BRIDGE BANKS: DETOX TOOLS FOR A MELTED ECONOMY

Gabriela Steier

Available at: https://works.bepress.com/gabriela_steier/2/
BRIDGE BANKS: DETOX TOOLS FOR A MELTED ECONOMY

Gabriela Steier

Duquesne University School of Law
Table of Contents

INTRODUCTION....................................................................................................................................... 3

I. BRIDGE BANKS AS A TOOL FOR ECONOMIC GROWTH.................................................................5
   A. THE GERMAN BAD BANK MODE ....................................................................................................... 5
   B. THE SIGNIFICANCE OF MULTINATIONAL BANKING FOR BANKS IN THE UNITED STATES DURING THE CURRENT MORTGAGE CRISIS ................................................................. 6
   C. THE BAD BANK AS GERMANY’S RESPONSE TO THE FINANCIAL CRISIS ................................... 10
   D. THE BRIDGE BANK AS A STATUTORY SCHEME TO CAST OFF TOXIC BANK DEBT .................. 14
   E. A COMPARISON OF THE BAD BANK AND BRIDGE BANK MODELS ........................................... 16

II. GERMAN BANKS IN CONTEXT .........................................................................................................17
   A. SUPERVISION OF THE CENTRAL BANKING SYSTEM: THE EUROPEAN CENTRAL BANK AND THE GERMAN CENTRAL BANK ........................................................................................................... 17
   B. THE THREE PILLARS OF BANKING IN GERMANY ...................................................................... 19
      Pillar 1 - Savings Banks (Sparkassen) .................................................................................................. 21
      Pillar 2 - Private Commercial Banks (Kreditbanken, Genossenschaftsbanken) .................................. 22
      Pillar 3 - Public and Cooperative Credit Institutions (Volks- and Raiffeisenbanken) ....................... 22

III. BAD BANKS AND ECONOMIC GROWTH AS A REMEDY FOR THE CURRENT FINANCIAL CRISIS ........................................................................................................................................ 26
   A. CAN A BAD BANK BE SUCCESSFUL IN THE UNITED STATES? ....................................................... 26
   B. EUROBONDS .................................................................................................................................... 30
   C. THE COMMERZBANK AS A BAD BANK EXAMPLE ........................................................................ 33
   D. BENEFITS FOR REGULATORY BODIES IN THE U.S. .................................................................. 35

CONCLUSION ......................................................................................................................................... 36

APPENDIX 1 ........................................................................................................................................... 40

APPENDIX 2 ........................................................................................................................................... 49

APPENDIX 3 ........................................................................................................................................... 52

APPENDIX 4 ........................................................................................................................................... 53
Introduction

Consider the possibility to create a financial tool that would bridge the current economic crash to a brilliant future and absorb the current toxic debts. Such a tool is urgently needed. Treasury Secretary Henry Paulson said, “regulators in the United States must have a way to allow investment banks to fail without threatening the stability of the broader financial system.” Moreover, Ben Shalom Bernanke, the current Chairman of the Federal Reserve explained that “regulators might unwind a failing investment bank in an orderly manner,”1 namely by using bridge banks. In July 2008, when the economy was crumbling, he suggested that “Congress may wish to consider . . . new tools . . . for ensuring an orderly liquidation of a systemically important securities firm that is on the verge of bankruptcy.”2 A bridge bank could accomplish just that -- with some tweaking of the law.3

In comparison, the German Parliament (Bundestag) responded to the 2008 economic crash with the implementation of such a tool: bad banks. Germany accomplished exactly what Paulson and Bernanke demanded Congress to design in the United States. Taking a close look at the German model can yield potential inspiration to adapt the current law to the demands created by the financial meltdown.

2 Id.
3 Black’s Law Dictionary defines a bridge bank as “[a] national bank chartered to operate an insolvent bank for up to three years or until the bank is sold.” Black’s Law Dictionary (9th ed. 2009), bridge bank.
Amending the bridge bank statute, 12 U.S.C.A. § 1821, to allow defaulting banks to create bridge depository institutions by creating possibilities for greater fragmentation within the financial sector in the United States may provide mechanisms to recycle government funds and to heal the economy from the inside out. In Part I, in order to explain why such updates to the bridge bank statute are promising, I will draw upon the German bad bank model and analyze its potential to facilitate economic growth. Next, in Part II, I will put the bad bank model in context within the regulatory framework in Germany and the three-pillar banking system. I will also draw from recent developments in the European Union to explore which aspects of the German bad banks may provide beneficial inspiration for amendments to the bridge bank statute in the United States and how they may work. In Part III, I will provide examples and in-depth analysis of the potential role of bridge depository institutions in the current global economic crisis as measures to fuel economic growth.

The following comparative approach may moreover deepen one’s awareness of the home system by comparing it to the German counterpart. This approach may, in turn, allow for an impartial and objective reevaluation of the home system springing from the recognition that one’s system may not have the best or only solutions to problems and a humble acceptance of

4 This paper will draw from some of the most recent sources in international and German finance and provide the author’s translations of crucial excerpts where needed. The bilingual author of this article introduces transnational and translinguistic insights, which may remain hidden to an outside-translator, for “the outsiders-translators’ access to the original will be compromised by their not being of the culture which produced the original text.” Some of the translated texts and interpretations of German laws are accessible for the English reader for the first time in the context presented in this paper. VIVIAN GROSSWALD CURRAN, COMPARATIVE LAW AN INTRODUCTION 40 (Carolina Academic Press, Comparative Law Series) (2002).

other ways of legal thought, which can bring inspiration and new solutions. A comprehensive comparison of the bridge bank scheme in the United States and the bad bank model in Germany will hopefully achieve such inspiration to overcome the global financial crisis in the long-run.

I. Bridge Banks as a Tool for Economic Growth

A. The German Bad Bank Model

What Congress calls a “bridge bank,” the Bundestag calls a “bad bank.” At their core, both of these types of bridge depository institutions are similar, but their purposes and legal designs and different. Bridge banks cast off liquidated subsidiaries. In comparison, their German counter parts, the bad banks, are designed to stop the downward pull of the economic crash through debt management. On the one hand, bridge banks remove cash flow from the economy by setting up separate banking entities burdened with large debts which will not be paid off. German bad banks, on the other hand, recycle debt into guaranteed government loans to banks and from banks to the public, thereby reintroducing funds into the market. This paper will explore how the German version of such bridge depository institutions can serve as legal tools to avert further financial meltdown of banks in the United States and to facilitate economic growth by reintroducing funds into the economy.

Economic growth appears to be best way out of the current financial crisis, because government bail-outs or widespread restructuring are much more expensive and risky.

7 26 C.F.R. § 1.597-4.
alternatives. Thus, *The Economist* suggests a four-point plan to save Europe that would affect
and could be applied to the United States as well:

A rescue must do four things fast. First, it must make clear which of Europe’s
governments are deemed illiquid and which are insolvent, giving unlimited
backing to the solvent governments but restructuring the debt of those that can
never repay it. Second, it has to shore up Europe’s banks to ensure they can
withstand a sovereign default. Third, it needs to shift the euro zone’s
macroeconomic policy from its obsession with budget-cutting towards an agenda
for growth. And finally, it must start the process of designing a new system to
stop such a mess ever being created again.  

This four-point plan toward economic growth can be implemented through the use of bridge
depository institutions. Congress’ bridge bank idea, however, would have to follow a bad bank
more closely, so that money can be brought back into the system, instead of taken out.

Notably, bad banks can recycle funds and allow banks to repay their debts over time.

Through the restructuring of the debt skeleton underlying the financial meltdown, the same funds
can be reintroduced in the national economy and shield government funds from costly bail-outs.
The resulting conservation of money that would have otherwise been lost in sovereign default
goes back to the taxpayer. Thus, implementing bridge banks in the restructuring of domestic debt
may promote economic growth through the conversion of debt into investible loans. Part I of this
paper hereinafter explores such bridge banks as a tool to recycle debts and bring funds back into
the United States’ economy to promote growth. The German banking system may provide
helpful inspiration to stabilize the market in the United States.

B. The Significance of Multinational Banking for Banks in the United States
during the Current Mortgage Crisis

---

Multinational banking\(^9\) has recently gained in importance in face of the globalization of some of the largest internationals to loan financing.\(^10\) According to William A. Lovett, Professor of Law and Economics, Tulane University School of Law, the span of this multinational banking system is comparable to the domestic banking industry, but rests primarily on economic growth, foreign investment and multinational schemes to avoid taxation within this large international network of banking.\(^11\) It follows that the global economic impact of the American superpower is smaller than expected. At the same time, the importance of economic growth is emphasized even further where the distressed economy in the United States has to keep up with the European, Chinese, Japanese and other global markets. The BRICS states, for example, have grown from developing countries into global finance powers. This trend could also affect the credit crunch because they show some economic growth despite the depression and further affect the economy in the United States because of the interconnectedness of the financial systems world-wide.

In fact, this multinational banking system must be appreciated as a whole because it has firmly established a global economy, where all major economic nations are intertwined. Professor Lovett explains that American banks only make up 10 of the 75 largest international banks involved in this vast network.\(^12\) The most recent ranking of the top 50 global banks published by the Global Finance magazine for the year 2011 puts European banks in the top five, but only three American banks in the top ten. While five German, five French, five British, three Dutch, two Spanish, two Italian, two Swiss, one Belgian and one Swedish banks make up a total

\(^{9}\) William Lovett, Banking and Financial Institutions Law 222 (7th ed. 2009).
\(^{10}\) Id.
\(^{11}\) Id.
\(^{12}\) Id.
of 26 of the top 50 global banks, only five United States banks placed at all.\textsuperscript{13} This illustrates that the market in the United States does not exist isolated from the European Union and the rest of the world in any way. Instead, the economies, along with the national and multinational banks, are closely connected in the global economy. The current financial crisis proves that a downward pull of one financial power has the potential to affect the entire international network. An isolated view of the systems will therefore be at best incomplete. I suggest that the understanding of another system will result in a more comprehensive analysis of one’s own system, and allow for promising improvements. Therefore, this paper focuses on and closely examines the German bad banks and draws conclusions for an implementation of bridge banks in the United States in an effort to seek cures for the current financial crisis.

