Commentary: State-Chartered Financial Institutions in the 1990s - A New Perspective

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By Alvin C. Harrell

I. Introduction

Effective June 30, 1994, Home Savings and Loan Association of Oklahoma City (“Home Savings” or “the association”) terminated its federal deposit insurance and began to operate as an uninsured state-chartered depository institution, regulated and examined by the Federal Home Loan Bank Board. This marked the end of federal deposit insurance for the institution and its successor institutions.

1. Home Savings is a state-chartered, capital stock savings and loan association with about $11 billion in total assets. The author is President and Chairman.

2. There is a six-month phase-out period. All funds are to be deposited as of June 30, 1994, will continue to be insured, but subsequent withdrawals, until December 31, 1994.

Oklahoma Banking Commission but not the Office of Thrift Supervision (“OTS”) or the Federal Deposit Insurance Corporation. 

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Home Savings was not the first Oklahoma thrift to voluntarily terminate deposit insurance. Okmulgee Savings and Loan Association showed that it was possible by voluntarily terminating deposit insurance in early 1993. Okmulgee Savings lost only about 30% of its deposits, demonstrating that termination of deposit insurance was a legally and operationally viable strategy. Home Savings was intrigued but did not immediately follow suit because (1) at that time, Home Savings was federally chartered and a federal association cannot drop deposit in-
the debtors proposed in their Chapter 11 plan to pay off a foreclosure judgment on their residence over a 20-year period, with interest.

In opposition to the plan, the mortgagee contended that since a Chapter 13 consumer debtor is precluded from satisfying a New Jersey foreclosure judgment in full through the life of a Chapter 13 plan, a consumer debtor should not be able to circumvent this prohibition in a Chapter 11 case.

Disagreeing with another New Jersey bankruptcy case which had accepted the mortgagee’s argument, the court in Kennedy observed that unlike Chapter 13 in which Congress specifically proscribed modification of the rights of home mortgage lenders, there is no similar proscription in Chapter 11. Therefore, the court concluded that a Chapter 11 plan could be used to satisfy or modify a foreclosure judgment on a New Jersey residence. Nevertheless, the court rejected the debtors’ proposed treatment of the mortgagee in their plan. According to the court, while the debtors could modify the mortgagee’s right to immediate payment of its loan from the proceeds of the sale of the real estate, requiring the mortgagee to wait 20 years for payment in full of its claim would violate the Bankruptcy Code’s requirement of “fair and equitable” treatment in Chapter 11.

XXX. Lid on New Jersey Fire Insurance

Effective November 1, 1993, the New Jersey Department of Banking adopted a new rule limiting the amount of fire insurance a mortgagee can require on New Jersey real property.

The rule applies to financial institutions and licensees. The rule provides that a lender may not require a borrower to obtain fire insurance in excess of the replacement value of the mortgaged property as a condition for granting the mortgage loan. Under existing New Jersey insurance laws, an insurance company may issue fire insurance policies to the extent of the actual cash value of the property at the time of loss, not to exceed replacement or repair cost.

As a result of the new rule, a lender making a loan in excess of the property’s replacement cost may not require the borrower to obtain fire insurance in the amount of the loan. The rule leaves unclear whether lenders must monitor replacement value throughout the loan term.

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urance, and (2) Home Savings was fat and happy, comfortable with a status quo that was generating unprecedented earnings due to the very low deposit interest rates being paid by insured institutions.

Some time later it was learned that yet another Oklahoma thrift, this time a federal association, had voluntarily terminated deposit insurance by first converting to a state charter. This institution, Globe Savings Bank of El Reno, did so as part of a voluntary liquidation plan and did not seek to continue in business as a savings and loan association; instead, Globe converted to an ordinary state-chartered corporation in order to preserve certain claims against the federal government relating to its acquisition of a failed thrift. But the experience of Globe suggested the possibility that a federally chartered savings and loan might terminate deposit insurance by first converting to a state savings and loan charter. All that remained was an incentive to make the switch, something to disturb the association’s satisfaction with the status quo. That incentive was provided by the Dallas Regional Office of the OTS (“Dallas OTS Regional Office”).

