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# **The Centralization of the Banking Industry: Dodd-Frank’s Impact on Community Banks and the Need for Both Regulatory Relief and an Overhaul of the Current Framework**

*Bryce W. Newell\**

## I. INTRODUCTION

The Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Dodd-Frank”)<sup>1</sup> has a number of controversial and disputed features. Nonetheless, Dodd-Frank’s purpose is, “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, *to end ‘too big to fail,’* to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”<sup>2</sup> Thus, one of the central purposes of Dodd-Frank is to end the banking industry’s “too big to fail” banks in order to protect taxpayers from bailing out these big banks. This objective has been approached through a massive increase in regulatory oversight of the entire banking industry, including small and local commercial banks. Yet, since 2010, when Dodd-Frank was introduced, the five biggest banks in America have grown in market share.<sup>3</sup>

In December 2012, the Federal Deposit Insurance Corporation (FDIC) commissioned a study on community banking.<sup>4</sup> This study defined community banks based on “criteria related to traditional lending and deposit gathering activities and limited geographic scope.”<sup>5</sup> At the end of 2010, 94% of all banking organizations fit this definition, but, as of 2011, community banks “held [only 14%] of banking

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 5, 7, 12, 15, 26, 28, 31, 42 U.S.C.).

2. *Id.* pmbl. (emphasis added).

3. Jeff Cox, *5 Biggest Banks Now Own Almost Half the Industry*, CNBC (Apr. 15, 2015, 2:33 PM), <http://www.cnbc.com/2015/04/15/5-biggest-banks-now-own-almost-half-the-industry.html>.

4. FED. DEPOSIT INS. CORP., FDIC COMMUNITY BANKING STUDY (Dec. 2012), <https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf>.

5. *Id.* at I.

industry assets.”<sup>6</sup> This means that just 6% of banks held the other 86% of banking industry assets. The study also found that the banking industry has been consolidating dramatically since 1984, and “the share of [United States] banking assets held by community banks declined from [38%] to [14%]” over this time period.<sup>7</sup>

The transition of the banking system from local-oriented community banks to national megabanks could have far reaching consequences. Dodd-Frank could actually be enhancing the consolidation of the banking industry, in direct opposition to its principal purpose – eliminating “too big too fail” banks. While the industry has intentionally trended towards consolidation in the past, the current dramatic increase of consolidation of banking assets is likely an unintended consequence of increased regulation. This consequence comes from astronomical regulatory costs passed on to community banks, as well as increased capital requirements that diminish these banks’ competitiveness. Dodd-Frank has exacerbated this problem, and it will likely result in further increased consolidation of the banking industry.

This Article argues that the focus of regulation must first refrain from being overly broad. The current climate illuminates the problems of overbroad regulation. Dodd-Frank not only introduces new rules, but it also creates numerous regulatory bodies that govern the financial services industry, such as the Financial Stability Oversight Council, to oversee financial institutions.<sup>8</sup> The Act produced a substantial litany of new responsibilities, rules, regulations, and requirements that come with increased costs.

Dodd-Frank was a reactive piece of legislation following the Great Recession. This Article argues that it is overbroad, and, consequently, it helps promote the very problem that its aim was to eliminate: “too big to fail” banking institutions. The solution is to substantially minimize regulation of banks that have less than \$10 billion in assets. Beyond this, a new regulatory framework is needed to maximize the effectiveness of regulation. This new regulatory framework will call on the states to have control over the regulation of community banks located within their borders. A state system of regulation will promote the necessary focus for regulation to be effective, and it also will enhance the ability of federal regulators to focus exclusively on large banking institutions that pose systemic risk to the economy. By instituting legislation similar to the Uniform Commercial Code (UCC),

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6. *Id.*

7. *Id.*

8. See MORRISON & FOERSTER, THE DODD-FRANK ACT: A CHEAT SHEET 4 (2010), <http://media.mofo.com/files/uploads/images/summarydoddfrankact.pdf>.

this type of regulation would continue to have a uniform approach: where for the most part, the regulations will be uniform throughout the country, but enforcement will be independently administered by the states.

This approach would help to ensure that community banks have the ability to compete within the market by decreasing their regulatory burdens and costs. Large banks benefit from economies of scale that diminish the impact of regulatory costs. However, small community banks pay a higher price to comply with the overly burdensome regulatory costs. This Article's main argument is that the FDIC should continue its recent trend of loosening community-banking regulations in order to maintain the competitive balance of the banking industry.<sup>9</sup>

The Dodd-Frank Act generated enormous regulatory costs, and it is possible that this, along with a mix of other regulatory factors, has diminished the importance of community banks. Part II of this Article will discuss community banks: how they are defined, why they are important, and how they should be identified under any regulatory framework. Part III will discuss the impact Dodd-Frank has had on community banks and on large institutional banks. Part IV will discuss the regulatory regime that should be adopted, which will increase the effectiveness of regulation for both community banks and the largest banking institutions. Part IV will also define what the framework is, how it would be implemented, and what the benefits and possible burdens would be. Finally, Part V will conclude by reiterating both the fundamental purpose of regulation as well as why this proposed method will work best.

## II. COMMUNITY BANKS

The American banking industry has historically been decentralized, especially when compared to the rest of the Western world. Past banking regulation severely limited the ability of banks to diversify geographically in the United States.<sup>10</sup> The United State has traditionally been wary of too much concentration in the banking industry. Thus, the banking industry model has been influenced by a large number of small local banks throughout the country. However, as deregulation of this model took place in the early 1980s, the industry

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9. See Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp., To the FDIC Community Banking Conference: Strategies for Long-Term Success 5 (Apr. 6, 2016), <https://fdic.gov/news/news/speeches/spapr0616.pdf>.

