is, in essence, "reactive." This reactive legislation is exemplified in incentives for thrift institutions to exercise their new assets powers, interstate and cross-industry "emergency" acquisitions, and commercial bank competition with non-depository institutions.

The expansion of the investment powers of thrift institutions contained in the Act clearly is not intended to supplant the traditional division between the thrift and commercial banking industries. Commercial loans and other thrift asset powers remain subject to percentage-of-asset limitations. Indeed, the Act recites that the asset powers are conferred "to provide [thrift] institutions the flexibility necessary to maintain their role of providing credit for housing."102 Although this asset limitation is a serious deficiency in itself, since thrifts will remain precluded from fully competing in the credit markets, the Act in some ways reinforces existing disincentives to asset expansion by thrift institutions.

Research has shown that state-chartered thrift institutions that have been granted the power to diversify their asset portfolios generally have made little use of such authority.103 A major reason for this lack of diver-

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102 Act § 311 (to be codified at 12 U.S.C. § 1464(a)).
103 Since June 1980, state chartered S&L's in Florida have enjoyed the power to make commercial loans and to invest in corporate and governmental securities. A study conducted by the Federal Reserve Bank of Atlanta, however, found that "In the short-run Florida chartered associations have done very little to exercise the expanded authority their state
sification is existing federal tax policy, which provides a substantial tax deduction for thrifts that hold at least eighty-two percent of their assets in qualified form, mainly residential mortgages, cash and federal securities.\textsuperscript{104} Assets replacing mortgages in a thrift's portfolio typically do not carry interest rates sufficiently high to overcome the tax advantage of this so-called "bad debt deduction."\textsuperscript{105}

Notwithstanding that the FHLBB already had permitted the interstate deployment of remote service units by thrifts,\textsuperscript{106} and was apparently prepared to authorize other forms of interstate expansion by federally chartered S&Ls,\textsuperscript{107} section 334 of the Act prohibits interstate branching by such institutions if the institutions do not qualify for the bad debt deduction.\textsuperscript{108} Similarly, section 335 limits the permissible activities of S&L holding companies whose S&L subsidiaries do not qualify for the deduction.\textsuperscript{109} As a result, Garn-St Germain reinforces the effect of tax policies which discourage investment by thrift institutions in assets other than residential mortgage loans. Federal thrift institutions that exercise their new powers to diversify their asset portfolios face both an increase in tax liability and statutory restrictions on interstate expansion,\textsuperscript{110} as well as the possibility of legally mandated divestitures. These provisions passed without a word of justification in the legislative history. They are, however, flatly inconsistent with the goal of encouraging the diversification of thrift assets into higher-yield, competitive investments.

A second compromise measure is the authorization for federal-statutes provide them." Baker, Florida S&L's Use of Expanded Powers, Federal Reserve Bank of Atlanta, Economic Review (July 1982), at 15.

\textsuperscript{104} I.R.C. §§ 593, 7701(a)(19)(E) (1976). These tax provisions are referred to as the "bad debt deduction" because they permit a deduction of a proportion of taxable income as an addition to the qualifying institution's bad debt reserves. This bad debt deduction is effectively a reduction in the tax rate for those institutions that qualify, since it greatly exceeds any reasonable expectation of loss. See U.S. Department of the Treasury, Report of the Interagency Task Force on Thrift Institutions 107 (June 1980).

\textsuperscript{105} See id. at 110-13 (bad debt deduction is thus “a powerful disincentive to diversify”).


\textsuperscript{107} See supra note 25.

\textsuperscript{108} Act § 334 (to be codified at 12 U.S.C. § 1464(c)(1)). Section 334 also adds an exemption, similar to the Douglas Amendment, allowing interstate expansion when state law permits. Present interstate branches are grandfathered, and institutions have up to two years to divest offending branches. Id.

\textsuperscript{109} Id. § 335 (to be codified at 12 U.S.C. § 1730a(n)). Holding companies are given three years “to either come into conformance or sell the S&L subsidiary.” Senate Report, supra note 49, at 18.