III. The Dallas OTS Regional Office

For over 60 years Home Savings had been under the jurisdiction of the Topeka, Kansas OTS regional office (or its predecessor under the Federal Home Loan Bank Board). During that time Home Savings had never experienced a significant regulatory problem; its relationship with examiners and other supervisory personnel (even those reputed to be “difficult”) always had been excellent. But in late 1992 Home Savings (along with other Oklahoma thrifts) was transferred to the jurisdiction of the Dallas OTS Regional Office. Within a few months the association’s Board of Directors knew what it was like to feel the wrath of a regulatory agency whose authority and mandate apparently exceed its perception and judgment. The association’s Board of Directors (“the Board”) became increasingly concerned that a small institution like Home Savings could not survive in such a hostile regulatory environment. The Board began to reconsider its options.

IV. Defensive Strategy or Creative Opportunity?

At first, termination of deposit insurance was considered as a defensive mea-

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Hence Savings thus became the third Oklahoma thrift to voluntarily terminate deposit insurance, rather than the second as once widely reported.

Banking analysts initially viewed Home Savings that it was possible to terminate deposit insurance. Outside counsel we, if the term of the liquidation was not possible. This notice required the bank to liquidate the liquidation was not possible. This notice was found to be insufficient for filing their experience and thereby making possible the Home Savings transaction.

10. This is largely dependent on state law, as discussed infra.

11. Washington D.C. banking attorney with extensive regulatory experience (now since retired) told author that the OTS Dallas Region is the most in the country, though other reports from around the country suggest that the problems may be widespread. See, e.g., Paul S. Nollett, Common Sense: The Missing Factor In Too Many Bank Examinations, Amer. Bank., April 13, 1993, at 8 & Jim McElveen, Back-to-Back Exams: Am. Community Bank Draws a City of Funds, Amer. Bank., Oct. 21, 1993, at 9 & infra note 12.
2. In the court's view, the cost study must be performed before establishing the fee, not after being sued for purposes of justifying the fee.

3. Under Garrett and Beasley, the bank could recover its actual damages, measured as to late fees "by the period of time the money was wrongfully withheld plus the administrative costs reasonably related to collecting and accounting for a late payment." Thus, the plaintiff class should have recovered an amount equal to the bank's late and overlimit fee revenue less its actual damages. In applying this standard, the *Hitz* court added the extra interest that accrued on late and overlimit balances to the amount of the late and overlimit fees imposed. From this sum, the court subtracted not only the administrative costs "reasonably related to collecting and accounting for" late and overlimit balances, but also the bank's cost of funds for the extension of credit for such balances. The plaintiff thus receives more in damages than under a traditional measure of damages in an amount equal to the amount by which the extra interest exceeds the cost of funds.

If the approach of the trial court in *Hitz* is endorsed by the appellate court, lenders may find it extremely difficult to defeat a claim for unlawful penalties California.

2. South Dakota

The South Dakota Attorney General addressed the issue of whether credit card late charges agreed to by a South Dakota bank and its customer are subject to the liquidated damages provision in S.D. Codified Laws Ann. section 53-9-5. The South Dakota banking statute allows "other charges made in connection with" a credit card account to be charged in "an amount agreed to by the bank and the customer." Such fees are "deemed interest."\(^{65}\)

VI. Conclusion

A number of issues in the area of interstate lending have yet to be resolved. The courts and federal regulators have generally adopted a broad view of the federal preemption of state law, but lenders should continue to watch for new developments in the courts.

As federal preemption gathers strength, plaintiffs are looking more to unconscionability and liquidated damages statutes or common law theories as bases for their claims. Lenders should be aware of these potential claims and also that no clear consensus of interpretation has yet emerged.