10. William Keeton, Jim Harvey & Paul Willis, *The Role of Community Banks in the U.S. Economy*, 88 FED. RESERVE BANK OF KANSAS CITY ECON. REV., 2nd Quarter 2003, at 15, 15, <https://www.kansascityfed.org/Publicat/econrev/Pdf/2q03keet.pdf>.

experienced a shift towards large megabanks concentrating much of the market share.

### A. *Definition of a Community Bank*

Defining which banking institutions fall into the category of “community bank” is an important aspect to the discussion of Dodd-Frank’s impact on such banks. Different scholars and industry analysts have attempted to define community banks in a variety of ways. Typically, community banks are defined as smaller banks or standalone banks that focus “on providing basic banking activities to a local community.”<sup>11</sup> However, such a definition does not capture all community banks, and it is too narrow for the purposes of regulation. There is also an inherent subjective aspect to this definition of community bank. For instance, defining “community” is itself a difficult task: how large is a community? where does it start? where does it end? When there are subjective components involved, this brings about a discretionary feature in establishing a definition. This is one reason why regulators often disagree as to “what constitutes a community bank.”<sup>12</sup> When the regulators cannot agree on a definition of a community bank, the task of regulating banks in a streamlined and tailored approach becomes much more difficult. Thus, this section discusses the implications of a proper working definition of “community bank,” the pros and cons of such a definition, and how this definition can be incorporated into the larger regulatory framework of the banking industry.

The first question regulators must deal with is whether the definition of community banks should be broad or narrow. A broad definition of community banks encompasses three main components.<sup>13</sup> First, a broader definition of community banks will ensure that more banks around the country will be able to compete against the economies of scale of larger banks. Second, it will dissuade the continued consolidation of the banking industry because merging for the sake of economies of scale will be less of an incentive. Third, it will ensure that most, if not all, community banks will have access to decreased regulation.

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11. Marshall Lux & Robert Greene, *The State and Fate of Community Banking* 3 (Harv. Kennedy Sch. M-RCBG Assoc. Working Paper Series, Paper No. 37, 2015).

12. *Id.* at 4 (noting that the three largest federal banking regulators – the Office of the Comptroller of the Currency (OCC), the FDIC, and the Federal Reserve Board – all use different definitions).

13. *See generally* FED. DEPOSIT INS. CORP., *supra* note 4.

Those in favor of a narrow definition of community banks may argue that an overly broad definition could lead to many banks escaping regulation. Arguably, this could be an exploitable loophole in the regulation of the banking sector, and it could potentially lead to behavior that is contrary to the economic health of the banking industry. Banks could attempt to manipulate their holdings in order to qualify as community banks, when they should not. However, too narrow of a definition would essentially result in a regulatory approach that does not acknowledge or eradicate the current problem of the banking industry, that is, the trend of increased consolidation.

Thus, regulators must first agree on the proper definition of a community bank. However, outlining a regulatory exemption that applies to a certain sector of the banking industry will undoubtedly be met with various attacks from all sides. A new regulatory framework must be instituted in order to prevent community banks from continuing their rapid decline. Further, it is imperative to curtail the growth of megabanks and the increase of “too big to fail” institutions. Thus, a proper definition of community banks is mandatory in order to have any useful impact on the current situation.

#### B. *How Community Banks Are Currently Defined By Regulators*

The FDIC’s study of community banking developed a “workable definition” of community banks.<sup>14</sup> “[T]he study develops a new research definition of a community bank around criteria related to traditional lending and deposit gathering activities and limited geographical scope.”<sup>15</sup> Using this definition, the FDIC found that about 94% of all banking organizations fell within this category, including 330 larger banks that likely would “have been excluded if asset size were the only criterion.”<sup>16</sup> This definition seems to be broad enough to capture the entire category of community banks.

The FDIC found that, as of 2011, community banks “held [14%] of banking industry assets, but [46%] of the industry’s small loans to farms and businesses.”<sup>17</sup> This implies another aspect to the definition: small loans are inextricably tied to community banking. The FDIC focused on this aspect and attempted to bring in banks that “tend to be relationship lenders, characterized by local ownership . . . and local decision making.”<sup>18</sup> There seems to be a sense of “locality” involved

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14. *Id.* at A-1.

15. *Id.* at I.

16. *Id.*

17. *Id.*

18. *Id.*

with “community,” but these terms are tough for regulators to adequately express via regulation. This could help explain why the current regulatory framework of “one size fits all” does not adequately capture the needs of community banks.

The FDIC bases its definition of community bank on the geographic scope as well as the focus of banks’ lending habits.<sup>19</sup> Interestingly, they do not include a maximum cap on what institution qualifies as a community bank.<sup>20</sup> This is simply unfeasible in applicability because there is no way to apply a regulatory framework without having a bright-line base point as to who qualifies as a community bank. This is a major flaw in the FDIC’s study, and its failure to establish a size limit on the community bank definition illustrates FDIC’s hesitancy to change the regulatory framework. Even though there are several technical factors that the FDIC utilizes to further narrow down what a community bank is, they fail to contribute a definition that could be applied by regulatory bodies.

The Government Accountability Office (GAO) issued a report in 2012 that analyzed the impact Dodd-Frank has had on community banks.<sup>21</sup> This report defined community banks as any bank that has total assets of less than \$10 billion.<sup>22</sup> This comprised 99% of the industry, about 7,400 banks, but “the majority of community banks have \$250 million or less in total assets.”<sup>23</sup> There are 109 banks that have more than \$10 billion in total assets,<sup>24</sup> which is less than 1% of all United States banks. This is a significant disparity that highlights the dramatic differences between community banks and large institutional megabanks.