\textsuperscript{110} The FHLBB retains the authority to permit thrifts unaffected by these provisions of the Garn-St Germain Act to expand on an interstate basis. See supra note 25 (regulations permitting statewide S&L branching). Moreover, the FHLBB recently has promulgated regulations, in implementation of the Act's state law exemption. See supra note 107. These regulations permit acquisition and establishment of out-of-state branches where authorized by state law. 48 Fed. Reg. 20,930 (1983).
ly-sanctioned “emergency acquisitions” of financially troubled or closed institutions. Congress specifically noted that such acquisitions would be permitted notwithstanding interstate branching restrictions and limitations on holding company expansion, and would be permitted by non-depository institutions. However, two factors significantly limit the likely impact of this authorization on interstate and cross-industry expansion. First, the authorizations sunset after three years, giving little time for them to serve as a real vehicle for lowering geographic and industry barriers. Second, the Act mandates restrictive bidding procedures weighted disproportionately in favor of in-state institutions of the same type as the acquired institution. After the first round of bidding, if the bid resulting in the lowest cost to the federal insurance agency is not from “an in-state like-type institution as the failing institution,” persons submitting bids within a specified range of the low-cost bid may submit new bids. After the second round, the Act directs “priorities” of bids that favor both in-state depository institutions and institutions of the same type as the acquired institution. Thus, while ostensibly favoring geographic and cross-industry expansion, the Act maintains with only minor modification the traditional and inefficient geographic and product distinctions that have limited the development of the financial sector in the last half century.

With regard to asset powers, commercial banks clearly did not receive what they sought from Congress, namely the power to engage in full-service brokerage activities and to underwrite municipal revenue bonds, corporate bonds, and equity securities. In one important area, however, commercial banks received what they probably had not bargained for,

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112 Act § 141(a)(3), (7).

113 Senate Report, supra note 50, at 47; see also id. at 49.


115 Id. (to be codified at 12 U.S.C. §§ 1823(f)(3)(B), 1730a(m)(3)(B)). The order of priority is: same-state, same-type; different-state, same-type; same-state, different-type; different-state, different-type. In addition, the Act is intended to grant priority to institutions in adjoining states if the agency “goes outside the in-state bidding tiers.” Senate Report, supra note 50, at 47, 49.

116 Title III of S. 1720, the bill initially introduced by Senator Garn in 1981, would have amended the Glass-Steagall Act to permit federally chartered banks to deal in, and underwrite, revenue obligations, issued, guaranteed by, or on behalf of a state or state political subdivision, and would have amended the Investment Company Act of 1940, 12 U.S.C. § 80a-1 et seq. (1970), to enable any commercial bank, thrift institution or depository institution holding company to operate investment companies and to underwrite and distribute the securities of investment companies. Another bill introduced during the 97th Congress would have authorized bank holding companies to engage in limited securities activities
significant restrictions on the insurance activities of bank holding companies. Section 601 of the Act amends section 4(c)(8) of the Bank Holding Company Act\(^{117}\) to provide that "it is not closely related to banking or managing or controlling banks for a bank holding company to provide insurance as a principal, agent or broker ...."\(^{118}\) Although six enumerated exemptions grandfather certain insurance activities previously authorized by regulations of the Federal Reserve Board,\(^{119}\) the primary effect of section 601 is to prohibit "substantive expansion" by banking organizations into the insurance business.\(^{120}\) Again, the legislative history provides no justification for this new restriction. In a decade in which non-depository financial institutions increasingly are engaging in de facto banking notwithstanding the Glass-Steagall Act, and in which insurance/brokerage combinations such as Prudential/Bache and Sears are positioning themselves to offer so-called "total financial planning," new restrictions on commercial bank and bank holding company activities only can further hamstring their competitiveness and profitability. From both a competitive and policy perspective, section 601 is an anachronism.

Each of these three areas is merely symbolic of the fact that, for all its significance as a regulatory reform measure, the Garn-St Germain Act takes only a few steps toward substantive reform of financial services regulation. Given the exigencies of the thrift net worth crisis and the reality of political accommodation, breaks in the neatly-compartmentalized regulatory framework were permitted only to the extent necessary to preserve the financial viability of depository institutions. For example, thrift institutions may now accept demand deposits, but not from general commercial customers\(^{121}\) and the traditional domain of commercial banks is not threatened substantially. Although the Act modifies the traditional specialization of financial institutions, it does not fundamentally change,


\(^{118}\) Act § 601.