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Shesmanoff recently reported that the average banking institution spends an amount equal to 59% of its annual income on regulatory compliance.\(^{13}\) This is a striking figure considering that it likely includes large institutions capable of achieving economies of scale in order to reduce the compliance burden. It suggests that the compliance cost for smaller institutions is well above 50%. This was certainly true of Home Savings, which found itself spending $100-$200,000 per year, roughly 200-400% of its average annual income, on regulatory compliance. Home Savings could afford this burden in 1993, due to the extraordinarily wide spread between its cost of funds and the yield on loans and investments. But that extraordinary spread was too good to last, and had already begun to decline by mid-1993. The Board of Directors faced the prospect of continually increasing regulatory costs\(^{14}\) in the face of a declining yield spread, with the association caught in between and slowly bleeding to death. At some point the result was likely to be an unfavorable merger, or worse yet a regulatory takeover based on "inadequate management" or "inadequate earnings."\(^{15}\) The Board was forced to confront the prospect of a

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\(^{64}\) See supra note 11. The post-1989 regulatory environment includes regulatory self-management, credit allocation, and line-of-business enforcement actions. See, e.g., Harrell, Comment: The Bank Holding Companies Act in the 1990s—A Sea Change for America, 47 N.C. Comm. Fin. L. Q. Rep. 316 (1993). In the hands of any overzealous regulatory agency this is a dangerous risk. The Board of Directors was forced to confront the fact that the regulatory agency created to assure the safety and soundness of thrift institutions had become a primary threat to the existence of small institutions like Home Savings. See, e.g., William H. Browne, Unequal Regulation May Drive Small Banks Over the Edge, Amer. Banker, May 25, 1994, at B; Robert Murchison, OTS Changes Focus of Enforcement Work to Healthy Thrifts, Amer. Banker, May 8, 1994; Fred B. Runyan, Tough Days—"Regulators From Hell" Frighten Some Banks But Also Win Praise, Wall St. J. April 22, 1993, at N; Ben Elgin, A Regulation that Makes Lending Unattractive, Amer. Banker, Oct. 13, 1993, at 19.

\(^{65}\) Undated letter to financial institutions from Shesmanoff Information Services, Inc., describing a 1992 survey. It seems likely that the figure is higher today.

\(^{13}\) See, e.g., Claudia Cummins, Fed's Loan-Ware Seen Red Type Struggling for Banks, Amer. Banker, June 14, 1994, at 1.
powers the strength of their accounts at affordable rates will lose an important source of financing.

The increased risk to buyers of accounts from Tenth Circuit sellers will remain until the United States Court of Appeals for the Tenth Circuit repudiates the decision or all of the legislatures for states in the Tenth Circuit amend Article 9 to remove the basis for the decision. For other transactions, the risks could also increase. The court in Octagon Gas is not the first one to become confused and to conclude that a sale of an account is not a sale for resolving the priority of a federal tax lien and an unperfected assignment of an account against the purchaser of the account, the District of Columbia Court of Appeals in District of Columbia v. Thomas Funding Corp., dismissed the claim that the purchaser had priority over a tax lien under the Federal Tax Lien Act as a "purchaser" under that Act. The court stated that "a purchaser of accounts rarely will qualify as a purchaser under the statute because a purchaser of accounts under District of Columbia law obtains a security interest in the accounts pursuant to Article 9 of the Uniform Commercial Code." Fortunately, this statement is dictum. The purchaser had filed a defective financing statement and had only an unperfected interest within the meaning of the federal tax lien act. His interest was subordinate in any event.

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10. See note at beginning of this issue for an example of the evaluations advertising campaign.

11. This was possible because Home Savings (like many other small institutions) had very high compliance costs relative to a low deposit base, so that the increased deposit costs could be offset by reduced compliance costs. Obvioulsy the economics would be different for an institution with a larger deposit base and lower relative compliance costs.

12. This was the case not only because of reduced regulatory constraints outside the federal banking system, but because of the Board's increased willingness to let states take relaxed for the threat of federal regulatory enforcement actions.


15. 593 A.2d at 1037 (emphasis by the court).

healthy institution being put out of business by the regulators.

Thus, termination of deposit insurance was initially considered as a defensive measure, designed to preserve Home Savings as an independent institution. But it soon became apparent that Home Savings had a unique strategic opportunity to create an independent institution largely free of the constraints of federal banking regulation.