The GAO definition is broader than the FDIC definition. Under the GAO’s definition, community banks held approximately “[20%] of the industry’s total assets in 2011.”<sup>25</sup> However, both definitions come from different starting points. The GAO used size as the sole criteria for the purpose of the report.<sup>26</sup> Size is extremely important in the characterization of community banks because size is what essen-

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19. FED. DEPOSIT INS. CORP., *supra* note 4, at I.

20. *See id.*

21. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-881, COMMUNITY BANKS AND CREDIT UNIONS: IMPACT OF THE DODD-FRANK ACT DEPENDS LARGELY ON FUTURE MARKET RULINGS (2012).

22. *Id.* at 5.

23. *Id.*

24. *See* NAT’L INFO. CTR., U.S. FED. RESERVE SYS., *Holding Companies with Assets Greater Than \$10 Billion*, FED. FIN. INSTS. EXAMINATION COUNCIL, <https://www.ffiec.gov/nicpubweb/nicweb/HCSGreaterThan10B.aspx> (last visited Dec. 24, 2016).

25. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 21, at 5.

26. *Id.*

tially differentiates a community bank from a large bank. Therefore, size should unquestionably play a role in the definition of community bank. It is also possible to harmonize the GAO's definition with the FDIC's definition in order to adequately capture the essence of community banks.

Common industry practice utilizes size as a method to determine which banks qualify as community banks.<sup>27</sup> This method is the easiest to apply, and it provides a clear bright-line approach to defining community banks. While community banks are often viewed as relationship-oriented lenders doing most of their business in the community where they are located, such a definition has difficulty in application. The best method of identifying community banks is by size.

An approach based on size is easy to apply by regulators and illustrates a bright-line on who qualifies as a community bank and who does not. However, the proper size threshold is important in the classification. Any bank that has less than \$10 billion in total assets should qualify as a community bank, and these banks should be regulated accordingly. Banks that have holdings of more than \$10 billion in assets pose significant systemic risk to the economy. Four of these 109 banks have assets over \$1 trillion.<sup>28</sup> If these banks fail, economic collapse could ensue. Thus, these banks require a more encompassing form of regulation. However, because community banks do not pose these same risks, they should have regulations that are refined for their economic impact.

### C. *The Importance of Community Banking to the U.S. Economy*

In 2012, Federal Reserve Chairman, Ben Bernanke, discussed the value of community banks on the economy.<sup>29</sup> Bernanke stated that community banks play “a critical role” in local economies by lending in their regions.<sup>30</sup> He also noted that community banks are better able to adapt to the changing needs of their customers because of the “close ties” they have in “the communities they serve.”<sup>31</sup> These effects happen at the local level, but there is a multiplier effect that resonates on the national economy.<sup>32</sup>

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27. See generally FED. DEPOSIT INS. CORP., *supra* note 4.

28. See Chris Vanderpool, *5 Banks Hold more than 44% of US Industry's Assets*, SNL (Dec. 12, 2014, 2:04 PM), <https://www.snl.com/InteractiveX/Article.aspx?cdid=A-30025507-14130>.

29. *The Importance of Community Banking: A Conversation with Chairman Ben Bernanke*, CMTY. BANKING CONNECTIONS, 3rd Quarter 2012, at 1, 10, <https://www.communitybankingconnections.com/assets/articles/2012/q3/cbcq32012.pdf?la=en>.

30. *Id.*

31. *Id.*

32. *Id.*



Community banks are integral in the communities that they serve. Community banks have long standing relationships with their customers, and these relationships lead to a deeper knowledge of a customers' creditworthiness. This intimate knowledge allows community banks to play a critical role in helping local business develop. Rather than determining the riskiness of a loan based on electronic models and a "one size fits all" approach typically taken by institutional banks, community banks are able to prioritize risk based on actual knowledge gleaned from established working relationships with customers. This is a unique and important characteristic that illustrates the importance of community banks to small business in the United States economy. Community banks make almost half of all small business loans, and they continue to play a vital role in local economies.<sup>33</sup> Developing a deeper understanding of relationship banking is an integral part of economic growth.

Institutional banks have standardized the way loans are made.<sup>34</sup> While there are obvious benefits, there is also the adverse effect of minimizing the importance of face-to-face interaction. Face-to-face interaction can help banks analyze the potential risks of a loan by examining more than just a person's credit score.<sup>35</sup> A standardized approach underscores the importance of a person's character. When a bank makes a loan, they take a risk. They are betting that the loanee will repay the loan. When a bank makes a small business loan, they are also betting, to some extent, that the business will be successful enough to repay the debt. Thus, for many, an individual's character and integrity are fundamental in determining whether someone will qualify for a business loan. Institutional banks have minimized the importance of relationship banking by utilizing models and statistics in order to determine whether someone will qualify for a loan.<sup>36</sup> Large megabanks base their loan decisions almost exclusively on data and credit reports, but they fail to acknowledge individual attributes.

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33. See Lael Brainard, Governor, Fed. Reserve Sys., Remarks at the Community Banking in the 21st Century, the Third Annual Community Banking Research and Policy Conference Cosponsored by the Federal Reserve System and Conference of State Bank Supervisors, Federal Reserve Bank of St. Louis, St. Louis, Missouri: Community Banks, Small Business Credit, and Online Lending 3 (Sep. 30, 2015), <https://www.federalreserve.gov/newsevents/speech/brainard20150930a.pdf>.

34. See, e.g., Uniform Residential Loan Application, FANNIE MAE, [https://www.fanniemae.com/content/guide\\_form/1003rev.pdf](https://www.fanniemae.com/content/guide_form/1003rev.pdf) (last visited Feb. 16, 2017).

35. *Don't Neglect Face-To-Face Banking Interactions*, LENDING SOLUTIONS CONSULTING: LSCI BLOG, <http://www.rexcuadvice.com/blog/dont-neglect-face-face-banking-interactions> (last visited Feb. 16, 2017).