\(^{120}\) \textit{SENATE REPORT}, \textit{supra} note 50, at 37. The exemptions permit bank holding companies to engage in, among other things, credit life, disability, and involuntary unemployment insurance activities and general insurance agency activities in small towns. Section 601, however, prohibits the underwriting or sale of property and casualty insurance products.

\(^{121}\) \textit{See supra} note 77 and accompanying text.
and in some ways the Act reinforces, that regulatory enforced specialization.

III. THE FUTURE OF REGULATORY REFORM

By enacting a potpourri of measures including direct operating subsidies, asset expansion and relaxed merger restrictions, Congress sought to avoid the short-term problem of thrift institution failures without being forced to address the underlying problem directly. With accelerating homogenization of financial markets and institutions, and with depositors becoming increasingly sophisticated in their choice of alternative financial instruments, the specialized local thrift institution already may have become a thing of the past. REGULATORY ATTEMPTS TO COMPARTMENTALIZE INSTITUTIONS AND TO STRUCTURE COMPETITION ALONG PRESCRIBED LINES CREATE-PERVERSE INCENTIVES and straightjacket the ability of the regulated firms to respond to market changes. The effects have been felt not only in the thrift industry, but throughout the regulated financial services industry. While commercial banks have been restricted in their services and products, non-depository financial institutions have developed interest-bearing transaction and investment accounts and have expanded their activities nationwide without regulatory barriers. Although some balance has been added recently, as in the Federal Reserve Board's approval of BankAmerica's acquisition of Charles Schwab Corp., a discount brokerage firm, the primary regulatory barriers remain.

Much can be said, of course, for an approach to regulatory reform that involves a measured transition to competition. As discussed previously, rapid deregulation may itself create competitive imbalances. However, that should not obscure the realization that the Garn-St Germain Act is not all the legislation that is necessary to remove artificial barriers to competition in the financial services industry. Of the tradi-

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122 See Carron, supra note 34, at 85.
123 See supra notes 40-41 and accompanying text.
125 See supra notes 97-101 and accompanying text.
tional forms of financial services regulation, only one, price regulation, has been substantially eliminated. The Garn-St Germain Act modifies a second traditional form of regulation, restrictions on competition in products and services but primarily for thrift institutions only. The restrictions of the Glass-Steagall Act remain, and the barriers to geographic expansion by depository instructions largely are intact. Competitive and technological forces, as well as what appears to be a basic change in public policy with respect to economic regulation, eventually should lead to further reform, or elimination, of these restrictions.

A. Geographic Restrictions

The McFadden Act and the Douglas Amendment restrict interstate activities of commercial banks and bank holding companies. The National Housing Act and regulatory policy restrict interstate expansion of thrifts and S&L holding companies. The "protections" actually afforded by these measures, however, are becoming increasingly ephemeral. As improvements in telecommunications and transportation have integrated national commerce, large bank holding companies have been able to devise lawful means of providing consumer finance services, management services, and trust services through interstate subsidiaries. The geographic restrictions thus do not eliminate all interstate competition, but merely hobble banking organizations in their ability to compete. Institutions are structured, and services are provided, not on the basis of efficiency, but rather along the lines mandated by regulatory limitations.

Regulatory interpretation of these geographic restrictions also has been muddled and inconsistent. For example, automatic teller machines (ATMs), which hold the potential to revolutionize the delivery of financial services and already account for a significant portion of consumer transactions, have been held to be "branches" within the scope of the McFadden Act. By the close of the 1970s, BankAmerica and Citicorp, the two largest bank holding companies, had operations in over 40 states. See Rhodes, The Competitive Effects of Interstate Banking, 66 FED. RES. BULL. 1 (1980).