The interconnectedness of the American and European financial markets, with their codependency and shared economic crisis, make up a great part of this global economy. Trends show that European bank shares fell by 25\% this year,\textsuperscript{14} whereas the European crisis-affected banks are merely neighbors to their American counterparts. One example of such a counterpart are the struggling Commerzbank in Germany and the Bank of America in the United States, which lost half of its share price and two thirds of its total value.\textsuperscript{15} Bankruptcies and liquidations of some of the largest brokerage firms,\textsuperscript{16} holding companies and banks give the United States


\textsuperscript{15} \textit{Id.}

many reasons to worry and even more reasons to get some ideas to prevent further meltdowns by looking at how other nations handle the economic crisis.

The link in the chain that connects the European Union and the United States in the current financial crisis is the long period of spending much more than they could afford. These days, the news is plastered with speculation about the economic crisis, over- or under regulation waves, stagnant economic growth and litigation triggered by the housing bust. The mortgage bubble burst, however, cannot be the exclusive scape goat of the current financial crisis. Despite the codependency of the European market and the large deficits caused by the housing bubble burst in the United States, there was some growth in Europe. The Economist reports that the “GDP grew in most [Eurozone] countries in the first half of 2011, though there were marked differences in performance. Germany was sprightly. So were the countries around with which it trades most heavily.” Once again, this illustrates that Germany is somehow shielding itself from the downward spiral so many countries are trapped in since the meltdown of 2008. These trends can partially be attributed to the fragmented banking system, as well as to the use of bad banks. The setting aside – or freezing – of toxic debts in bad banks is a part of the solution and the United States could use similar techniques to stop further financial meltdown.

http://online.wsj.com/article/SB10001424052970204394804577012061970129588.html?mod=googlenews-wsj#articleTabs%3D.


C. The Bad Bank as Germany’s Response to the Financial Crisis

In July 2009, within the first year of the economic meltdown, the Bundestag passed the “bad bank” statute into law. (Appendices 3 and 4) The goal was to create a way for creditors to take toxic debts off their balance sheets so that capital would not be tied to debt but, instead, be available for new loans. The BBC reported that, in response to the new statute, the voluntary participation of banks showed significant interest. Under the new bad bank plan, banks would receive bonds worth 90% of the value of the toxic assets and micromanage their debts. Andreas Schmitz, President of the Association of German Banks and Chairman of the Management Board of HSBC Trinkaus & Burkhardt AG, explained that the bad bank solution would work like a freezer, where every bank gets its own shelf and the bad assets are frozen for 20 years. The bad bank model is also designed to offset the trend of investment-shy investors in face of the economic crisis, a problem in the United States economy. Another purpose of the plan was to reduce quarterly deductions for losses from junk bonds and to decentralize the detoxification


22 Id.

23 Id.

24 Id.

25 Benedikt Fehr, Georg Giersberg, Manfred Schäfers, Kabinett billigt Entgiftung So funktioniert eine Bad Bank (The Cabinet agrees to Detoxification This is how a Bad Bank works) FRANKFURTER ALLGEMEINE ZEITUNG (May 13, 2009) (translation by author), http://www.faz.net/aktuell/wirtschaft/kabinett-billigt-entgiftung-so-funktioniert-eine-bad-bank-1580867.html.
process of distressed banks. Figure 1 illustrates the flow of assets from a defaulting bank, through a bad bank, and subsequently back into the market.

**Figure 1 The Circle of Transfers in the German Bad Bank Model**

The defaulting bank creates a bad bank and transfers its toxic debts at the book value minus 10% to the bad bank. In return, the defaulting bank receives loans, guaranteed by the German government, at 90% of the book value of the assets in the circle of transfer. The bad bank freezes the toxic debt for 20 years and pays the Government fees for guaranteeing its loans to the Bank. Loans made to consumers return to the government in the form of taxes and to the general economy when the public’s purchase power is increased through those loans. The market can thereby recover and later pay off the dents held and managed by the bad banks.

The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, hereinafter BaFin) is the regulatory body authorizing the creation of a bad bank, once BaFin “determines that (1) the existence of a bank is endangered, (2) such failure endangers the stability of the financial system, and (3) other less severe measures such as restructuring and reorganization procedures are not expected to successfully alleviate the risk of

---

failure of the financial system.”\textsuperscript{27} If the aforementioned conditions are met, the defaulting bank may transfer its bad debts to the bad bank, which is incorporated for this purpose.\textsuperscript{28} Several advantages would spring from such a bad bank creation. The Federal Ministry of Finance summarized the advantages of the bad bank plan as follows:

\begin{quote}
First: Businesses can temporarily relax their balance sheets. Second: They simultaneously receive planning safety in relation to the required deductions. Third: With the help of this principle, the risks for the government and thereby for the taxpayers can be kept at a minimum. In fact, the costs for these measures are absorbed by the owners of the transferring institutions – the government is not releasing them from responsibility. Fourth: The free bank equity can be reintroduced into the real economy through loans and investments, and also into workplace security.\textsuperscript{29}
\end{quote}

The resulting relaxation of balance sheet disclosure while warranting transparency, planning safety in deductions of losses, risk minimization, and reintroduction of loans into the economy to spur economic growth have yielded promising results of the bad bank concept since its implementation in 2009. Part III of this paper explores a recent example. Bad banks also seem to conserve more money, as compared to the casting off of bridge banks as defaulting bank subsidiaries. The aforementioned reintroduction of German government funds into the market greatly benefits taxpayers and thereby spurs national economic growth. See Figure 1. In turn, the interconnectedness of global markets substantiates the significance of national economic growth for the benefit of our multinational economy.

Notably, the successful use of bad banks likely played a significant role in the most recent economic developments in Germany. Not only did the unemployment rate in Germany fall

\textsuperscript{28} \textit{Id.}
\textsuperscript{29} Federal Ministry of Finance, \textit{supra}, note 20.
by 0.4 points to 6.6%, the lowest rate since 1991,30 but Germany’s economic growth reached 3% in 2011 and the forecasts for economic growth in 2012 count on 0.9% despite the economic crisis.31 According to data published by the Frankfurter Allgemeine Zeitung (hereinafter FAZ) one of the largest and most reliable German newspapers, 149,000 people who were previously unemployed now have jobs, so they can, in turn, bring more money into the economy.

Consequently, the reintroduction of funds makes more money available and allows the market to heal itself. Although the middle class has not yet felt this growth spur, at least some of this success can be attributed to bad banks, a useful tool in accomplishing the economic growth, as The Economist suggested, as a cure for the current financial crisis.

In retrospect, the past two years have proven that bad banks worked in stabilizing the German financial sector to some degree. The few technical differences in the statutory designs of bridge depository institutions provide partial explanations for the successful implementation in Germany as compared to the relatively fruitless bridge bank version in the United States. Therefore, it is important to understand how the bad banks work as compared to the bridge bank model, and what makes the bad banks more effective. Part II of this paper explores what drives the bad banks within the German banking system, so that lessons can be extracted and discussed in Part III, to inspire economic growth through the implementation of bridge banks in the United States.

30 “In September, the number of registered unemployed sank to 2,796 Million, the lowest value since 1991. In comparison to August, this is a reduction by 149 000.” Sven Astheimer & Kerstin Schwenn, Arbeitsmarkt zahlen Erstmals seit 1991 unter 2,8 Millionen Arbeitslose, FRANKFURTER ALLGEMEINE ZEITUNG (Sept. 29, 2011) (translation by author), http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/arbeitsmarkt-und-hartz-iv/arbeitsmarkt zahlen-erstmals-seit-1991-unter-2-8-millionen-arbeitslose-11373664.html.

D. The Bridge Bank as a Statutory Scheme to Cast Off Toxic Bank Debt

The statutory design of the German bad bank model outlines the prototypical attempt to heal the national economy from the inside out to ultimately restore balance in the global economy. Simply put, the freezing of debt prevents government bail-outs of large defaulting banks and saves taxpayer funds. Accordingly, *the Economist* stated that it would be cheaper to prevent a complete financial meltdown than to bail defaulting countries out.\(^{32}\) In fact, it appears that the same principle applies to preventing liquidation of major banks. One financial and legal tool that Congress provides to prevent such a meltdown, for example, is the formation of a “bridge depository institution.”\(^{33}\) However, the use of the bridge bank statute, 12 U.S.C.A. § 1821, should be modeled after the German bad bank scheme (Figure 1) but, of course, adapted to the system in place in the United States, since the German model, in contrast to its counter part in the United States, has been successfully used for the past two years. Bridge banks, by comparison, are barely used and show little success because they are outmoded and ineffective.

The incorporation and linear application of bridge banks in the United States is a significant contrast to the German bad bank cycle shown in Figure 1. Section 126 of the American Jurisprudence outlines how the FDIC creates a bridge bank as a tool to circumvent liquidation of a bank or corporation.\(^ {34} \) The creation of a bridge bank is conditional upon the approval by the FDIC. Bridge banks are only created when the FDIC, in its discretion, finds them to be necessary to prevent a bank or corporation from going bankrupt. If the FDIC finds such an emergency to exist, a given bridge bank is created and assigned national banking or

---

32 *The Economist*, *supra*, note 8.
34 10 Am. Jur. 2d Banks and Financial Institutions § 126.
savings institution powers. Certain conditions must also be met before the defaulting bank may transfer its assets and liabilities to the bridge bank pursuant to 12 U.S.C.A. § 1821 (n)(3).

Once the bridge bank is created, nonetheless, the board of directors of the defaulting bank or corporation will be in charge of the management and will adopt bylaws, which have to be approved by the FDIC. However, a bridge bank is not a governmental agent. Its name already distinguishes it from the “bad bank,” which rather alludes to typical socialist government meddling – something Congress shies away from. Instead, it is a statutory scheme to transfer toxic debts from an insolvent bank to a subsidiary and to cast it off, unless it is taken over through merger or acquisition, by another institution. The FDIC does not resolve the failing institution, it is merely isolated, so that the toxic debts held do not contaminate the original bank’s balance sheet. Figure 3 illustrates the linear life of a bridge bank.