36. See Keeton, Harvey & Willis, *supra* note 10, at 15.

### III. CONSOLIDATION OF THE BANKING INDUSTRY AND ITS IMPACT

One recent study illustrates the trend of consolidation of the banking industry.<sup>37</sup> Federal agencies, such as the Federal Reserve, and private organizations have collected data on this subject.<sup>38</sup> The banking industry's consolidation began well before the passing of Dodd-Frank. However, Dodd-Frank and its plethora of regulatory agencies have increased the rate of consolidation for a variety of reasons.

The consolidation of the banking industry began with the deregulation of locality requirements for banks in the 1980s.<sup>39</sup> Prior to this, banking operations were restricted geographically,<sup>40</sup> and it was difficult for banks to have branches across states. The geographic restrictions were a central tenet in the decentralization of the banking industry. There were many benefits of the deregulation, but an unintended consequence was the rapid consolidation of the industry due to mergers and rapid growth from the largest banks. These large banks serve a fundamental purpose within the financial sector, and it would be counterproductive to unilaterally stop free market activity. However, regulation affects different size banks in different ways, and there is a disproportionately negative effect that regulation has on smaller banks. It is important to note from the outset that consolidation has not been brought about solely by Dodd-Frank, but, rather, this Article argues that Dodd-Frank continues to escalate consolidation.

#### A. *Banking Statistics and Consolidation Data*

According to an FDIC Statistics comparison report, as of December 31, 2015, 27.8% of banks have assets under \$100 million, yet these banks have a total of .59% of all banking assets.<sup>41</sup> The same report shows that 61.4% of all commercial banks have assets between \$100 million and \$1 billion, but these banks control only 6.81% of all banking assets in the United States.<sup>42</sup> Finally, 10.8% of all commercial

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37. See Marshall Lux & Robert Greene, *supra* note 11.

38. *Id.*

39. See generally Philip E. Strahan, *The Real Effects of U.S. Banking Deregulation*, 85 FED. RESERVE BANK OF ST. LOUIS REV. 111, 114 (2003), <https://research.stlouisfed.org/publications/review/03/07/Strahan.pdf>.

40. See generally Kenneth D. Jones & Tim Critchfield, *Consolidation in the U.S. Banking Industry: Is the "Long, Strange Trip" About to End?*, 17 FDIC BANKING REV. 31, 37 (2005), <https://www.fdic.gov/bank/analytical/banking/2006jan/article2/article2.pdf>.

41. Standard Industry Reports: Statistics on Depository Institutions (SDI), FED. DEPOSIT. INS.CORP., <https://www5.fdic.gov/sdi/main.asp?formname=standard> (click on "Run Report" hyperlink in Standard Report #1 section) (last visited Dec. 25, 2016).

42. *Id.*

banks have assets over \$1 billion, but these 10% control 92.6% of all banking assets in the United States.<sup>43</sup> These are remarkable statistics, generated on the FDIC website.<sup>44</sup> The total number of reporting institutions in 2015 was 5338 commercial banks, according to the FDIC website.<sup>45</sup> The actual number is thus between 5338 and 7400 banks, depending on the statistics utilized.<sup>46</sup>

As of December 31, 2010, there were 6519 commercial banks reporting to the FDIC.<sup>47</sup> In the past six years alone, there are 1181 fewer banks, but there has been an increase of 67 banks with assets over \$1 billion. Since 1980, there have been over 10,000 mergers in the banking industry, involving over \$7 trillion in acquired assets.<sup>48</sup> Since 2000, there has been a decline of 3354 banks with assets of less than \$100 million.<sup>49</sup> This means that the industry went from having 58% of banks with assets under \$100 million in 2000, to now only 27.8% of banks with assets under \$100 million.<sup>50</sup> “The relaxation of restrictions on intrastate branching and interstate banking that took place in the 1980s and early 1990s facilitated both mergers and consolidations.”<sup>51</sup> This illustrates that the banking industry is consolidating, and it has been in this state for a number of years. However, it is unclear the impact that this will have on the U.S. economy as a whole, and it is unclear the exact extent that Dodd-Frank has had on speeding up the consolidation process.

The data above is compelling proof that the industry is consolidating. This consolidation process means that more banks have assets over \$1 billion and substantially less banks have assets under \$100 million. To further illustrate this point, there are currently 576 banks, as of December 31, 2015, that have assets over \$1 billion, which is approximately 11% of the total number of banks in the United States.<sup>52</sup> Yet, these 11% of banks control almost 93% of all banking assets in

43. *Id.*

44. *Id.*

45. *Id.*

46. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 5.

47. FED. DEPOSIT. INS. CORP., *supra* note 41 (click on “Run Report” hyperlink in Standard Report #1 section).

48. Robert M. Adams, *Consolidation and Merger Activity in the United States Banking Industry from 2000 Through 2010 2* (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2012-51, 2012), <https://www.federalreserve.gov/pubs/feds/2012/201251/201251pap.pdf>.

49. FED. DEPOSIT. INS. CORP., *supra* note 41 (follow the same process, but, after the report is run change the dates under “Report Dates” to the year 2000 and press the “Update Report” button located to the left of the “Report Dates” field).

50. *Id.*

51. FED. DEPOSIT. INS. CORP., *supra* note 4, at 2–2.

52. See FED. DEPOSIT. INS. CORP., *supra* note 41.

the United States.<sup>53</sup> The big banks clearly have substantial market power, while smaller banks' market power has diminished considerably.