126 See supra notes 6-8 and accompanying text.
127 For a more complete discussion of these issues, see Gorinson, Depository Institution Regulatory Reform in the 1980s: The Issue of Geographic Restrictions, 28 ANTITRUST BULL. 227 (Spring 1983).
128 See supra notes 19-21 and accompanying text.
129 See supra notes 22-25 and accompanying text.
130 By the close of the 1970s, BankAmerica and Citicorp, the two largest bank holding companies, had operations in over 40 states. See Rhodes, The Competitive Effects of Interstate Banking, 66 FED. RES. BULL. 1 (1980).
131 See Independent Bankers Ass'n v. Smith, 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976). The result created by the McFadden Act in this area becomes all the more apparent when differences exist between national and state banks in the freedom of banks to employ ATMs. State law may not consider an ATM a branch but the McFadden Act treats ATMs as branches, thus placing national banks at a competitive disadvantage with state-chartered institutions. Under the ruling in Independent Bankers, however, an ATM is considered a "branch" only if it is owned or leased by the bank in question. See Independent Bankers, 534 F.2d at 951. This ownership requirement makes possible interstate ATM
chartered S&Ls can utilize ATMs on an interstate basis. Recently, both the FDIC and the Federal Reserve Board concluded that a commercial bank that disposes of the bank’s commercial loan portfolio is no longer a “bank” within the meaning of the Bank Holding Company Act, thus allowing interstate expansion on that basis.

The practical impact of the geographic restrictions, which were intended to protect consumers by preventing “undue” concentration in the banking industry, is perverse. In the wholesale banking market, these restraints at best have succeeded only in slowing the advent of nationwide banking for commercial customers. Through loan production offices and other devices, commercial banks for some years have offered financial services to large corporate customers on a nationwide basis. Geographic restrictions today primarily affect competition in the provision of banking services to individuals and small business customers who do not and cannot have realistic banking alternatives outside their own localities. The byzantine structure created by these crazy-quilt restrictions has maintained highly concentrated local banking markets and has worked to the disadvantage of consumers, the group traditionally least able to afford substitutes for the services of depository institutions. Repeal or reform of these restrictions likely would lead to lower concentration at the local level, where increased competition would help ensure that prices were kept low and services remained high.

Recent steps taken by states to reduce interstate banking barriers, such as state authority for de novo chartering of banks and bank holding company subsidiaries for limited purposes, eventually may lower bar-
riers throughout the nation. Unfortunately, the parochial interests of state legislatures and the existence of powerful state banking lobbies suggest that such a development is not likely in the near future. In the interim, the continued costs of the existing barriers, particularly in restricting competition between commercial banks and nationwide non-depository financial institutions providing bank-like services, is too high a price for the industry and the economy to pay.

As William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, stated recently, "the time has come for repeal of the McFadden Act and the Douglas Amendment to permit depository institutions to expand where competitive opportunities appear." No valid reason exists for continuing the present unsatisfactory situation or for prohibiting efficient interstate competition in the financial services industry. At the very least, two measures clearly are necessary in the immediate context of industry transformation. First, statewide branching by national banks should be permitted to give national banks the same branching authority which federally chartered S&Ls already have in their own states. Second, the McFadden Act should be amended to exempt ATMs and other forms of EFT technology from the Act's coverage to encourage the efficient development of interstate ATM networks. Until anachronistic limits on geographic expansion are eliminated, competition in the financial services industry will remain artificially restricted and consumers will be precluded from realizing the full benefits of technological development.

B. The Glass-Steagall Act

Senator Garn's original bill would have liberalized the restrictions of the Glass-Steagall Act by permitting commercial banks to deal in and to underwrite state and municipal revenue obligations. As discussed previously, this initiative was eliminated as part of the essential com-

137 See, e.g., California Bankers Fight Reciprocal Bill, AMERICAN BANKER, May 17, 1983, at 2 col. 2. (California Bankers Association, for the second time in five years, is opposing efforts to permit reciprocal bank ownership by bank holding companies).

138 Brokerage house and securities firms are not subject to any restrictions on interstate expansion. In addition, these firms recently have been permitted to acquire depository institutions. For example, Dreyfus Corporation's acquisition of Lincoln State Bank of East Orange, New Jersey, has been approved by the FDIC. See FDIC Defends Dreyfus Bank Ruling, AMERICAN BANKER, Jan. 5, 1983, at 1. The device used for this acquisition was the "nonbank bank." By divesting its commercial loan portfolio, Lincoln State is no longer considered a bank within the meaning of the Bank Holding Company Act. See 12 U.S.C. § 1841(c) (1976); supra note 24. Citing "disorderly developments" in the financial services industry, the Federal Reserve Board recently drafted legislation that would place a moratorium on the acquisition of banks and thrifts by nonbanking companies such as Dreyfus. See Fed Proposes Merger Halt, New York Times, June 24, 1983, at D2, col. 3.