35 Id.
36 The creation of a bridge bank is conditional upon the following factors: A national bank or federal savings association may be chartered by the Comptroller of the Currency or the Director of the Office of Thrift Supervision as a bridge depository institution only if the Board of Directors determines that:

- the amount that is reasonably necessary to operate such bridge depository institution will not exceed the amount that is reasonably necessary to save the cost of liquidating, including paying the insured accounts of, one or more insured depository institutions in default or in danger of default with respect to which the bridge depository institution is chartered;
- the continued operation of the defaulting institution is essential to provide adequate banking services in the community; or
- the continued operation of the defaulting institution is in the best interest of the depositors.

10 Am. Jur. 2d Banks and Financial Institutions § 126 (internal citations omitted)

37 12 U.S.C.A. § 1821 (n)(1)(A) (West)
38 Am. Jur., supra, note 36.
39 Id.
If the FDIC deems it necessary to save an insured but insolvent bank from liquidation, the FDIC charters a bridge bank as a subsidiary of the endangered bank in order to assume the insured deposits, assets and liabilities of such an endangered bank. The bridge bank becomes an affiliate of the defaulting or struggling bank. Upon merger with another institution, consolidation, expiration or sale of more than 80% of its stock the bridge bank may be terminated. In this case, the debts of the original endangered bank is either absorbed through the termination of the bridge bank or cast off when the bridge bank is terminated.

**E. A Comparison of the Bad Bank and Bridge Bank Models**

Several differences between the bridge bank and bad bank models provide explanations for the success of one and the failure of the other. First, the statutory schemes were responses to different problems originating from different historic eras. While the German bad bank model was a response to the 2008 financial crisis, Congress created the FDIC with power to establish bridge banks as a response to the Great Depression. Second, each respective government has different responsibilities in the schemes. The German government guarantees the loans given to

---

the bank, so that the bank can make loans to taxpayers and circulate those funds in the national market. In contrast, the FDIC insures bridge bank deposits. See 12 U.S.C. § 1821. In fulfilling this duty to pay depositors, the FDIC has two primary alternatives: liquidation or a purchase and assumption.”43 Another important distinction between the two models is the end-result. The FDIC creates a bridge bank to avoid liquidation of a bank’s assets, and charters a national-type bank subsidiary, which the bank later casts off. Analogously, any insolvent bank in Germany may create its own bad bank to freeze debts and recycle government funds for use a loans to its customer. These distinctions prove to be important in the successful implementation of bad banks, as discussed in Part III. Understanding the fragmented structure of the German banking system and how the bad banks fit in is an important step toward deducing lessons to improve bridge banks in the United States.

II. German Banks in Context

A. Supervision of the Central Banking System: The European Central Bank and the German Central Bank

As the overarching financial institution, the European Central Bank (ECB) is the chief financial institution of the European Union and has national branches in each member country, such as the German Central Bank (Deutsche Bundesbank) headquartered in Frankfurt am Main. The main tasks of the Deutsche Bundesbank are maintaining the stability of the Euro and enforcing monetary policy as the strongest national branch of the ECB.44 During the current financial crisis, many European governments are looking to their central banks to bail them out,

43 Id.
because central banks act as their agents and erroneously bail them out.\textsuperscript{45} Most central banks, however, especially the German Central Bank (Deutsche Bundesbank), are reluctant to use their funds to finance the government because this could lead to inflation.\textsuperscript{46} In fact, according to a recent article in \textit{the Economist}, the Maastricht Treaty “prohibits the ECB from buying bonds directly from member governments.”\textsuperscript{47} Lesson 1 in Part III further explains why such bail-outs are hurting the economy.

The ECB’s regulatory power is an important aspect in the global financial crisis, because banks are skeptical and “[t]he amount of money parked at the European Central Bank (ECB) has risen to 15-month highs as banks hold back from lending to each other.”\textsuperscript{48} Moreover, the hesitation to lend to banks spread to the United States, where “[b]anks there led the S&P500 into official bear-market territory”\textsuperscript{49} in 2011. The legendary collapse of Lehman Brothers in 2008 instilled so much fear in the market that one look to the Eurozone’s financial crisis quickly affects and depresses the economy in the United States. In sum, the ECB is charged with monitoring and stabilizing the situation within the European Union and the Bundesbank is charged with the same task on the national level.

The Bundesbank also provides banking supervision, through “prudential regulations.”\textsuperscript{50}

Together with BaFin and according to its own homepage, “the Bundesbank is responsible for the

\textsuperscript{45} \textit{Economics focus Pulling for the home team Central-bank lending to government serves a valuable, though risky, purpose}, \textit{THE ECONOMIST} (Nov. 5, 2011), http://www.economist.com/node/21536567.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}


continuous oversight of the solvency, liquidity and risk management systems of the roughly 2,300 credit institutions in Germany . . . encompass[ing] on-site inspections pursuant to the Basel II framework.” Basel II also “requires that the own funds used by banks to hedge the loans they grant should match the actual, individual risks more closely than in the past.”

Although the HypoVereinsbank, the Dresdner Bank, and the Commerzbank have attempted to reduce the number of commercial banks in Germany through mergers, there are still hundreds of large banks in Germany, which all underlie the supervision of the Bundesbank. All of these banks are closely regulated and comprise elements of the fragmented but solid German three-pillar banking system.

**B. The Three Pillars of Banking in Germany**

Germany’s “competitiveness and attractiveness as a financial centre are based quintessentially on the free convertibility of its own currency and on the freedom of capital movements.” Every German knows and rests assured that the currency is backed by gold. Yet they fear that printing money would lead to inflation and this fear dates back to the Second World War. Angela Merkel, the German Chancellor currently defends this status adamantly, which I discuss further in Part III in the section on Eurobonds. The central German banking system, rests mainly on the so-called three pillars, consisting of the following institutions: (1)

---


52 *Id.*

53 *Germany*, ENCYCLOPÆDIA BRITANNICA (Nov. 11, 2011), http://www.britannica.com/EBchecked/topic/231186/Germany

savings banking institutions (Sparkassen), (2) private commercial banks (Privatbanken), and (3) cooperative banking institutions (Genossenschaften).

Figure 3 shows the three pillars in context within the regulatory network of German banks. These three pillars underlie the supervision of the Bundesbank which, in turn, is one of the national branches of the ECB. Clearing houses, cooperative central banks, regional savings banks, and wholesale banks are supervised by their respective overhead institutions (middle column in Figure 3) instead of the Bundesbank. This shows the hierarchical regulatory framework within the three-pillar system and the fragmented structure of the German banking system. 

Figure 3 Placement of the Three-Pillars of the German Banking System within the Overall Financial Sector in Germany
The yellow boxes indicate the three pillars, the blue boxes are other financial institutions in context and the green boxes the overarching financial bodies. Regulatory powers of the ECB (left column) extends over the German Central Bank (Deutsche Bundesbank) to the various types of banks in the middle column. The banking institutions in the right column are not encompassed by the Deutsche Bundesbank but underlie the supervision of the main banking types in the middle column. 

Besides the three-pillar universal banking structure there are some specialized [sic] banks in Germany. This group is extremely heterogeneous. The mortgage banks provide loans that are backed by liens on moveable or immoveable assets.
**Pillar 1- Savings Banks (Sparkassen)**

The first pillar in the German system are the local incorporated savings banks underlying the Landesbanken, state-run “head institutions.” Long-term stability and the earnings of profit are the main goal of savings banks. Localities govern and guarantee their own assets. All of these banks are connected through a joint liability scheme under the Savings Bank Finance Group. The joint liability scheme consists of thirteen guranatee schemes to “safeguard institutions as defined in Section 12 of the German Deposit Guarantee and Investor Compensation Act.” According to their own description, they maintain the liquidity and solvency of member banks to “ensur[e] that each institution can continue to meet its financial obligations.” There are also so-called International Savings Banks, which are part of the European Savings Banks Group and the World Savings Banks Institute that “have established a

Loans are refinanced by special bonds, the Pfandbriefe. Building and loan associations (Bausparkassen) finance themselves by deposits of their customers and provide loans for house building. The banks with special functions as the third sub-group grant loans to persons and institutions that are considered to be eligible for special funding. The state defines this funding eligibility with public targets like the promotion of small and medium-sized enterprises, reconstruction and development or support of foreign trade. The most important bank with special functions is the Kreditanstalt für Wiederaufbau (KfW). It is also active in the financing of projects of development policy, partly via its fully-owned subsidiary DEG (Deutsche Investitions- und Entwicklungs- gesellschaft).


56 *Id.*

57 UNIVERSITY OF POITIERS, *supra*, note 54.


59 *Id.*

60 *Id.*
consolidated institutional framework for international business cooperation." The European Savings Banks Group (ESBG) and the World Savings Banks Institute (WSBI) are centralized banks, representing about one third of all European retail banks. They “form a focal point for cross-border cooperation between savings bank institutions in the whole world.” Overall, savings institutions cater to wealthy private and large corporate customers and emphasize the preservation of capital over risky investments.

**Pillar 2 - Private Commercial Banks (Kreditbanken, Genossenschaftsbanken)**

Private commercial banks are designed to generate profits and their activities reach far past national borders. The assets of private commercial banks comprise about one third of the whole banking sector. To date, the five biggest private commercial banks are the Deutsche Bank, the Dresdner Bank, the Hypo-Vereinsbank, the Commerzbank and the Deutsche Postbank. These types of banks were most severely affected by the economic crisis. Part III will show how the Commerzbank, for example, used a bad bank to survive the financial meltdown.