By saving $100-$200,000 annually in regulatory costs, Home Savings could afford to pay substantially higher deposit interest rates. In turn this would enable the association to help replace those deposits that would inevitably be lost when deposit insurance was terminated. As many bankers are aware, it is normally uneconomical to raise deposit interest rates across the board, because the benefits of any new deposits will be outweighed by the dead weight of the increased costs on existing deposits (deposits that otherwise would have been retained at lower cost). There is, therefore, a strong disincentive that militates against a general increase in a bank's deposit interest rates. This is probably one reason why deposit interest rates have been slow to move upward during 1994. By "paying" for this increased cost of funds by reduced regulatory compliance costs, Home Savings was able to break out of this pattern.

In turn the reduction in federal regulatory costs and elimination of severe regulatory constraints also offered the prospect of increased flexibility to lend and invest the new deposits at attractive rates of return. Despite the current focus of federal banking regulation on social issues, it became apparent that Home Savings could provide superior service to its community, on both the lending and deposit sides of the ledger, without OTS regulation. In effect, a regulatory agency torn between supporting social obligations and safety/soundness was having a significantly adverse impact on both the content of a small institution. The Board concluded that a strong and viable community banking institution, serving primarily its local area, could best survive outside the umbrella of federal banking regulation. Freed of "one size fits all" federal regulation, Home Savings would have the flexibility to pursue diverse strategies and market niches, and to restrain operating costs, in ways not possible for a federally supervised institution. Ultimately, what started as a defensive measure permitted the pursuit of new strategic opportunities on both the deposit and lending sides of the ledger.

V. Institution-Related Factors

There were several factors, unusual if not unique to Home Savings, that made the decision to terminate deposit insurance possible and even compelling. Other institutions considering the same option may face a different and more difficult decision.

First of all, the question of the basic legal authority to operate without deposit insurance. In Oklahoma, as in other states, a newly-chartered bank or thrift is required to...
solved by the Article.20 These studies led to written reports detailing these matters. Some reports were published in the bar association journal.21 Each report furnished a basis for favorable testimony as to the suitability of the proposed law in the Oklahoma Legislature. The reports carefully specified, however, that they represented the collective views of the individual authors and not necessarily the view of any one author, the Oklahoma Bar Association, or any of its committees, officers or members. The legislation reported on was not part of the Oklahoma Bar Association legislation program, but rather was the legislative program of the Oklahoma Commissioners.

After the law passed, the report was revised by the bar committee to become an introductory or prefatory Oklahoma comment to the new statute which generally explained what the statute did and how prior law was changed. The report, as revised, was published by the printer of Oklahoma Statutes Annotated (West Publishing Company) when the annual supplement to Oklahoma Statutes Annotated was released. The Oklahoma Committee then drafted individual Oklahoma Comments for many UCC sections. The Oklahoma Comments were printed in addition to the Official Comments and the text of the statute itself,22 and, together with those materials, provide significant guidance to Oklahoma practitioners about the new law. But more than this material eventuated because, as the bar committee conducted its study and prepared its report, it often was prompted by its intellectual curiosity to probe more deeply. As a result, it was able to prepare additional detailed comments to many specific sections indicating changes in that particular area of the law, as well as at times providing supplemental information to what was covered in the Official Comments. For example, the Oklahoma Comment to Revised Article 3 section 3-102 opined that the Official Comment to that section rejects the interpretation of the relationship between Articles 3 and 8 rendered in Victory National Bank of Nowata v. Oklahoma State Bank, Viesta,23 which held, in a view peculiar to Oklahoma, that Article 8 of the Code, and not Article 3, is applicable to an ordinary certificate of deposit. For another example, the Oklahoma Comments to Revised UCC Article 3 sections 3-104, 3-105 and 3-106 discuss the impact of those sections of Revised Article 3 on Oklahoma cases decided under prior law. In fact, these efforts ultimately have prompted the participation of the Oklahoma Committee in providing input to the NCCUSL through studies of future revisions to the UCC while the NCCUSL is still completing the task of revision on the national level.24 In the meantime, the Oklahoma Comments also represent a published resource that may have relevance in other states when parties confront issues similar to those addressed in the Oklahoma Comments.