139 Testimony of William F. Baxter, Assistant Attorney General, Antitrust Division, before the Committee on Banking, Housing and Urban Affairs, United States Senate, at 7 (June 8, 1983)(hereinafter cited as "Baxter Testimony").

140 Id. at 7-8.

141 See supra notes 5, 54, and accompanying text.
promise that secured passage of the Garn-St Germain Act. However, the extremely rapid transformations now occurring make reform of Glass-Steagall a top priority.

Non-depository financial institutions are able to offer an extensive array of bank-like services at market rates, free from geographic restraints, reserve requirements and other restrictions applicable to depository institutions, such as maturity and account balance minimums. Coupled with utilization of advanced telecommunications technology, this freedom has changed forever the competitive structure of the financial services marketplace. For example, Sears combines in one financial sector Allstate Savings and Loan Association, Allstate Insurance, the securities firm of Dean Whitter Reynolds and the real estate firm of Coldwell Banker. Recent mergers between the American Express Company and Shearson Loeb Rhodes and between the Prudential Insurance Company and the securities firm of Bache Halsey Stuart Shields are well known. These integrated financial services firms are placing increased competitive pressure on commercial banks and other depository institutions, which are precluded from offering similar "one-step" financial convenience.

In recent years commercial banks have been testing the outer confines of the Glass-Steagall Act. Other liberalizations have occurred through judicial decisions. However, as with geographic restrictions, the industry divisions mandated by the Glass-Steagall Act are becoming increasingly obsolete and have fostered methods of conducting business that exist because of legal obligations rather than economic efficiency. The assault of non-depository financial institutions on the traditional banking domain has demonstrated that competitive entry in the financial services industry increases innovation and results in the offering of financial services to consumers at the lowest possible cost.

On the other hand, the limitation of commercial bank activities has hindered their attempts to remain competitive with non-traditional financial institutions. Perhaps commercial banks have been sheltered from true price and service competition for so long that they cannot successfully compete. If that is the case, repeal or modification of the Glass-Steagall Act, might induce some bank failures. The remedy for any failures deemed

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142 One example of this is the development by commercial banks of so-called "sweep accounts," which would hold deposits in a normal savings or transaction account and automatically "sweep" funds above a specified minimum into a money market mutual fund. See Shockey & Kurucza, Glass-Steagall Issues Raised by “Sweep” Programs, Legal Times, October 11, 1982, at 13, col. 1. In September, 1982, the Securities Industry Association petitioned the Federal Reserve Board to halt the operation of sweep accounts by national banks. Petition of the Securities Industry Ass’n, In re Sweep Accounts (filed Sept. 10 1982). With the authorization of money market deposit accounts by the Garn-St Germain Act, the incentive for use of such accounts by commercial banks has not been eliminated.


144 See Baxter Testimony, supra note 139, at 9.
undesirable for policy reasons, however, is contained in existing deposit insurance protections. By using artificial restrictions on competition as an indirect means of ensuring the “safety and soundness” of banking institutions, the Glass-Steagall Act creates regulatory distortions that outweigh whatever marginal benefit the Act provides to the security of bank depositors. Having moved closer to a competitive financial services industry with the Garn-St Germain Act, the time has come to reconsider the regulatory reforms which were postponed in the crisis surrounding the thrift industry.

C. Deposit Insurance

A third area of regulation that merits reconsideration in the wake of the Garn-St Germain Act is deposit insurance. Commentators of varied persuasion have recognized that federal insurance of accounts in depository institutions is a major factor in the stability of the American banking system. However, the introduction of increased competition to the financial services industry, both among depository institutions and between depository and non-depository financial institutions, may provide the basis for significant change in the current system of deposit insurance.

Federal deposit insurance guarantees depositors that, in the event of an institution’s failure, depositors will receive the full par value of their insured deposits. The maximum insured value on any one account has been raised progressively to today’s level of one hundred thousand dollars. Premiums for deposit insurance, however, are ‘leveled on insured institutions’ in proportion to their total deposits, even though not all deposits are insured and not all institutions are equally risky and likely to become insolvent. Moreover, the federal insurance agencies have handled practically all large institution failures through the mechanism of the “purchase and assumption” transaction which insures that no depositor, regardless of the dollar value of his account, incurs a loss.