**Pillar 3 - Public and Cooperative Credit Institutions (Volks- and Raiffeisenbanken)**

The German Central Cooperative Bank (Deutsche Zentral-Genossenschaftsbank, hereinafter DZ Bank) oversees the public and cooperative credit institutions in Germany. These coopeatives are currently owned by about the sixteen million clients who received dividends. They have the largest network of branches of all the institutions within the German banking

---

61 Id.
62 FINANZGRUPPE DEUTSCHER SPARAKassen UND GIROVERBAND, supra, note 58.
63 Bleuel, supra, note 55.
64 ENCYCLOPÆDIA BRITANNICA, supra, note 53.
65 Bleuel, supra, note 55.
system. Among their main services are international banking, capital market financing, corporate banking, and risk management. Similar to the savings institutions, the commercial banks, such as the Volks- and Raiffeisenbanks, also provide liquidity for middle class customers. The general goal is the furtherance of their members’ interests. Volksbanken are more concentrated on urban and Reiffeisenbanken on rural areas, but mergers increase because the banks hope to be more competitive by joining forces. 66

Another form of bank within the third pillar are the cooperative central banks (Genossenschaftliche Zentralbanken), 67 which are similar to central giro institutions in the second pillar mentioned above. 68 “Acting as the leading bank of the cooperative banking sector, the Deutsche Genossenschaftsbank AG (DG-Bank AG) has the task of furnishing the credit cooperatives with the possibility to offer full scale banking services.” 69 The cooperative central banks thereby fan out their services and maintain a thoroughly fragmented structure to promote resistance to market fluctuations in the localities. Table 1 is a consolidation of several sources and shows a ranking of the ten largest German banks for 2009 and 2010, their capitals and the corresponding declines in assets.

66 UNIVERSITY OF POITIERS, supra, note 54.
67 Id.
68 Id.
69 Id.
Table 1 The 10 Largest German Banks

<table>
<thead>
<tr>
<th>Ranking in 2009</th>
<th>Bank Ranking in 2010 from places 1 to 10</th>
<th>Type of Bank</th>
<th>Change in Capital %</th>
<th>Capital Surplus in 2010 in billion Euro</th>
<th>Capital in 2010 in billion Euro</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1. Deutsche Bank AG</td>
<td>Credit Institution</td>
<td>27.0</td>
<td>2330</td>
<td>1906</td>
</tr>
<tr>
<td>2</td>
<td>2. Commerzbank AG</td>
<td>Credit Institution</td>
<td>-10.6</td>
<td>1489</td>
<td>754</td>
</tr>
<tr>
<td>3</td>
<td>3. KFW Bankengruppe</td>
<td>Credit Institution</td>
<td>10.4</td>
<td>2631</td>
<td>442</td>
</tr>
<tr>
<td>4</td>
<td>4. DZ Bank AG</td>
<td>Coop. Banking Institution</td>
<td>-1.3</td>
<td>1125</td>
<td>383</td>
</tr>
<tr>
<td>5</td>
<td>5. LBBW</td>
<td>Savings Institution</td>
<td>-9.1</td>
<td>-347</td>
<td>374</td>
</tr>
<tr>
<td>6</td>
<td>6. Unicredit Bank AG</td>
<td>Credit Institution</td>
<td>2.3</td>
<td>1728</td>
<td>372</td>
</tr>
<tr>
<td>7</td>
<td>7. Hypo Real Estate Holding AG</td>
<td>Coop. Banking Institution</td>
<td>-8.8</td>
<td>-910</td>
<td>328</td>
</tr>
<tr>
<td>8</td>
<td>8. Bayrische Landesbank</td>
<td>Credit Institution</td>
<td>-6.6</td>
<td>590</td>
<td>316</td>
</tr>
<tr>
<td>9</td>
<td>9. Norddeutsche Landesbank Nord/LB</td>
<td>Savings Institution</td>
<td>-4.2</td>
<td>236</td>
<td>229</td>
</tr>
<tr>
<td>10</td>
<td>10. West LB AG</td>
<td>Credit Institution</td>
<td>-21.0</td>
<td>-240</td>
<td>192</td>
</tr>
</tbody>
</table>

The data shows that capital held by German banks since 2009 has been declining. A Rule of thumb in banking is that a bank can only give out loans that are up to 12.5 times as much as its capital. German banks altogether are thus unlikely to raise sufficient capital, even through public offerings, to satisfy the needs of bail-outs of E.U. member states, such as Greece and Portugal, while financing Eurobonds at the same time. See Part III.

---


71 Paulus & Schwintowski, supra, note 17, at 3.

72 Deutsche Bank experienced the highest losses of all commercial banks, which results from its size and internationalisation. The write-downs of Dresdner Bank and Commerzbank were substantially lower, also if compared to their lower assets. The private bank being most threatened by insolvency in 2008 is the Hypo Real Estate that belongs to the group of specialized [sic] banks. . . .The assets written down by end of December were split into a 51 per cent share of private banks of the first pillar and the special bank group, 9 percent of the cooperative bank group and 40 percent of public banks. Because public banks account for 42 per cent of the total bank assets in Germany, present data do not support the opinion that
Legend: LB indicates the Landesbank type incorporation of the bank. AG stands for “Aktiengesellschaft,” i.e. public limited liability corporation.

When the financial meltdown spread from the United States to Germany, the three-pillar system kept the German system comparatively stable. Hans Bleuel, a German scholar, explained that the fragmented but heavily regulated system of the three-pillars generated a relatively resilient protection against the meltdown.73

It is important to appreciate the intricate system of German banks before comparing the potential for successful implementation of the bad bank model in the United States. I am not suggesting that Congress should revise the bridge bank statute 12 U.S.C.A. § 1821 to match the German Kreditwesengesetz (KWG) § 48a. See Appendices 1 and 3. Such an endeavor would not work because the banking system in the United States is vastly different and the economic crisis hinges on different dilemmas. Instead, I am presenting one relatively successful German response to the financial meltdown so that the elements of the bad bank model can be understood in context and inspire those who strive to overcome the economic crisis in the United States with creative

excessive risk taking has been limited to the public sector. . . . The repeated emergency support actions for banks and the mounting pressure on money markets gave rise to a more systematic framework for bank support, the financial market stabilisation act (Finanzmarkstabilisierungsgesetz or short: FMStG). . . . The main objective of the FMStG is to stabilise money markets and banks accordingly, the so-called Rettungsschirm (emergency parachute) for banks. With an overall volume of 480 € billion this rescue pack is of larger scale in the international perspective when compared to the realized [sic] write-downs and losses of the financial sector. . . . With 400 € billion by far the larger part of the rescue pack is designated for guarantees of bonds and loans of banks. The remaining 80 € billion are for purposes of recapitalization [sic] as well as purchases of non-performing assets. Bleuel, supra, note 55.

73 Id.
innovations. Part III will explore the promises for successful implementation of the bad bank model and illustrate critical aspects of real-life examples.

III. Bad Banks and Economic Growth as a Remedy for the Current Financial Crisis

A. Can a Bad Bank be Successful in the United States?

One of Germany’s leading scholars on the law of banking and capital markets, Professor Dr. Hans-Peter Schwintowski, Professor of Law at the Humboldt University in Berlin, Germany, gave an exclusive interview for this paper. In response to the author’s inquiry regarding the United States’ chances of successfully employing the German model, he explains why the bad bank model is a quite feasible and promising partial solution to promote economic growth as a step toward overcoming the current financial crisis:

A bad bank eases the self-healing process of a bank in any case. Taking a closer look, the problematic loans from the ordinary course of a bank’s business are extracted and shifted to the bad bank. Hence, the “healthy” bank is no longer burdened and can provide forward-looking loans (which are important for the loan supply of the middle class). At the same time, the bad bank begins a long-term credit management process structured as intelligently as possible. This management mainly consists of keeping the debtor solvent – if possible, by rehabilitating him (meaning the American home builder), so that, once he gets back on his feet, the loan can slowly be returned. A partial waiver of repayment may make sense. Result: The home-builder keeps his house and remains solvent. At the same time, he repays some of his debt to the bad bank and becomes a solvent customer for the “healthy” bank. Another result: The bad bank only needs to write off parts of the loans and, in the medium-term, almost becomes profitable. This is good for the microeconomy as well as for the macroeconomy (furthering economic growth).

It is also true that economic growth is instrumental for overcoming the global financial crisis. Bridge depository institutions (Brücken-institute) can then contribute to economic growth when there are sufficient and adequate loans available for the economy (especially for the middle
class). If and as far as this is accomplished via bridge depository institutions, these institutions are enabled to promote economic growth.\footnote{Prof. Dr. Hans-Peter Schwintowski, Humboldt University Berlin, interview on file with the author, translated by author, Nov. 18, 2011. Prof. Dr. Hans-Peter Schwintowski is managing director of the Institute for energy and competition law in the communal economy and an expert in energy law, private insurance law and the law of banking and capital markets. This information is based on the Interdisciplinary Centre for Applied Statistics and Economics, Humbold University, Berlin, http://www.case.hu-berlin.de/members/persons/schwintowski His homepage for the faculty of law is available at http://schwintowski.rewi.hu-berlin.de/ (last accessed Dec. 19, 2011).}

It follows that the German model is a more financially prudent method for detoxifying those banks, which hold the aforementioned toxic debts that, in turn, could contaminate other parts of the banking sector. Therefore, the toxic assets are removed and isolated in a bad bank, so that fresh loans can be made available for the market. Although the idea of freezing debts for 20 years sounds promising, the model remains a theory. The following examples of the bad bank implementation by the German Commerzbank, a credit institution and the second largest bank in Germany, and HypoBank, reveal some of the pitfalls of a bad bank in practice.

These examples bring me back to the three-pillar system of the fragmented banking structure in Germany. The ultimate source of the funds needed to rebalance the debt resulting from the financial crisis comes from the banks within the three-pillar system. Naturally, the aforementioned strategies beg the question why German banks did not have to maintain more capital until recently and where the money for bail-outs and redistributions should come from? The answer, according to Hanno Mussler, Stefan Ruhkamp, and Bettina Schulz, analysts for the \textit{FAZ}, is that the fragmented and deregulated schemes fuel micromanagement of banks but fail to consider national debts,
so that the nine percent rule of thumb core capital is not steadily maintained.\textsuperscript{75} Today’s flash tests that are currently being conducted by the European bank supervisory bodies reveal that national buffers are required to control the core capital.\textsuperscript{76} Moreover, as long as the rating remains AA-, there is virtually no risk associated with government bonds.\textsuperscript{77} Consequently, the ECB warns that bailing Greece out, while its debt is 160 times higher than its GDP, would yield such widespread losses, that capital reserves may be depleted.\textsuperscript{78} As a result, money will flow from the German states to their Landesbanken and to the savings banks (Sparkassen).\textsuperscript{79} Only the Deutsche Bank and the Commerzbank are publicly traded institutions large enough to raise more capital on the stock market to provide such funds.\textsuperscript{80} In response to this suggestion, Michael Kemmer, General Manager of the Association of Private Banks in Germany, states that raising funds through additional public offerings would be insufficient for satisfying the debts.\textsuperscript{81}

In addition, a recent press release from the Association of Private Banks emphasizes that the results of their quantitative impact study regarding the adoption of Basel III showed that Germany would have to raise almost 600 billion Euros for the


\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{80} Mussler, Ruhkamp, Schullz, supra, note 75.