IV. Conclusion

Uniform laws uniformly and rapidly enacted are the only alternative to a chaotic condition that benefits no one,25 or to federal enactment which is the less desirable method to do the job.26 To facilitate the uniform laws process, local studies leading to uniform enactment of the law through increased understanding of how it was formulated, and the soundness of the policy choices made, are essential. But evolution has demonstrated that these studies may have additional benefits for the process. They may develop increased local input into the process itself, and, if their results are put in written form and published, the result is local comments or reports on the uniform law may not only assist the local practitioner but also lead to further insights and explanations of how the law operates. This may provide benefits on the national level as well as the state level. Hopefully this article will encourage the establishment or expansion of processes like those described in Oklahoma in other jurisdictions, so that practitioners from many jurisdictions will come to realize how much help in interpreting these laws may be found in local comments on them from their own as well as other jurisdictions.

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have federal deposit insurance.23 However, in Oklahoma certain thrifts which existed before federal deposit insurance was required under state law are "grandfathered" and may operate without federal insurance. There are very few thrifts left in Oklahoma from among those that were in business before deposit insurance was mandated. Of roughly 54 Oklahoma savings and loan associations

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that were in business a decade ago, less than a dozen have survived. Perhaps only a handful of these would be eligible to terminate deposit insurance.

Second, Home Savings found itself with a very high ratio of liquidity to total deposits. By the time the decision was made to terminate deposit insurance, liquid assets approached 75% of deposits, and highly marketable FHA/VA loans exceeded the remaining 25% of deposits, so that readily marketable assets exceeded 100% of deposit liabilities. Home Savings could easily pay the withdrawal of every penny of its deposits if need be.

In effect the association’s portfolio of conventional loans was funded entirely by its capital and reserves.

As a result Home Savings was in an unusually good position to terminate deposit insurance, in that there was never any danger of an inability to fund withdrawals during the termination process. Moreover it seemed that there might be a brief window of opportunity, as during the Board’s consideration of the termination of deposit insurance there was much discussion of possible Community Reinvestment Act (“CRA”) regulatory changes, including a proposed minimum 60% loan-to-deposits ratio that may well become a benchmark for the industry. If so, it is possible that an institution seeking to terminate deposit insurance might be unable to assemble sufficient liquidity to satisfy potential withdrawals without violating the CRA (which could then be a basis for denial of the request to terminate insurance). Of course an institution with a higher loan-to-deposit ratio could still terminate deposit insurance by arranging for a sale of loans as needed to fund potential withdrawals, but this would add an additional complication to an already challenging proposition.

Third, Home Savings enjoyed a very high capital-to-assets ratio, in the range of 20-25% (the ratio increased as modest withdrawals reduced liabilities following announcement of the termination). The risk-based capital ratio exceeded 140%. This meant that Home Savings could legitimately and effectively communicate to sophisticated potential investors that their deposits would be safe despite the lack of deposit insurance. While some customers are wedded to deposit insurance, seemingly to the exclusion of any other factor (including the rate of return on their investment), others are more willing to conduct a measured analysis of an institution’s financial position. To the latter, Home Savings is able to offer an above-market rate of return without significant risk. Few institutions have capital ratios that will permit this kind of marketing strategy.

Finally, the size of the association’s deposit base was sufficiently small to be less than a dominating element in an evaluation of the institution’s strategy. Far

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“ancillary” collateral when other collateral is also given;

- Additional penalties and remedies should be available to the consumer if a creditor wrongfully executes against a deposit account.

The fear among consumer advocates is that the unregulated use of deposit accounts as collateral could constitute a powerful “sledgehammer” for forcing concessions from consumers in the event of a dispute over a debt, allowing the creditor to “seize” the debtor’s accounts, so as to force an immediate settlement of any claims or defenses the consumer may have on unfavorable terms.

The Article 9 Drafting Committee’s task is to accommodate the concerns of both the banking industry and consumer groups, while producing a set of provisions which will provide meaningful improvement over the common law pledge.

In view of this challenge, the Drafting Committee may well conclude that there was a good reason for excluding deposit accounts from Article 9 to begin with.