These two practices are likely to become increasingly hard to defend as competition in the financial services industry accelerates. For example, it is well-recognized that uniform insurance premiums have encouraged depository institutions to assume additional risk, to earn the higher return typically associated with riskier investments, at no additional insurance


146 Only a very small proportion of banks and thrifts are not insured by either the FDIC of FSLIC. See supra note 18. All of these institutions are insured by state insurance funds.

147 See Economic Perspectives, supra note 43, at 21. Thus, conservative banks, and banks with a smaller proportion of insured to total deposits, effectively subsidize the insurance costs of other banks. Id.

costs. The Garn-St Germain Act itself encourages thrift institutions to embark into riskier enterprises, most notably commercial loans. As commercial banks encounter increased competition from non-depository financial institutions, they will face even more pressure to maintain profit margins and increase risk levels. Increased competition and risk by definition mean an increased failure rate among depository institutions.

As the financial services industry passes through the present transitional phase, the industry is rapidly becoming "a more risk-intensive, less-constrained environment that is likely to be less forgiving of faulty financial and credit judgments." As the FDIC has recognized, such a risk-intensive environment is no longer easily harmonized with an insurance system in which "banks' exposure to market discipline is greatly diminished." Nor is it easily harmonized with a system that discourages customers of depository institutions from evaluating the comparative risk of alternative institutions. By routinely protecting all depositors, including depositors with accounts in excess of the one hundred thousand dollar maximum, the federal deposit insurance agencies have contributed to a situation in which consumers invest in deposit accounts without regard to the profitability or financial stability of the institution in which they have invested their funds.

A variety of methods exist by which the current system of deposit insurance could be modified, including risk-related insurance premiums, "loss-sharing" through reduction or elimination of protection for uninsured and underinsured accounts, optional "excess" insurance, and increased reliance on private deposit insurance. These and other alternatives encompass different political and economic trade-offs that are beyond the scope of this article. Whatever the eventual direction chosen by Congress, that consideration has already begun. The Garn-St Germain Act directed the FDIC, the FSLIC and the NCUA each to conduct a study of "the current system of deposit insurance and its impact on the structure and operations of depository institutions," including the feasibility of risk-related insurance and other reforms. On April 15, 1983, these reports were transmitted to Congress, where the issue now lies.

D. Antitrust Considerations

Antitrust law is a final area that likely will be modified in the wake of Garn-St Germain. Two areas deserve discussion. First, the Act's expansion of the investment powers of thrift institutions indicates that over time thrifts are likely to offer increased, although still limited, competition to commercial banks. This suggests that changes may be appropriate in the definition of banking product markets for antitrust pur-

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150 Deposit Insurance, supra note 148, at III-3.
151 Id. at III-1.
152 Act § 712(a)(1).
poses. Second, as the financial services industry continues its restructuring phase, the complex regulatory procedures for review and approval of bank mergers, established by the Bank Merger Act of 1960, likely will prove increasingly unworkable and should be eliminated.

1. Financial Product Markets

As recently as 1974, the Supreme Court held that commercial banks and thrift institutions did not compete in the same "line of commerce," or product market, for the purpose of determining whether a merger between commercial banks violated section 7 of the Clayton Act. In United States v. Connecticut National Bank the Court stated:

At some stage in the development of savings banks it will be unrealistic to distinguish them from commercial banks for purposes of the Clayton Act. In Connecticut, that point may well be reached when and if savings banks become significant participants in the marketing of bank services to commercial enterprises. But, in adherence to the tests set forth in our earlier bank merger cases, which we are constrained to follow, we hold that such a point has not yet been reached.

Since that time the federal regulatory agencies have begun to recognize that the "cluster" of products and services offered by commercial banks has become less unique than it once was, prompting the agencies' evaluation, "in particular cases," of competition between commercial banks and thrift institutions.