To be clear, the banking industry consolidating is minimally impacted by bank failures. Since October 1, 2000, there have been 543 bank failures.<sup>54</sup> However, since 1990, there have been 6.5 bank mergers for every one bank failure.<sup>55</sup> Roughly 2900 banking institutions have failed between 1980 and 2013, but in that time "the total number of bank charters . . . dropped from approximately 20,000 to 6812."<sup>56</sup> Bank failures are overall less impactful on the consolidation than mergers, acquisitions, and organizational consolidations.<sup>57</sup>

The pattern of decline of the smaller banks has been mirrored by an equally substantial pattern of growth of the largest U.S. banks. Since 1984, "the largest banks – those with assets over \$10 billion – grew elevenfold . . . raising their share of industry assets from [27%] in 1984 to [80%] in 2011."<sup>58</sup> Industry analysts attribute a number of forces to industry consolidation during this time period, but it is becoming clear that Dodd-Frank and other banking regulations are a contributing cause of accelerated consolidation.<sup>59</sup> "From 2011 through 2014, the number of voluntary mergers increased each year."<sup>60</sup> "Mergers increased from 73 in 2011 to 162 in 2014."<sup>61</sup> The increase in mergers illustrates how consolidation continues to be the trend in the American banking industry, and Dodd-Frank, passed in 2010, continues to play a role in why banks choose to merge.

The Riegel-Neal Act of 1994 and the Gramm-Leach-Bliley Act of 1999 helped set up the conditions for the four largest banks' assets and liabilities to grow rapidly in the years preceding the financial crisis.<sup>62</sup>

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53. *Id.*

54. Failed Bank List, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/bank/individual/failed/banklist.html> (last visited Dec. 26, 2016) (showing a constantly updated list of failed banks since October 1, 2000).

55. Bob Solomon, *The Fall (and Rise?) of Community Banking: The Continued Importance of Local Institutions*, 2 UC IRVINE L. REV. 945, 947 (2012).

56. Tanya D. Marsh & Joseph W. Norman, *Reforming the Regulation of Community Banks After Dodd-Frank*, 90 IND. L. J. 179, 185 (2015).

57. *Id.*

58. FED. DEPOSIT INS. CORP., *supra* note 4, at I.

59. Marsh & Norman, *supra* note 56, at 185.

60. Michael Kowalik et al., *Bank Consolidation and Merger Activity Following the Crisis*, 100 FED. RESERVE BANK OF KANSAS CITY ECON. REV., 1st Quarter 2015, at 31, 34, <https://www.kansascityfed.org/publicat/econrev/pdf/15q1Kowalik-Davig-Morris-Regehr.pdf>.

61. *Id.*

62. Martin Neil Baily et al., *The Big Four Banks: The Evolution of the Financial Sector, Part I*, BROOKINGS INST. 10 (May 2015), [https://www.brookings.edu/wp-content/uploads/2016/06/big\\_four\\_banks\\_evolution\\_financial\\_sector\\_pt1\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/big_four_banks_evolution_financial_sector_pt1_final.pdf).

Banks took advantage of these laws, which gave them the ability to consolidate and expand geographically.<sup>63</sup> Even after the crisis, the U.S. government continued to encourage the acquisition of troubled financial institutions by more secure ones.<sup>64</sup> The result is that the five biggest banks in America now own nearly half of the industry's assets.<sup>65</sup> Dodd-Frank was intended to eliminate "too big to fail" status, but it is clear that too big to fail banks have actually increased in size since the financial crisis.

### B. *Increasing Costs of Regulation*

It is difficult to pinpoint the overall costs associated with regulation and what effect these costs have on consolidation; however, regulatory costs are on the rise.<sup>66</sup> Dodd-Frank is a likely contributor to rising costs. Indeed many community bankers have stated, "the cumulative effects of regulatory requirements led them to increase staff over the past ten years."<sup>67</sup> Further, the FDIC has proposed to study more detailed information regarding regulatory costs, yet many community banks have indicated that it would be costly to simply collect such information.<sup>68</sup> These costs have resulted in lower efficiencies for community banks.<sup>69</sup> Over the same period, large banks efficiency has actually increased.<sup>70</sup> This leads to the conclusion that increased regulation has more pronounced negative effects on smaller banks than it does for larger banks because large banks are able to pool resources to create efficient regulatory mechanisms that community banks do not have at their disposal.

63. *Id.*

64. *Id.*

65. Cox, *supra* note 3.

66. Phil Hall, *The Cost of Dodd-Frank: \$24 Billion in Compliance*, NAT'L MORTG. PROF'L MAG. (July 15, 2015, 16:05), <http://nationalmortgageprofessional.com/news/54936/cost-dodd-frank-24-billion-compliance> (citing to Ben Gitis et. al., *Dodd-Frank At 5: Higher Costs, Uncertain Benefits*, AM. ACTION FORUM (July 14, 2015), <https://www.americanactionforum.org/research/dodd-frank-at-5-higher-costs-uncertain-benefits>)).

67. FED. DEPOSIT INS. CORP., *supra* note 4, at IV.

68. *Id.*

69. See generally Ben Gitis, Andy Winkler & Sam Batkins, *Dodd-Frank At 5: Higher Costs, Uncertain Benefits*, AM. ACTION F. (July, 14, 2015), <https://www.americanactionforum.org/research/dodd-frank-at-5-higher-costs-uncertain-benefits>; see also Ash Patel, *Community Banks Still Struggling with Compliance Costs: While Bank of America Might Be Able to Absorb Additional Compliance Costs, the Additional Rounds of Paperwork and Auditing Could Crush a Community Bank*, CFO: AN ARGYLE COMPANY (Oct. 19, 2016), <http://ww2.cfo.com/regulation/2016/10/community-banks-still-struggling-compliance-costs>; Hester Pierce, Ian Robinson & Thomas Stratmann, *How Are Small Banks Faring under Dodd-Frank?* (George Mason Univ. Mercatus Ctr., Working Paper No. 14-05, 2014), [https://www.mercatus.org/system/files/Peirce\\_SmallBankSurvey\\_v1.pdf](https://www.mercatus.org/system/files/Peirce_SmallBankSurvey_v1.pdf).