VI. The Regulatory Response

Recently there have been signs that the federal banking agencies recognize the stifling impact their oversight is having on regulated institutions, especially small ones. They could hardly miss the point, as increasing numbers of federally chartered banks and thrifts embrace various strategies to escape or diminish direct federal oversight. Perhaps some day this will lead to real reform, if nothing else from an instinct of regulatory survival.

In the meantime, one of the primary challenges for financial institutions in the 1990s is to minimize the adverse effects of federal regulation. In addition to the Oklahoma thrifts that terminated deposit insurance, other noteworthy strategies include:

- A number of California institutions have given up their charters to become mortgage banks.

- A number of national banks have converted to state charters in an effort to escape regulation by the Office of the Comptroller of the Currency.

- There has been a flight from the OTS by thrifts converting to state savings banks, which in some states are regulated by the state and FDIC rather than the OTS. In some states nearly half of the thrifts have engaged in this kind of “charter flip” over the past few years.

- The most common means of escape for community banking institutions is simply to sell out to a holding company or merge with a larger institution. Unlike Home Savings, most of the institutions choosing this path do not have the option to escape federal banking regulation and still remain independent. The result has been a significant decline in the number of community banking institutions, a trend reminiscent of the thrift industry before FIRREA.

When FIRREA was enacted in 1989, there were roughly a dozen federally-insured community banks and thrifts headquartered in the association’s local CRA community (the central corridor of south Oklahoma City). Today only one remains, and it is reported to be engaged in merger discussions with an outside bank holding company. This entire community banking system, developed over three quarters of a century, was essentially wiped out in five years after FIRREA.

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25. See, e.g., Barbara A. Reiss, Lending Some Emphasis For Smaller Banks by Fall, Amer. Bank, June 17, 1994, at 1; Barbara A. Reish, Lending is Meaningless to CRA to Focus on Reinsuring Escapes, Amer. Bank, April 7, 1994, at 1; Barbara A. Reiss, Policymakers Renaming the FDIC for Overhead of Bank Regulations, Amer. Bank, Feb. 17, 1994, at 2; Shawn Henry, OTS Moving Up to Shush Red Tape, Aide Says: Amer. Bank, Dec. 2, 1993, at 1. Unfortunately the details don’t always match up to the rhetoric. See, e.g., Clarkie Clemen, FDIC’s Build It Up/Build It Down Strategy Growing for Banks, Amer. Bank, June 14, 1994, at 1. Your author has reviewed the current regulatory relief measures being considered by Congress, and is very impressed.


This case also contains an interesting discussion of the interplay between the UCC provisions on lapse, other state law, and federal law. Citing United States v. Kimbell Foods, Inc., and Clearfield Trust Co. v. United States, the Fourth Circuit applied UCC section 9-403(2) and North Carolina General Statute section 44-69.1 in determining that the Farmer's Home security interest had lapsed under state law 18 months after sale of the collateral.

XII. Conclusion

Continuation statement and related problems "continue" to take a "toll" on secured parties far out of proportion to the seemingly simple mechanics involved. This suggests a need for secured creditors to regularly monitor continuation statement filings with a full understanding of the intricacies of section 9-403. The travails of those who have learned this the hard way provide valuable lessons for those of us who have been more fortunate thus far.

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The banking regulators obviously have noticed this trend and have begun to react, partly by talking up regulatory relief and reform. At the same time, however, there have been signs of interest in limiting the flight from federal regulation by discouraging use of all escape routes except merger or acquisition by another owner or institution that would remain within the same regulatory jurisdiction.

All of this provided some cause for concern on the part of the association's Board of Directors. There was some concern that the OTS or OCC (sibling agencies that together control the FDIC Board pending the appointment of an FDIC chair) might seek to bar the termination or even seek retribution against the association or its Board of Directors. As it turns out those concerns were apparently overblown, and the request for termination was granted without incident (though only after an unexplained delay). Consider, however, these more or less contemporary events:

- After hearing the decision to terminate deposit insurance, a good friend (and nationally respected authority in this area of law) called to say, in effect, "Congratulations, you've got guts—but what do you think your CRA rating will be when the regulators find out about this?"