With the advent of the Garn-St Germain Act, however, thrift institutions are authorized to provide almost the same range of products and services offered by commercial banks. Indeed, because thrifts can now accept demand deposits and make commercial loans, the traditional hallmarks of a commercial bank, the Act amends the definition of "bank" in the Bank Holding Company Act to declare that thrift institutions are not "banks." Simply put, thrifts have now reached the point at which they are poised to become "significant participants" in the marketing of

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153 See supra note 24.
156 See supra note 24.
158 Act § 333 (to be codified at 12 U.S.C. § 1841(c)).
services to commercial customers. Thus, if Connecticut National Bank retains any validity today, which the authors believe it does not, its days clearly are numbered.

This development has significant consequences for antitrust analysis. First, it indicates that thrift institutions and commercial banks should be considered in the same product market for antitrust purposes. The weight that thrift institutions should be given in analyzing the competitive effect of a merger should depend on the degree to which, in any particular geographic market, thrifts actually exercise their new powers to compete with commercial banks over the full range of banking services. Second, and analogously, product markets in depository institution mergers can no longer be defined simply by reference to the nature of the merging institutions, but rather must be defined by reference to the nature of specific types of products and services and the customers to whom they are offered. This is the approach taken by the Department of Justice in its most recent bank merger cases. The Department has argued that the competitive impact of a depository institution merger must be assessed in the two markets of "wholesale" banking and "retail" banking.

More generally, the inclusion of both commercial banks and thrifts in wholesale and retail banking product markets should permit more refined evaluation of the scope of effective competition in financial services. As thrifts exercise their new powers, consumers will be able to choose among a greater array of competitive alternatives. The increase in the number and variety of actual and potential competitors indicates that many mergers that might have been challenged in the past may now take on a more neutral cast, thereby permitting expansion through merger or consolidation with a lessened risk of antitrust exposure.

The Garn-St Germain Act places a capacity constraint on thrifts in their exercise of their new commercial lending powers. Thrifts can invest up to 5% of their assets in commercial loans until January 1, 1984, and up to a limit of 10% thereafter. Act § 325 (to be codified at 12 U.S.C. § 1464(c)(1)(R)). Thus, in commercial lending activities thrifts are not yet full competitors to commercial banks. This limitation also should be considered in assessing the weight that should be given to thrift institutions in analyzing the relevant product market in a commercial bank merger.

The Department has defined retail banking as "all banking services offered to individual customers, including: time deposits, savings deposits, transaction accounts, consumer loans and residential mortgage loans." Wholesale banking is defined as "all banking services offered to commercial customers, including: demand deposits, time deposits, transactions accounts, savings deposits and commercial loans." United States v. National Bank & Trust Co. of Norwich, No. 83-CV-537 (N.D.N.Y. filed May 6, 1983). See also United States v. Virginia Nat'l Bankshares, 1982-2 Trade Cas. 64,871 (W.D. Va. 1982).

This approach has suffered somewhat from a lack of sufficient data on specific services and customers, necessitating the continued use of proxies, such as total deposits, because more accurate data is generally unavailable. However, the analytical approach is correct and, given the changes in permissible banking activities wrought by Garn-St Germain and the 1980 Act, these difficulties in data collection are unavoidable.
2. Regulatory Merger Review

One legacy of regulation that continues to impede effective antitrust enforcement is the many layers of competitive review to which bank mergers are now subject. Every bank merger or bank holding company acquisition involving a federally insured bank must receive prior approval from either the Comptroller of the Currency, the FDIC, or the Federal Reserve Board. Both the Bank Merger Act of 1966\textsuperscript{102} and the Bank Holding Company Act of 1956\textsuperscript{3} incorporate the substantive standards of the antitrust laws, including section 7 of the Clayton Act.\textsuperscript{164}

Despite the fact that the banking agencies are supposed to apply a uniform standard, however, their approaches frequently are inconsistent. Confusion is evident from the regulators' use of the statutorily required "competitive factors" reports on mergers that they receive from the other regulatory agencies and the Department of Justice. As a recent General Accounting Office report concluded, the agencies frequently disagree with the recommendation submitted by their coordinate agencies and by the Department, often without articulating any basis for reaching a markedly different conclusion.\textsuperscript{165}