\textsuperscript{81} Id.
global banking sector.\textsuperscript{82} Mr. Kenner emphasized that private banks already have “sustainable business models and can therefore implement the new rules.”\textsuperscript{83} In the same press release, he also states that “the rules should be seen both in a national and a global context so that German banks were not overburdened and the supply of credit in the economy remain[s] intact.”\textsuperscript{84} Consequently, a depletion of Germany’s funds would only counteract the economic growth required to implement the four-point plan advocated by\textit{The Economist} as discussed in Part I.

Economic growth may be the best strategy to recover from the 2008 financial meltdown, but regardless of how promising bad banks are, there are only theoretical solutions to-date. The United States, for example, have a federal statute in place and do not use it. See Appendix 1. It may be time to make use of the tools available to counteract the effects of the current crisis. While bad banks, then, seem to be a good national solution now, their success is still speculative and uncertain. German financial news report on the continuous stress tests in the European banking sector and project that the Eurozone countries still suffer great losses in the current financial crisis. Debts are growing and restructuring options are rare. A digest of the latest economics news in Germany demonstrates a tendency to prevent an escalation of debts of individual countries’ debts. Consequently, a unification of national debts through Eurobonds, where Germany is supposed to carry much of the financial burden, is the new strategy occupying the current financial literature.


\textsuperscript{83} Id.

\textsuperscript{84} Id.
B. Eurobonds

Eurobonds may provide more inexpensive financing for some European countries, but they would also redistribute debt of insolvent member states, such as Greece and Portugal, to solvent ones, such as Germany. Of course, this proposition disagrees with Chancellor Angela Merkel and many other concerned Germans who are worried about the stability of the Euro and the high tax rates. At the same time, the European Parliament in Brussels would have much more influence on the German Bundestag’s household management if the Bundestag signed off on the Eurobond strategy. Another reason to worry about Germany’s potential return on investments in Eurobonds is that the ECB’s purchase of “boatloads of government bonds will eventually cause inflation,” according to The Economist. The same fear of inflation would hold true for France and this is why President Sarkozy is also fighting against the redistribution of debts. European countries have requested 60 billion Euros from Germany and 80 billion from France since the beginning of 2011, according to the FAZ. The FAZ also reports, “the risk of losing, nonetheless, remains so high that the banks in the financial market do not trust each other that several banks cannot finance themselves and even pose threats to the stability of the banking system.” Transfers, such as the ones to a bridge bank, may remind the reader of the debt parking that occurred during the period before the Lehman Brother’s fall or the current Greek problem. I will discuss the resulting mistrust among banks below, but it is worth noting that the banks “parked” the money, then suffered from the misguided

86 Mussler, Ruhkamp, Schullz, supra, note 75.
87 Id.
speculations, and now the mistrust is even larger (emphasis added). Therefore, if the European Parliament of the ECB took over to redistribute the Eurozone debts, Germany and France would lose independence, which could be devastating for the German and French cornerstones of the European Union.

The devastating results for bailed-out countries, according to Professors Schwintowski and Paulus from the Humbold University in Berlin, would be that credit ratings for insolvent countries, such as Greece, would be downgraded to the point where these countries’ government bonds can no longer be supported by the respective central banks. Consequently, the fact that liquidity must come from the free market where these countries would face exorbitantly high interest rates propels the debts of these countries into higher numbers and leads them further into distress. In contrast, following the Lehman Brothers’ example and casting off insolvent institutions would most likely lead to a collapse of the Euro; an outcome that The Economist disproves as a much more expensive alternative to any attempted rescue schemes.

Before discussing the results, some of the practical problems that the bad bank model had to overcome before being passed into law must be addressed because they point to some of the difficulties that could arise if Congress modeled the bridge bank statute after its German counterpart. First, the Bundestag rejected a state-owned bad bank under the pretense that it would burden taxpayers. Nonetheless, the funds provided by

88 Paulus & Schwintowski, supra, note 17, at 5
89 Id.
90 Id.
91 THE ECONOMIST, supra, note 8.
92 Christine Mai, Wertpapiermüll: Womit die Bad Banks kämpfen, FINANCIAL TIMES DEUTSCHLAND, Feb. 2, 2009, (translation by author),
the Sonderfonds Finanzmarktstabilisierung, the Special Financial Market Stabilization Funds (SoFFin), ultimately come from taxpayers.\footnoteId{93} Second, the risks of bad banks would have to be shifted to investors, such as the bridge bank model suggests.\footnoteId{94} The rewards could be significant profits if the frozen debts regained in value.\footnoteId{95} Third, the ratings of the frozen debt instruments would have to be insured to keep them interesting for investors\footnoteMai, supra, note 92. who are ultimately supposed to finance the bad banks. The bridge bank statute foresees such insurances, but how much the guarantees would cost can hardly be predicted.\footnoteId{97} Fourth, drawing the line between depreciated and doomed assets is a crucial issue in determining the limits that banks should and must adhere to in freezing debts.\footnoteId{98} Allowing too many toxic debts to be frozen could cause further imbalance and would again lead to overspending, which caused the housing bubble burst in the United States in the first place. German investors could also catch the overspending-fever if the bad bank models left room for abuse. Fifth, the frozen debts need to be taken off balance sheet in order to promote a recovery in investor safety in those banks that use bad banks.\footnoteId{99} Finally, such legalized “off balance sheet” transactions could distort the competition in the banking industry.\footnoteId{100} The mortgage bubble burst of 2008 and recent pump-and-dump

\footnotetextId{93}{Id.}
\footnotetextId{94}{Id.}
\footnotetextId{95}{Id.}
\footnotetextId{96}{Mai, supra, note 92.}
\footnotetextId{97}{Id.}
\footnotetextId{98}{Id.}
\footnotetextId{99}{Id.}
\footnotetextId{100}{Mai, supra, note 92.}
schemes, however, already proved such practices to be extremely dangerous, such as in the cases of Enron and WorldCom. The current statute, see appendix 3, attempts to resolve these issues, but not all could be successfully avoided by the Commerzbank’s bad bank discussed below.

C. The Commerzbank as a Bad Bank Example

When the German legislature passed the bad bank model into law, the first bank that considered implementing the scheme was the Commerzbank. In February, 2009, the Financial Times Deutschland reported that the toxic debts of the subsidiary Eurohypo were to be frozen in a bad bank on behalf of the Commerzbank and Hypo Real Estate.\textsuperscript{101} Initial sceptics were afraid that bad banks would cast off debts like bridge banks in the United States and thereby spiral German banks into further distress. Five months later, in July 2009, however, Commerzbank’s stocks skyrocketed.\textsuperscript{102} Investors regained trust and purchased the stocks because the transfers of assets appeared to yield increases in value. This was exactly what was expected of the bad bank. The German Ministry of Finance and the European Parliament in Brussels, however, warned that such increases merely created an illusion because of the ten percent discount at which the toxic debts are transferred to the bad bank.\textsuperscript{103} See Figure 1.


\textsuperscript{102} Nina Luttmer & Meike Schreiber, Bad Bank: Keine Juwelen am Bankenschrottplatz, Financial Times Deutschland, Jul. 2, 2009, ftd.de/finanzen/maerkte/marktberichte/bad-bank-keine-juwelen-am-bankenschrottplatz/534991.html?.

\textsuperscript{103} Id.
The German business newspaper *Handelsblatt* reported that Commerzbank transferred 55 billion Euros into the bad bank.\(^\text{104}\) “In 2010, European banks paid almost 10 billion Euros in fees, interest and dividends for rescue packages.”\(^\text{105}\) Losses through forfeited interests, investments, and, most of all, transfers to bad banks, amounted to 85 billion Euros.\(^\text{106}\) All in all, in 2011, the German state injected so much money into Commerzbank’s bad bank, that it essentially owns about one third of the institution.\(^\text{107}\)

The financial newspaper *Handelsblatt* reported that “states now have to buy stock to recapitalize core capital. Whether the German states will receive any dividends is still uncertain.”\(^\text{108}\) Taking all the rescue injections into the banking sector together, the German government spent about 1200 billion Euros for guarantees\(^\text{109}\) of the types illustrated by Figure 1. Such significant investments seem to be exorbitant in view of the schemes that seeks to recycle funds. In view of the potential costs of bail-outs, however, these sums seem like bargains.

As a notable idea behind the bad bank schemes, the Bundestag also considered the bad bank statutes to bully the Landesbanken into consolidation.\(^\text{110}\) In his response to the new bad bank statute, Prime Minister of Bavaria, Horst Seehofer, reminded the

---


105  *Id.*

106  *Id.*

107  *Id.*

108  *Handelsblatt, supra,* note 4.

109  *Id.*

110  *Bad-Bank-Gesetz - Es muss was kosten,* Financial Times Deutschland, June 30, 2006, (translation by author), http://www.ftd.de/meinung/kommentare/:leitartikel-bad-bank-gesetz-es-muss-was-kosten/534303.html?mod.
Bundestag that the Landesbanken are backed by funds from the individual German states and that the liability schemes of such institutions could lead to strangulation of the banks if the bad banks went bad.\textsuperscript{111} His concern spoke directly to the differences in the banking models within the three-pillar system and emphasized that the implementation of bad banks would play out very differently for the various types of banks described in Part II. In retrospect, it is clear that this concern was addressed with the distinction of two different bad bank models, one for the private banks and one for the Landesbanken.\textsuperscript{112} The German government paid a high price for its bad bank model and to maintain the three-pillar system, where significant funds were used to stabilize the numerous Landesbanken.\textsuperscript{113} These losses were an unforeseen side-effect.