This underscored the Board's concern that the OTS might use the highly discretionary CRA rating system to give Home Savings a low rating and then use that to block the termination.

- While the association's application to terminate deposit insurance was pending, there were reports of several other savings associations whose applications to escape the OTS by converting to a state savings bank charter were rejected due to low CRA ratings.

- There have been other reports of banks with low loan-to-deposit rating and then use that to block the termination.

32. Home Savings always had a "satisfactory" CRA rating and it's first had long been a reverse mortgage in the sense of attracting deposits from outside its area and lending them at low and moderate interest rates to the association's clientele. Still, the CRA rating system is inherently discretionary, and the association's high liquidity position (possibly necessary in order to establish the ability to fund withdrawals upon termination of deposit insurance) was that Home Savings would not meet the proposed CRA 600 sustainable loan ratios. See Proposed Rule, Community Reinvestment Act Regulations, 58 Fed. Reg. 4766 (Dec. 31, 1993).

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It may be difficult for brokers to defend their actions if, in truth, they had agreed to negotiate loans on behalf of borrowers, but then received compensation from lenders for submitting applications for loans with higher than required rates. The practice of offering buy rates in the automobile financing industry may be one thing where consumers would rarely assume that car dealers are acting in the consumers' best interests. In the mortgage industry, however, it may be reasonable for borrowers to expect that brokers with whom they have entered into a contractual relationship owe some duty to them to obtain the best loan possible.

• Okmulgee Savings reportedly received approval of its application to terminate deposit insurance (during the Bush administration) in about 60 days. The statute seemingly contemplates approval within 90 days. It took more than five months for Home Savings to receive FDIC approval, despite the fact that career FDIC staff at all levels apparently recommended approval very quickly. When the FDIC Order granting approval finally was received, it was back-dated roughly 50 days, with a cover letter explaining that the delay was a result of “suggestions” made by members of the FDIC Board.

• Shortly after Home Savings received approval to terminate deposit insurance, an Oklahoma credit union announced that its members were considering a plan to convert from a mutually chartered credit union to a capital-stock state savings bank, in order to raise capital for expansion and allow the members to purchase shares of stock. Within days, the institution was seized by the National Credit Union Administration (“NCUA”), on grounds of “inadequate management” and “declining earnings.” The stated purpose was to “protect the members,” apparently from themselves.

While none of this ultimately affected Home Savings, it suggests a possible regulatory attitude that could pose problems for other institutions considering a similar change. There appears to be some danger that federal regulators could use their highly discretionary powers to prevent healthy institutions from leaving the regulatory jurisdiction. If so, an institution may be too late if it waits until it has a problem before seeking to change its charter or switch to another regulator, in the sense that almost any problem (including, potentially, “inadequate management,” “declining earnings,” or a low CRA rating) could be used as a basis for rejecting the institution’s application.

VII. Summary and Conclusions

Home Savings was able to terminate deposit insurance, in order to operate as a “de-regulated” depository institution, because of unusual institutional factors, including exceptionally high capital and liquidity ratios, high earnings, a favorable CRA record, a “grandfathered” thrift charter and favorable state laws, a small deposit base and modest aspirations in terms of asset growth.

Banking is being “reinvented” by the U.S. government. Home Savings preferred to reinvent itself in its own image, as an uninsured community building and loan association right out of the early 20th century, an anachronism to some but a flexible niche player to others. As federally regulated banking institutions are increasingly consolidated, regulated, and controlled, more and more local and creative financing transactions are being conducted outside the banking system. The concept of “narrow banking” and the “utility model” of regulation have essentially won the day at the federal level. If local economies are to flourish, it will require a new perspective on state-chartered financial institutions, some seemingly anachronistic, that can operate outside this stifling federal bank regulatory system. Financial deregulation failed in the 1980s because of federal oversight and deposit insurance; it will be tested again in the 1990s without either, by institutions outside the federal bank regulatory system, in the process also testing some old perceptions about the roles of state and federal governments in the American financial system. The biggest remaining question is whether the states will recognize and fully accommodate the opportunities being presented.