This statutory scheme is costly in several ways. The lack of uniformity among the agencies creates uncertainty in the industry and encourages regulatory forum shopping by merging institutions seeking a more favorable reception. The redundant competitive reviews add unnecessary regulatory costs and delay to otherwise efficient transactions. For example, even when neither a regulator nor the Department has identified a competitive problem, present law mandates a thirty-day waiting period after approval before a transaction may be consummated. Moreover, the Bank Merger Act immunizes mergers from antitrust scrutiny, except under section 2 of the Sherman Act,\textsuperscript{6} after expiration of the waiting period.\textsuperscript{167} This generally necessitates frenzied activity by both the parties to the merger and the Department of Justice during the 30-day stay, when a more reasoned approach would permit comprehensive competitive review without the necessity or threat of expedited litigation. Finally, the web of the Bank Merger Act and the Bank Holding Company Act catches transactions which present no possible competitive problems. So-called "phantom" mergers, formations and acquisitions of de novo banks, and corporate

\textsuperscript{102} 12 U.S.C. § 1828(c) (1976).
\textsuperscript{105} Comptroller General, Bank Merger Process Should Be Modernized and Simplified 20-27 (August 16, 1982).
\textsuperscript{107} Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(7)(C). Thrift mergers and bank holding company acquisitions of failing thrifts do not enjoy such immunity. Instead, such mergers and acquisitions can be challenged at any time under §7 of the Clayton Act, 15 U.S.C. § (1976), in the same manner as any other merger.
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reorganizations are thus subjected to unjustifiable regulatory delay and sometimes significant filing costs.\(^{168}\)

With the increasing pace of mergers among depository institutions,\(^{169}\) the transaction and regulatory costs associated with duplicate competitive review no longer can be justified. The time has come to consider removing the banking regulators altogether from review of the competitive aspects of depository institution mergers and acquisitions. As in other sectors of the economy, the Clayton Act, coupled with the premerger notification provision of the Hart-Scott-Rodino Antitrust Improvements Act,\(^{170}\) should be deemed sufficient for effective antitrust analysis. The counterproductive aspects of the present scheme\(^{171}\) should be replaced with a uniform, rational approach to which all financial institutions would be subject.

This proposal, recently advanced by Assistant Attorney General Baxter,\(^{172}\) would have two important effects. First, it would expedite mergers and acquisitions that involve no competitive problem, which includes the vast majority of all commercial bank mergers.\(^{173}\) Second, the proposal would aid consistency in antitrust enforcement by leaving to the Department of Justice, the executive branch agency responsible for enforcing the antitrust laws, sole authority to enforce the Clayton Act in bank merger cases on behalf of the federal government. By rationalizing and unifying competitive analysis, and at the same time allowing review of financial soundness and other non-competitive factors to remain with the banking regulators, the proposal would improve antitrust enforcement without jeopardizing other Congressional policy goals. Whether viewed from the perspective of the antitrust lawyer or the banking lawyer, these are persuasive reasons for change.

IV. CONCLUSION

The Garn-St Germain Act is a landmark piece of legislation. Although not comprehensive and not perfect, the Act dramatically continues the

\(^{168}\) See Baxter Testimony, supra note 139, at 14-17.

\(^{169}\) The Antitrust Division is responsible for evaluating mergers and acquisitions under the Bank Merger Act and the Bank Holding Company Act. In 1982, the Division received and reviewed over 1800 depository institution merger applications.


\(^{171}\) For example, under the Bank Merger Act the banking regulator that approves a bank merger is permitted to intervene as of right to defend its decision in any case challenging the acquisition under the antitrust laws. 12 U.S.C. § 1828(c)(7)(D). Since the statute requires the court to determine the issue de novo, the practical result of this intervention is to allow the defendant bank to argue that the “government” is supporting its position in the case, although the plaintiff may be the United States Department of Justice. See id. § 1828(c)(7)(A). Thus, the “government” is busy litigating against itself, surely a most inefficient method of antitrust enforcement.

\(^{172}\) Baxter Testimony, supra note 139, at 18-19.

process of regulatory reform of the financial services industry begun in 1980. Given the technological and economic transformation now occurring in the industry, however, more changes are on the way. Having nearly conquered the immediate crisis in the thrift industry, Congress now should turn its attention to the more basic deregulation issues that were placed on the back burner a year and a half ago.