D. Benefits for Regulatory Bodies in the U.S.

The major benefit of the bad bank model would be the resulting transparency. For the reason that the statutory requirements mandate complete disclosure of all debts that are written off to bad banks, banks may regain trust in each other and resume collaboration in furtherance of the national economy. Such collaboration, in turn, would encourage economic growth on an additional, parallel level to the freezing of debts.


\textsuperscript{113} \textsc{Financial Times Deutschland}, \textit{supra}, note 110.
Maybe the resulting profits could be used to buy out the frozen papers of bad banks and ultimately heal the economy.

In *Texas Am. Bancshares, Inc. v. Clarke*, the Fifth Circuit, held that “the FDIC is appointed receiver of the failed bank” in the United States. This is in stark contrast to the German model, where dividends are supposed to be paid to investors, which are not necessarily the government. The Fifth Circuit continued to explain that the FDIC pays the difference if the bridge bank ultimately has more debts than assets. This is how the FDIC “insures” the bridge bank, which alludes to mini bail-outs, rather than bank rescue schemes, because acquiring a failed bank is nothing but paying it off to the parent corporation. As compared to its German counterpart, the bridge bank statute is thus designed to use government funds for “bank bail-outs” and even for cash, rather than saving the tax funds for back-up.

**Conclusion**

The four-point rescue plan for Europe suggested by the *The Economist* in Part I could potentially be applied to the United States if Congress amended the bridge bank statute to modernize the bridge depository institution model and, thereby, facilitate some of the functioning aspects of the German bad bank model to heal the domestic economy. In doing so, the first conclusion from the German model is that fragmentation of the banking system allows for greater stability and resistance to market fluctuations. Thus,

115 Id.
116 Id.
the resulting lesson for the United States may be to reduce government crutches for the largest banks and allow them to spin off into bridge bank subsidiaries. Such spin offs would allow the banks to focus on micromanagement so that each little bank can regain responsibility for its own assets. Such responsibility, in turn, may increase risk aversion similar to the Landesbanken in Germany and secure investor funds. Consequently, the banks would be forced to hone their assets and able to make profits to ultimately pay dividends. These dividends could theoretically fuel economic growth by reintroducing funds into the market. These same funds are currently being met by government subsidies of the large banks and taken out of the market (emphasis added). Finding a way to turn such well-intended but unthrifty rescue packages from the government around to be paid to the government, would benefit the intermediaries, i.e. the tax payers who could then profit from their resulting increased spending power because the bridge banks could loan then money. Circulating funds through bridge banks – if they were restructured with an eye to the German band bank model – could consequently heal the market with rechanneled funds that are already present. Figures 1 and 2 illustrate that the circular transfer and recycling of funds per the German bad bank model is more favorable than the linear disposition of funds currently described by 12 U.S.C.A. § 1821.

The second lesson is a negative one based on the Eurobonds, which are potentially dangerous for the European Union. Investments in those bonds allude to investments in government bail-out accounts, which may weaken the largest European economies, Germany and France. If the ECB had more power over France and Germany, a likely side-effect of the Eurobonds, these cornerstone countries of the European Union would be weakened so much, that the Euro could be jeopardized as a currency. A
depletion of Germany’s funds would therefore only counteract the economic growth required to implement the four-point plan but also damage the E.U. Such damage could trigger chain reaction within the interconnected financial systems and drag the economy in the United States and the BRICS countries down further and must be prevented. According to the economic, political and stock reports published by the magazine *Euro*, conservative investments are the more prudent choice and may yield more pay-off on the long run than speculative and risky ones.\(^\text{117}\) One possible way to discourage risky speculation in the United States, especially in view of the gloomy market, is to fan out into smaller banks, similar to the German banks within the three-pillar system. Germany’s relative resilience to the fluctuations caused by the 2008 stock market crash proves that the diversification of banks into the pillars and subparts may have promising effects on the American banks as well.

Analogous to the German and French cornerstones in the European Union are the large banks in the United States that are presumably too big to fail. If the government bails them out, money is redistributed, but so is power. It is ultimately undesirable to give “governmental powers” to large banks, which are unstable in the current market, and unable to meet the resulting responsibilities. While it is exceptional that incorpoated entities can rise to such power, it is unhealthy for the general balance of powers. Thus, a fragmentation of the financial sector in line with the German example, even if only in part, may create more stability and conserve powers for the government in the United States. An amendment to the bridge bank statute should allow for some fragmentation of the banking system.

\(^{117}\) *See generally* EURO, (Dec., 2011), www.finanzen.net.
The bridge bank statute should therefore be updated to furnish a response to the current global economic crisis, rather than being a relic of the Great Depression. As mentioned above, a redesign of the bridge bank statute to allow freezing of debts and recycling of funds in the United States, would be a first step toward implementing the four-point rescue plan and promoting economic growth to combat the current economic crisis. In sum, amendments of the bridge bank statute to allow distressed banks to create subsidiary bridge banks to follow Germany’s example to fragment the financial sector may stabilize the economy, spur economic growth and ultimately show a way out of the current global financial crisis.
Appendix 1

Effective: July 21, 2011

12 U.S.C.A. § 1821. Insurance Funds

(n) Bridge depository institutions

(1) Organization

(A) Purpose
When 1 or more insured depository institutions are in default, or when the Corporation anticipates that 1 or more insured depository institutions may become in default, the Corporation may, in its discretion, organize, and the Office of the Comptroller of the Currency, with respect to 1 or more insured banks or 1 or more insured savings associations, shall charter, 1 or more national banks or Federal savings associations, as appropriate, with respect thereto with the powers and attributes of national banking associations or Federal savings associations, as applicable, subject to the provisions of this subsection, to be referred to as “bridge depository institutions”.

(B) Authorities
Upon the granting of a charter to a bridge depository institution, the bridge depository institution may--
(i) assume such deposits of such insured depository institution or institutions that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate;
(ii) assume such other liabilities (including liabilities associated with any trust business) of such insured depository institution or institutions that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate;
(iii) purchase such assets (including assets associated with any trust business) of such insured depository institution or institutions that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; and
(iv) perform any other temporary function which the Corporation may, in its discretion, prescribe in accordance with this chapter.

(C) Articles of association
The articles of association and organization certificate of a bridge depository institution as approved by the Corporation shall be executed by 3 representatives designated by the Corporation.
(D) **Interim directors**

A bridge depository institution shall have an interim board of directors consisting of not fewer than 5 nor more than 10 members appointed by the Corporation.

(E) **National bank or Federal savings association**

A bridge depository institution shall be organized as a national bank, in the case of 1 or more insured banks, and as a Federal savings association, in the case of 1 or more insured savings associations.

(2) **Chartering**

(A) **Conditions**

A national bank or Federal savings association may be chartered by the Comptroller of the Currency as a bridge depository institution only if the Board of Directors determines that--

(i) the amount which is reasonably necessary to operate such bridge depository institution will not exceed the amount which is reasonably necessary to save the cost of liquidating, including paying the insured accounts of, 1 or more insured depository institutions in default or in danger of default with respect to which the bridge depository institution is chartered;

(ii) the continued operation of such insured depository institution or institutions in default or in danger of default with respect to which the bridge depository institution is chartered is essential to provide adequate banking services in the community where each such depository institution in default or in danger of default is located; or

(iii) the continued operation of such insured depository institution or institutions in default or in danger of default with respect to which the bridge depository institution is chartered is in the best interest of the depositors of such depository institution or institutions in default or in danger of default or the public.

(B) **Insured national bank or Federal savings association**

A bridge depository institution shall be an insured depository institution from the time it is chartered as a national bank or Federal savings association.

(C) **Bridge bank treated as being in default for certain purposes**

A bridge depository institution shall be treated as an insured depository institution in default at such times and for such purposes as the Corporation may, in its discretion, determine.

(D) **Management**

A bridge depository institution, upon the granting of its charter, shall be under the management of a board of directors consisting of not fewer than 5 nor more than 10 members appointed by the Corporation.

(E) **Bylaws**
The board of directors of a bridge depository institution shall adopt such bylaws as may be approved by the Corporation.

(3) Transfer of assets and liabilities

(A) In general

(i) Transfer upon grant of charter
Upon the granting of a charter to a bridge depository institution pursuant to this subsection, the Corporation, as receiver, or any other receiver appointed with respect to any insured depository institution in default with respect to which the bridge depository institution is chartered may transfer any assets and liabilities of such depository institution in default to the bridge depository institution in accordance with paragraph (1).

(ii) Subsequent transfers
At any time after a charter is granted to a bridge depository institution, the Corporation, as receiver, or any other receiver appointed with respect to an insured depository institution in default may transfer any assets and liabilities of such insured depository institution in default as the Corporation may, in its discretion, determine to be appropriate in accordance with paragraph (1).

(iii) Treatment of trust business
For purposes of this paragraph, the trust business, including fiduciary appointments, of any insured depository institution in default is included among its assets and liabilities.

(iv) Effective without approval
The transfer of any assets or liabilities, including those associated with any trust business, of an insured depository institution in default transferred to a bridge depository institution shall be effective without any further approval under Federal or State law, assignment, or consent with respect thereto.

(B) Intent of Congress regarding continuing operations
It is the intent of the Congress that, in order to prevent unnecessary hardship or losses to the customers of any insured depository institution in default with respect to which a bridge depository institution is chartered, especially creditworthy farmers, small businesses, and households, the Corporation should--

(i) continue to honor commitments made by the depository institution in default to creditworthy customers, and

(ii) not interrupt or terminate adequately secured loans which are transferred under subparagraph (A) and are being repaid by the debtor in accordance with the terms of the loan instrument.