70. See *id.*

The FDIC claims that continuation of this trend depends on three factors: 1) the ability of new community bank charters to enter the industry, 2) when the normalization of interest rates will take place, and 3) whether non-community banks will be able to generate noninterest income and cut noninterest expenses.<sup>71</sup> While these three factors are certainly important in determining how community banks will remain competitive in the industry, this analysis severely discounts the role regulation has in stifling competition for community banks. Regulation, spearheaded by Dodd-Frank, created a playing field that favors large banking institutions. The irony is that Dodd-Frank's goal was to stop banks from becoming "too big to fail," yet the outcome is a system that perpetuates consolidation. This leads to an increase of "too big to fail" banks. The only way to stop consolidation from continuing is, first, recognize this problem, and second, change the existing regulatory structure in order to keep the competitive playing field in balance. Large banks have the ability to minimize regulatory costs, but community banks do not share in the economies of scale of large banks. This has led to huge profits for the large banks of the world while community banks face the choice of merging or failing.

#### IV. DODD-FRANK AND ITS IMPACT

##### A. *Background of Dodd-Frank*

Congress passed Dodd-Frank in 2010 in response to the 2007 financial crisis.<sup>72</sup> Dodd-Frank heavily regulates the banking and financial industries. This Act is the single largest regulatory mandate issued by Congress over the banking industry. Dodd-Frank is an 848 page bill that is implemented by various federal regulatory agencies.<sup>73</sup> On average, a new rule is implemented every 2.8 days.<sup>74</sup> As of July 1, 2013, there were over 13,789 pages of rules that have been created by over ten regulators.<sup>75</sup> These rules impact every area of the financial markets: the derivatives markets, consumer protection, mortgage reforms, banking and systemic risk, and private funds.<sup>76</sup> Thus, Dodd-Frank has become the most comprehensive regulatory reform instituted over the banking industry in United States history.

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71. FED. DEPOSIT INS. CORP., *supra* note 4, at IV.

72. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 26, 28, 31, 42 U.S.C.).

73. *See 3 Years of Dodd-Frank*, DAVIS POLK, <http://www.davispolkportal.com/infographic/july2013infographic.html> (last visited Nov. 23, 2016).

74. *Id.*

75. *Id.*

76. *Id.*

Dodd-Frank compels both large banks and community banks to meet new regulatory requirements even though community banks played no substantial role in the financial crisis. One reason Dodd-Frank is overly broad is because of the regulatory requirements it imposes on community banks. Community banks must maintain more stringent capital requirements.<sup>77</sup> These capital requirements are restrictive, burdensome, and costly to community banks. A survey taken in 2015 by the Independent Community Bankers of America (ICBA) found that 73% of community banks reported that these new regulations inhibit mortgage lending.<sup>78</sup> As noted previously, community banks drive economic growth in their communities, so restricting community banks' ability to lend money has detrimental effects on local economies.

Dodd-Frank enables regulators to expand the scope of the Act significantly because it directs federal regulatory agencies to implement its provisions through 398 separate rulemaking requirements.<sup>79</sup> Many of these provisions allow agencies broad discretion to issue regulations deemed "necessary and appropriate."<sup>80</sup> A good example of the discretionary powers applicable under Dodd-Frank is the creation of the Consumer Financial Protection Bureau (CFPB).<sup>81</sup> The Consumer Financial Protection Act of 2010, Title X of Dodd-Frank, consolidates rulemaking authority into one regulator, the CFPB.<sup>82</sup> The statutory language established less objective standards that provide the CFPB wide discretionary latitude to determine the types of institutions that fall within its regulatory reach.<sup>83</sup> How the CFPB applies these standards "could significantly affect the scope of the [CFPB]'s powers, the regulatory burden of covered entities, and the impact that the Bureau's actions have on consumer financial markets."<sup>84</sup> This is just one

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77. *Id.*

78. *ICBA Survey: 73 Percent of Community Banks Say Regulations Inhibiting Mortgage Lending*, ICBA NEWS (Jan. 27, 2015), <http://www.icba.org/news/newsreleasedetail.cfm?ItemNumber=190663&navItemNumber=183939>.

79. DODD-FRANK PROGRESS REPORT, DAVIS POLK 2 (2014), <https://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report>.

80. See CURTIS W. COPELAND, CONG. RESEARCH SERV., R41472, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 4 (2010), <http://www.llsdc.org/assets/DoddFrankdocs/crs-r41472.pdf>.

81. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1376 (codified as amended in scattered sections of 5, 7, 12, 15, 26, 28, 31, 42 U.S.C.).

82. DAVID H. CARPENTER, CONGR. RESEARCH SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 13 (2014), <https://www.fas.org/sgp/crs/misc/R42572.pdf>.

83. *Id.*

84. *Id.*

example of the discretion Dodd-Frank provides to regulators under the authority of the Act.

### B. *Impact of Dodd-Frank*

Last year, a study concluded, “since the enactment of Dodd-Frank, community banks have lost market share at twice the rate they did prior to Dodd-Frank.”<sup>85</sup> This study also noted, “regulatory costs tend to fall proportionately heavier on smaller banks, which, in turn, tends to promote consolidation of the industry.”<sup>86</sup> Dodd-Frank’s impact is industry consolidation. If this is an unintended consequence of the sweeping regulation, then regulators must act swiftly in order to reverse this trend. Some analysts have questioned whether this consequence was intended or not.<sup>87</sup> Indeed, Rep. Jeb Hensarling stated in a July 2015 speech:

The Dodd-Frank architecture, first of all, has made us less financially stable. . . . Since the passage of Dodd-Frank, the big banks are bigger and the small banks are fewer. But because Washington can control a handful of big established firms much easier than many small and zealous competitors, this is likely an intended consequence of the Act. Dodd-Frank concentrates greater assets in fewer institutions. It codifies into law ‘Too Big to Fail’ and taxpayer-funded bailouts.<sup>88</sup>

It is clear that Dodd-Frank has promoted consolidation and has increased “too big to fail” banks.

One study concluded that Dodd-Frank cost over \$24 billion in compliance costs.<sup>89</sup> Further, Dodd-Frank created a burden of more than 61 million paperwork hours.<sup>90</sup> This study illustrates that small financial firms have seen the most severe negative impact while the largest companies have grown precipitously at a rate of 11.9% since 2010.<sup>91</sup> The lack of job growth in the financial sector has been concentrated in

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85. See Todd Zywicki, *New Study Finds That Dodd-Frank Has Promoted Industry Consolidation and Killed Community Banks*, WASH. POST (Feb. 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/09/new-study-finds-that-dodd-frank-has-promoted-industry-consolidation-and-killed-community-banks> (citing to Lux & Greene, *supra* note 11.).

86. Lux & Greene, *supra* note 11, at 3.

87. See Ellen Brown, *Killing Off Community Banks - Intended Consequence of Dodd-Frank?*, TRUTHOUT (Oct. 23 2015), <http://www.truth-out.org/news/item/33360-killing-off-community-banks-intended-consequence-of-dodd-frank>.

88. Ryan Smith, *On Its Fifth Anniversary, Hensarling Slams Dodd-Frank*, MORTG. PROF'L AM. (July 22, 2015), <http://www.mpamag.com/news/on-its-fifth-anniversary-hensarling-slams-doddfrank-23302.aspx> (quoting Rep. Jeb Hensarling, chairman of the House Financial Services Committee).

89. See Hall, *supra* note 66.

90. *Id.*

91. Gitis, et. al., *supra* note 66.



small and regional firms.<sup>92</sup> However, since 2010, job growth in financial regulatory agencies has seen a substantial increase, with the industry seeing an increase of 19.2%.<sup>93</sup> Employment in the Federal Reserve System increased 32.2% since Dodd-Frank's enactment.<sup>94</sup> This displays the intriguing fact that Dodd-Frank increased the regulatory industry, but with this increase, there has been a substantial decrease of smaller financial firms in the industry.

The GAO reported, "regulators, industry participants, and [Federal Reserve] studies all find that consolidation is likely driven by regulatory economies of scale."<sup>95</sup> Marshall Lux further states, "large banks are better suited to handle heightened regulatory burdens than . . . smaller banks, causing the average costs of community banks to be higher."<sup>96</sup> Even Federal Reserve Governor Tarullo noted, "[a]ny regulatory requirement is likely to be disproportionately costly for community banks, since the fixed costs associated with compliance must be spread over a smaller base of assets."<sup>97</sup> Since economies of scale have a direct impact on banks' ability to shoulder the burden of regulatory costs, community banks have been impacted to a greater extent. Thus, Dodd-Frank has had, and will continue to have, a greater impact on community banks, than on large banks. As Dodd-Frank continues to be implemented, community banks will continue to suffer.

Dodd-Frank was enacted to curtail the influence of large institutional banks, but the results have been the opposite. Increased consolidation will lead to more "too big to fail" institutions because mergers will naturally increase banks' market share. This is a dire consequence of Dodd-Frank, whether intentional or not. In order to promote a more stable banking industry, regulators must adapt to the problem of consolidation. Turning the tide on consolidation requires a regulatory framework that treats community banks as substantially different than institutional banks. It is essential that regulators eliminate the current capital requirements and regulatory burdens that Dodd-Frank imposes on banks that have less than \$10 billion in total assets.

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92. *Id.*

93. *Id.*

94. *Id.*

95. Lux & Greene, *supra* note 11, at 21.

96. *Id.*

97. *Id.* at 22 (quoting Daniel Tarullo, member of the Board of Governors of the U.S. Federal Reserve Board).

## V. A DIFFERENT APPROACH TO COMMUNITY BANK REGULATION

Neel Kashkari, President of the Federal Reserve Bank of Minneapolis, implored “Congress to consider ‘bold, transformational’ rules including the breaking up of the nation’s largest banks to avoid bailouts.”<sup>98</sup> In his first speech as head of the Minneapolis Federal Reserve, Mr. Kashkari stated that Congress did not go far enough with Dodd-Frank and that new solutions are necessary “to solve this problem once and for all.”<sup>99</sup> Kashkari proposes that the nation’s big banks should be broken up into smaller entities.<sup>100</sup> He believes the biggest banks are still “too big to fail” and continue to pose a significant risk to the economy, even after Dodd-Frank.<sup>101</sup>

One possibility to overcome Dodd-Frank’s harmful effects on community banks would be to break up the largest banks and, at the same time, to reduce regulation and compliance procedures over the entire banking industry. By breaking up the largest banks, Congress would be significantly reducing the risk of a “too big to fail” economic collapse resulting in another bailout situation. However, any such bill must recognize that small banks pose significantly less risk to the economy. Thus, it is imperative that any such regulation recognizes that a new regulatory framework must be enacted in order to allow banking to continue to operate effectively. There are many pros and cons to this approach; however, decentralization has historically been a long-standing feature of United States banking.<sup>102</sup> A potential development could be the impact antitrust regulators will have as the industry continues to consolidate. With the five largest banks controlling nearly half of the industry, it leads to the question: When will antitrust regulators mandate that continued consolidation must end?