(4) Powers of bridge depository institutions
Each bridge depository institution chartered under this subsection shall have all corporate powers of, and be subject to the same provisions of law as, a national bank or Federal savings association, as appropriate, except that--

(A) the Corporation may--
(i) remove the interim directors and directors of a bridge depository institution;  
(ii) fix the compensation of members of the interim board of directors and the  
board of directors and senior management, as determined by the Corporation in its  
discretion, of a bridge depository institution; and  
(iii) waive any requirement established under section 71, 72, 73, 74, or 75 of this  
title (relating to directors of national banks) or section 71a of this title which  
would otherwise be applicable with respect to directors of a bridge depository  
institution by operation of paragraph (2)(B);  

(B) the Corporation may indemnify the representatives for purposes of paragraph (1)(B)  
and the interim directors, directors, officers, employees, and agents of a bridge depository  
institution on such terms as the Corporation determines to be appropriate;  

(C) no requirement under any provision of law relating to the capital of a national bank  
shall apply with respect to a bridge depository institution;  

(D) the Comptroller of the Currency may establish a limitation on the extent to which any  
person may become indebted to a bridge depository institution without regard to the  
amount of the bridge depository institution's capital or surplus;  

(E)(i) the board of directors of a bridge depository institution shall elect a chairperson  
who may also serve in the position of chief executive officer, except that such person  
shall not serve either as chairperson or as chief executive officer without the prior  
approval of the Corporation; and  
(ii) the board of directors of a bridge depository institution may appoint a chief executive  
officer who is not also the chairperson, except that such person shall not serve as chief  
executive officer without the prior approval of the Corporation;  

(F) a bridge depository institution shall not be required to purchase stock of any Federal  
Reserve bank;  

(G) the Comptroller of the Currency shall waive any requirement for a fidelity bond with  
respect to a bridge depository institution at the request of the Corporation;  
(H) any judicial action to which a bridge depository institution becomes a party by virtue  
of its acquisition of any assets or assumption of any liabilities of a depository institution  
in default shall be stayed from further proceedings for a period of up to 45 days at the  
request of the bridge depository institution;  

(I) no agreement which tends to diminish or defeat the right, title or interest of a bridge  
depository institution in any asset of an insured depository institution in default acquired  
by it shall be valid against the bridge depository institution unless such agreement--  
(i) is in writing,  
(ii) was executed by such insured depository institution in default and the person  
or persons claiming an adverse interest thereunder, including the obligor,  
contemporaneously with the acquisition of the asset by such insured depository  
institution in default,
(iii) was approved by the board of directors of such insured depository institution in default or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(iv) has been, continuously from the time of its execution, an official record of such insured depository institution in default;

(J) notwithstanding section 1823(e)(2) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such depository institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (I); and

(K) except with the prior approval of the Corporation, a bridge depository institution may not, in any transaction or series of transactions, issue capital stock or be a party to any merger, consolidation, disposition of assets or liabilities, sale or exchange of capital stock, or similar transaction, or change its charter.

(5) Capital

(A) No capital required

The Corporation shall not be required to--
   (i) issue any capital stock on behalf of a bridge depository institution chartered under this subsection; or
   (ii) purchase any capital stock of a bridge depository institution, except that notwithstanding any other provision of Federal or State law, the Corporation may purchase and retain capital stock of a bridge depository institution in such amounts and on such terms as the Corporation, in its discretion, determines to be appropriate.

(B) Operating funds in lieu of capital

Upon the organization of a bridge depository institution, and thereafter, as the Board of Directors may, in its discretion, determine to be necessary or advisable, the Corporation may make available to the bridge depository institution, upon such terms and conditions and in such form and amounts as the Corporation may in its discretion determine, funds for the operation of the bridge depository institution in lieu of capital.

(C) Authority to issue capital stock

Whenever the Board of Directors determines it is advisable to do so, the Corporation shall cause capital stock of a bridge depository institution to be issued and offered for sale in such amounts and on such terms and conditions as the Corporation may, in its discretion, determine.

(D) Capital levels
A bridge depository institution shall not be considered an undercapitalized depository institution or a critically undercapitalized depository institution for purposes of section 347b(b) of this title.

(7) Assistance authorized
The Corporation may, in its discretion, provide assistance under section 1823(c) of this title to facilitate any transaction described in clause (i), (ii), or (iii) of paragraph (10)(A) with respect to any bridge depository institution in the same manner and to the same extent as such assistance may be provided under such section with respect to an insured depository institution in default, or to facilitate a bridge depository institution’s acquisition of any assets or the assumption of any liabilities of an insured depository institution in default.

(8) Acquisition

(A) In general
The responsible agency shall notify the Attorney General of any transaction involving the merger or sale of a bridge depository institution requiring approval under section 1828(c) of this title and if a report on competitive factors is requested within 10 days, such transaction may not be consummated before the 5th calendar day after the date of approval by the responsible agency with respect thereto. If the responsible agency has found that it must act immediately to prevent the probable failure of 1 of the depository institutions involved, the preceding sentence does not apply and the transaction may be consummated immediately upon approval by the agency.

(B) By out-of-State holding company
Any depository institution, including an out-of-State depository institution, or any out-of-State depository institution holding company may acquire and retain the capital stock or assets of, or otherwise acquire and retain a bridge depository institution if the bridge depository institution at any time had assets aggregating $500,000,000 or more, as determined by the Corporation on the basis of the bridge depository institution’s reports of condition or on the basis of the last available reports of condition of any insured depository institution in default, which institution has been acquired, or whose assets have been acquired, by the bridge depository institution. The acquiring entity may acquire the bridge depository institution only in the same manner and to the same extent as such entity may acquire an insured depository institution in default under section 1823(f)(2) of this title.

(9) Duration of bridge depository institution
Subject to paragraphs (11) and (12), the status of a bridge depository institution as such shall terminate at the end of the 2-year period following the date it was granted a charter. The Board of Directors may, in its discretion, extend the status of the bridge depository institution as such for 3 additional 1-year periods.
(10) Termination of bridge depository institution status

The status of any bridge depository institution as such shall terminate upon the earliest of--

(A) the merger or consolidation of the bridge depository institution with a depository institution that is not a bridge depository institution;

(B) at the election of the Corporation, the sale of a majority of the capital stock of the bridge depository institution to an entity other than the Corporation and other than another bridge depository institution;

(C) the sale of 80 percent, or more, of the capital stock of the bridge depository institution to an entity other than the Corporation and other than another bridge depository institution;

(D) at the election of the Corporation, either the assumption of all or substantially all of the deposits and other liabilities of the bridge depository institution by a depository institution holding company or a depository institution that is not a bridge depository institution, or the acquisition of all or substantially all of the assets of the bridge depository institution by a depository institution holding company, a depository institution that is not a bridge depository institution, or other entity as permitted under applicable law; and

(E) the expiration of the period provided in paragraph (9), or the earlier dissolution of the bridge depository institution as provided in paragraph (12).

(11) Effect of termination events

(A) Merger or consolidation

A bridge depository institution that participates in a merger or consolidation as provided in paragraph (10)(A) shall be for all purposes a national bank or a Federal savings association, as the case may be, with all the rights, powers, and privileges thereof, and such merger or consolidation shall be conducted in accordance with, and shall have the effect provided in, the provisions of applicable law.

(B) Charter conversion

Following the sale of a majority of the capital stock of the bridge depository institution as provided in paragraph (10)(B), the Corporation may amend the charter of the bridge depository institution to reflect the termination of the status of the bridge depository institution as such, whereupon the depository institution shall remain a national bank or a Federal savings association, as the case may be,, 5 with all of the rights, powers, and privileges thereof, subject to all laws and regulations applicable thereto.

(C) Sale of stock

Following the sale of 80 percent or more of the capital stock of a bridge depository institution as provided in paragraph (10)(C), the depository institution shall remain a national bank or a Federal savings association, as the case may
be,\(^5\) with all of the rights, powers, and privileges thereof, subject to all laws and regulations applicable thereto.

(D) Assumption of liabilities and sale of assets

Following the assumption of all or substantially all of the liabilities of the bridge depository institution, or the sale of all or substantially all of the assets of the bridge depository institution, as provided in paragraph (10)(D), at the election of the Corporation the bridge depository institution may retain its status as such for the period provided in paragraph (9).

(E) Effect on holding companies

A depository institution holding company acquiring a bridge depository institution under section 1823(f) of this title, paragraph (8)(B) (or any predecessor provision), or both provisions, shall not be impaired or adversely affected by the termination of the status of a bridge depository institution as a result of subparagraph (A), (B), (C), or (D) of paragraph (10), and shall be entitled to the rights and privileges provided in section 1823(f) of this title.

(F) Amendments to charter

Following the consummation of a transaction described in subparagraph (A), (B), (C), or (D) of paragraph (10), the charter of the resulting institution shall be amended to reflect the termination of bridge depository institution status, if appropriate.

(12) Dissolution of bridge depository institution

(A) In general

Notwithstanding any other provision of State or Federal law, if the bridge depository institution's status as such has not previously been terminated by the occurrence of an event specified in subparagraph (A), (B), (C), or (D) of paragraph (10)--

(i) the Board of Directors may, in its discretion, dissolve a bridge depository institution in accordance with this paragraph at any time; and

(ii) the Board of Directors shall promptly commence dissolution proceedings in accordance with this paragraph upon the expiration of the 2-year period following the date the bridge depository institution was chartered, or any extension thereof, as provided in paragraph (9).

(B) Procedures

The Comptroller of the Currency shall appoint the Corporation as receiver for a bridge depository institution upon certification by the Board of Directors to the Comptroller of the Currency of its determination to dissolve the bridge depository institution. The Corporation as such receiver shall wind up the affairs of the bridge depository institution in conformity with the provisions of law relating to the liquidation of closed national banks or Federal savings associations, as appropriate. With respect to any such bridge depository institution, the Corporation as such receiver shall have all the rights, powers, and privileges and
shall perform the duties related to the exercise of such rights, powers, or privileges granted by law to a receiver of any insured depository institution and notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of any State agency or other Federal agency.

(13) Multiple bridge depository institutions
   Subject to paragraph (1)(B)(i), the Corporation may, in the Corporation's discretion, organize 2 or more bridge depository institutions under this subsection to assume any deposits of, assume any other liabilities of, and purchase any assets of a single depository institution in default. . . .

Appendix 2

Effective: September 17, 2008

26 C.F.R. § 1.597-4, Treas. Reg. § 1.597-4

§ 1.597-4 Bridge Banks and Agency Control.

(a) Scope. This section provides rules that apply to a Bridge Bank or other Institution under Agency Control and to transactions in which an Institution transfers deposit liabilities (whether or not the Institution also transfers assets) to a Bridge Bank.

(b) Status as taxpayer. A Bridge Bank or other Institution under Agency Control is a corporation within the meaning of section 7701(a)(3) for all purposes of the Internal Revenue Code and is subject to all Internal Revenue Code provisions that generally apply to corporations, including those relating to methods of accounting and to requirements for filing returns, even if Agency owns stock of the Institution.

(c) No section 382 ownership change. The imposition of Agency Control, the cancellation of Institution stock by Agency, a transaction in which an Institution transfers deposit liabilities to a Bridge Bank, and an election under paragraph (g) of this section are disregarded in determining whether an ownership change has occurred within the meaning of section 382(g).

(d) Transfers to Bridge Banks--(1) In general. Except as otherwise provided in paragraph (g) of this section, the rules of this paragraph (d) apply to transfers to Bridge Banks. In general, a Bridge Bank and its associated Residual Entity are together treated as the successor entity to the transferring Institution. If an Institution transfers deposit liabilities to a Bridge Bank (whether or not it also transfers assets), the Institution recognizes no gain or loss on the transfer and the Bridge Bank succeeds to the transferring Institution's basis in any transferred assets. The associated Residual Entity retains its basis in any assets it continues to hold. Immediately after the transfer, the Bridge Bank succeeds to and takes into account the transferring Institution's items described in section 381(c) (subject to the conditions and limitations specified in section 381(c)), taxpayer identification number ("TIN"), deferred FFA account, and account receivable for future FFA as described in paragraph (g)(4)(ii) of this section. The Bridge Bank also succeeds to and continues the transferring Institution's taxable year.

(2) Transfers to a Bridge Bank from multiple Institutions. If two or more Institutions transfer deposit liabilities to the same Bridge Bank, the rules in paragraph (d)(1) of this section are modified to the extent provided in this paragraph (d)(2). The Bridge Bank succeeds to the TIN and continues the taxable year of the Institution that transfers the largest amount of deposits. The taxable years of the other transferring Institutions close at the time of the transfer. If all the transferor Institutions are members of the same consolidated group, the Bridge Bank's carryback of losses to the Institution that transfers the largest amount of deposits is not limited by section 381(b)(3). The limitations of section 381(b)(3) do apply to the Bridge Bank's carrybacks of losses to all other transferor Institutions. If the transferor Institutions are not all members of the same
consolidated group, the limitations of section 381(b)(3) apply with respect to all transferor Institutions. See paragraph (g)(6)(ii) of this section for additional rules that apply if two or more Institutions that are not members of the same consolidated group transfer deposit liabilities to the same Bridge Bank.

(e) Treatment of Bridge Bank and Residual Entity as a single entity. A Bridge Bank and its associated Residual Entity or Entities are treated as a single entity for income tax purposes and must file a single combined income tax return. The Bridge Bank is responsible for filing all income tax returns and statements for this single entity and is the agent of each associated Residual Entity to the same extent as if the Bridge Bank were the common parent of a consolidated group including the Residual Entity. The term Institution includes a Residual Entity that files a combined return with its associated Bridge Bank.

(f) Rules applicable to members of consolidated groups--(1) Status as members. Unless an election is made under paragraph (g) of this section, Agency Control of an Institution does not terminate the Institution’s membership in a consolidated group. Stock of a subsidiary that is canceled by Agency is treated as held by the members of the consolidated group that held the stock prior to its cancellation. If an Institution is a member of a consolidated group immediately before it transfers deposit liabilities to a Bridge Bank, the Bridge Bank succeeds to the Institution’s status as the common parent or, unless an election is made under paragraph (g) of this section, as a subsidiary of the group. If a Bridge Bank succeeds to an Institution’s status as a subsidiary, its stock is treated as held by the shareholders of the transferring Institution, and the stock basis or excess loss account of the Institution carries over to the Bridge Bank. A Bridge Bank is treated as owning stock owned by its associated Residual Entities, including for purposes of determining membership in an affiliated group.

(2) No 30-day election to be excluded from consolidated group. Neither an Institution nor any of its Consolidated Subsidiaries may be excluded from a consolidated group for a taxable year under § 1.1502-76(b)(5)(ii), as contained in 26 CFR part 1 edition revised April 1, 1994, if the Institution is under Agency Control at any time during the year.

(3) Coordination with consolidated return regulations. The provisions of the regulations under section 597 take precedence over conflicting provisions in the regulations under section 1502.

(g) Elective disaffiliation--(1) In general. A consolidated group of which an Institution is a subsidiary may elect irrevocably not to include the Institution in its affiliated group if the Institution is placed in Agency receivership (whether or not assets or deposit liabilities of the Institution are transferred to a Bridge Bank). See paragraph (g)(6) of this section for circumstances under which a consolidated group is deemed to make this election.

(2) Consequences of election. If the election under this paragraph (g) is made with respect to an Institution, the following consequences occur immediately before the subsidiary Institution to which the election applies is placed in Agency receivership (or, in the case of a deemed election under paragraph (g)(6) of this section, immediately before the consolidated group is deemed to make the election) and in the following order-
(i) All adjustments of the Institution and its Consolidated Subsidiaries under section 481 are accelerated;

(ii) Deferred intercompany gains and losses with respect to the Institution and its Consolidated Subsidiaries are taken into account and the Institution and its Consolidated Subsidiaries take into account any other items required under the regulations under section 1502 for members that become nonmembers within the meaning of § 1.1502-32(d)(4);

(iii) The taxable year of the Institution and its Consolidated Subsidiaries closes and the Institution includes the amount described in paragraph (g)(3) of this section in income as ordinary income as its last item for that taxable year;

(iv) The members of the consolidated group owning the common stock of the Institution include in income any excess loss account with respect to the Institution's stock under § 1.1502-19 and any other items required under the regulations under section 1502 for members that own stock of corporations that become nonmembers within the meaning of § 1.1502-32(d)(4); and

(v) If the Institution's liabilities exceed the aggregate fair market value of its assets on the date the Institution is placed in Agency receivership (or, in the case of a deemed election under paragraph (g)(6) of this section, on the date the consolidated group is deemed to make the election), the members of the consolidated group treat their stock in the Institution as worthless. (See § 1.337(d)-2, § 1.1502-35(f), and § 1.1502-36 for rules applicable when a member of a consolidated group is entitled to a worthless stock deduction with respect to stock of another member of the group.) In all other cases, the consolidated group will be treated as owning stock of a nonmember corporation until such stock is disposed of or becomes worthless under rules otherwise applicable.
Appendix 3

Gesetz über das Kreditwesen (Kreditwesengesetz - KWG)
§ 48a Übertragungsanordnung

current through June 2011

(1) Die Bundesanstalt kann nach Maßgabe der folgenden Bestimmungen anordnen, dass das Vermögen eines Kreditinstituts einschließlich seiner Verbindlichkeiten auf einen bestehenden Rechtsträger (übernehmenden Rechtsträger) im Wege der Ausgliederung übertragen wird (Übertragungsanordnung).

(2) Eine Übertragungsanordnung darf nur ergehen, wenn

1. das Kreditinstitut in seinem Bestand gefährdet ist (Bestandsgefährdung) und es hierdurch die Stabilität des Finanzsystems gefährdet (Systemgefährdung) und
2. sich die von der Bestandsgefährdung ausgehende Systemgefährdung nicht auf anderem Wege als durch die Übertragungsanordnung in gleich sicherer Weise beseitigen lässt.

Die Bundesanstalt, die Bundesanstalt für Finanzmarktstabilisierung und der Lenkungsausschuss handeln beim Erlass und beim Vollzug einer Übertragungsanordnung auch dann rechtmäßig, wenn sie bei verständiger Würdigung der ihr zum Zeitpunkt ihres Handelns erkennbaren Umstände annehmen dürfen, dass die gesetzlichen Voraussetzungen für ihr Handeln vorliegen. § 4 Absatz 4 des Finanzdienstleistungsaufsichtsgesetzes bleibt unberührt.


(4) Die Bundesanstalt ist berechtigt, dem Lenkungsausschuss und der Bundesanstalt für Finanzmarktstabilisierung die für die Entscheidung erforderlichen Informationen zu übermitteln; § 9 Absatz 1 Satz 5 gilt entsprechend.

Appendix 4

Gesetz zur Errichtung eines Restrukturierungsfonds für Kreditinstitute
(Restrukturierungsfondsgesetz - RStruktFG)

Artikel 3 G. v. 09.12.2010 BGBI. I S. 1900 (Nr. 63), 1921; zuletzt geändert durch Artikel 6 G. v. 22.06.2011 BGBI. I S. 1126; Geltung ab 31.12.2010
FNA: 660-8; 6 Finanzwesen 66 Sicherheitsleistungen des Bundes 660 Bundesbürgschaften

§ 5 Gründung eines Brückeninstituts und Anteilserwerb

(1) Der Restrukturierungsfonds kann, auch ohne konkreten Anlass, juristische Personen gründen, die im Rahmen von Übertragungen nach § 48a Absatz 1 des Kreditwesengesetzes oder aufgrund umwandlungsrechtlicher oder privatrechtlicher Vereinbarungen als übernehmender Rechtsträger fungieren können (Brückeninstitut).

(2) Der Restrukturierungsfonds kann Anteile an dem übernehmenden Rechtsträger im Sinne des § 48a des Kreditwesengesetzes oder gemäß umwandlungsrechtlicher oder privatrechtlicher Vereinbarung erwerben. Ein Anteilserwerb soll nur erfolgen, wenn ein wichtiges Interesse des Bundes vorliegt und der vom Bund erstrebte Zweck sich nicht besser und wirtschaftlicher auf andere Weise erreichen lässt. Die §§ 65 bis 69 der Bundeshaushaltsgesetze finden keine Anwendung.

(3) § 202 Absatz 3 Satz 1 des Aktiengesetzes ist auf Brückeninstitute nicht anzuwenden.

(4) Ist ein Brückeninstitut als übernehmender Rechtsträger gemäß § 48m Absatz 4 Satz 4, Absatz 5 oder aufgrund des § 48r Absatz 2 des Kreditwesengesetzes zur Gewährung von Anteilen an das Kreditinstitut verpflichtet, muss der Restrukturierungsfonds darauf hinwirken, dass die dafür erforderlichen Hauptversammlungsbeschlüsse zustande kommen.