Kashkari’s proposal, breaking up the big banks, may or may not be a viable solution to the “too big to fail” problem.<sup>103</sup> His proposal illustrates how community banks should have an entirely different regulatory focus.<sup>104</sup> There are different categories of banks, and federal

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98. RUETERS & FORTUNE EDITORS, *Break Up the Big Banks, Says the Fed’s New Guy*, FORTUNE (Feb. 17, 2016, 5:48 AM), [http://fortune.com/2016/02/17/kashkari-fed-banking-reform-speech/?xid=gn\\_editorspicks&google\\_editors\\_picks=true](http://fortune.com/2016/02/17/kashkari-fed-banking-reform-speech/?xid=gn_editorspicks&google_editors_picks=true).

99. *Id.*

100. *Id.*

101. *Id.*

102. See generally Richard Sylla, *The US Banking System: Origin, Development, and Regulation*, GILDER LEHRMAN INST. AM. HISTORY, <https://www.gilderlehrman.org/history-by-era/hamiltoneconomics/essays/us-banking-system-origin-development-and-regulation> (last visited Feb. 16, 2017).

103. RUETERS & FORTUNE EDITORS, *supra* note 98.

104. See *id.*

regulation should be aimed at minimizing the risks that these categories present. The economic risks posed by the largest banks are substantially greater than the economic risks posed by community banks. However, Dodd-Frank's approach does not focus on these different risks; instead, the Act creates new capital requirements for all banking institutions, regardless of size.

While many of the rules that regulators issued pursuant to Dodd-Frank make some attempt to tailor the effect on small banks,<sup>105</sup> regulators themselves have acknowledged that more could be done to reduce regulatory burdens on community banks.<sup>106</sup> Community banks have different regulatory needs than large banks. This seems like an obvious economic reality. However, the regulatory impact is not balanced in the proper ratio for community banks and the largest institutions.

#### A. *The Proposed Solution: State Regulation of Community Banks*

The first necessary change to reduce the regulatory impact that is disproportionate on community banks is to immunize them from the oversight of federal regulation that has been implemented under Dodd-Frank. Banks that have total assets below \$10 billion would qualify for this exemption. This exemption would allow Dodd-Frank to serve its purpose, that is, reduce the substantial systemic risk the largest banking institutions have on the national economy. The ultimate shortcoming of Dodd-Frank is that it fails to adequately differentiate the regulatory needs and requirements of large banking institutions versus those of small community banks. However, the differences between large and small banks are pronounced.

A bank that has over \$1 trillion in assets should not have the same regulatory requirements, including capital requirements and compliance standards, as a bank that has \$5 billion in assets, or a bank with \$200 million in assets. The size of the bank should correspond to the regulatory burden imposed. When a bank has a minimal economic footprint, it does not make sense to impose stringent capital requirements in the name of economic safety. However, a bank that has a over a trillion dollars in assets should have increased capital require-

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105. SEAN M. HOSKINS & MARC LABONTE, CONG. RESEARCH SERV., R43999, AN ANALYSIS OF THE REGULATORY BURDEN ON SMALL BANKS (2015), <https://www.fas.org/sgp/crs/misc/R43999.pdf>.

106. See Daniel Wilson, *Small Banks Slam 'One Size Fits All' Dodd-Frank Regs*, LAW360 (Sept. 16, 2014, 5:47 PM), <http://www.law360.com/articles/577496/small-banks-slam-one-size-fits-all-dodd-frank-regs> (Tony Bland, OCC Senior Deputy Comptroller for Midsize and Community Bank Supervision, stated, "We understand a one-size-fits-all approach doesn't work," concluding that his agency "could do more" to reduce regulatory burdens on smaller institutions.).

ments because the risk of collapse has a greater potential to affect the economy as a whole. Currently, Dodd-Frank does little to distinguish between the regulatory burdens imposed on banks based on their relative size.

This proposal does not mean that community banks are exempt from any and all regulation. The second way Congress must act is to institute a uniform regulatory policy, to be adopted by the states, similar to the Uniform Commercial Code (UCC), that allows states to regulate community banks. A uniform approach to banking regulation is important, but it is wholly unnecessary to institute a new regulatory agency for the sole purpose of regulating community banks. State governments should regulate community banks through a uniform approach instituted by Congress. Not only are these banks relationship lenders within the community, but perhaps it is time for community banks to have regulation based on relationship principles as well. By allowing states to regulate community banks, federal regulators would be able to focus on large banking institutions. They would not have to waste time and money by performing on-site compliance checks at the thousands of banks across the country. Instead, states would have the authority to regulate community banks, which is advantageous for numerous reasons. First, community banks impact the local economy, and second, states are much more concerned with their economy than with the national economy.

The largest banks have a broad range of activities that cross state and national lines. Community banks, on the other hand, largely operate within a small geographic area.<sup>107</sup> This geographic limitation enhances the viability and effectiveness of state regulation, as opposed to federal regulation. This would also ease the burden on federal regulators by substantially limiting the number of regulated banks.

There are a little over one hundred banks that have assets over \$10 billion.<sup>108</sup> Federal regulatory agencies would be able to exclusively focus on these banks. This would eliminate the burden on regulators to control the entire banking industry. Further, regulators will be able to make rules that apply to these banks, and not have to increase costs by studying the potential effects such rules would have on community banks. There would be no need for two sets of rules from the federal regulators, instead, they could write and apply rules that are necessary to prevent megabanks from failing.

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107. FED. DEPOSIT INS. CORP., *supra* note 4, at 3-1.

108. See NAT'L INFO. CTR., *supra* note 24.

On the other hand, states will have the ability to create rules that will focus on community banks. The ability for regulators to focus on the needs of the industry will be a substantial improvement over the current system. Good and effective regulation is brought about through focus and sensitivity of those being regulated. In order for the banking industry to be properly regulated, the banking industry must be completely reclassified into two categories: community banks and megabanks. This will allow each component of the banking industry to have effective regulation. A system of regulation that fails to differentiate the impact that these two types of banks have on the economy is ineffective regulation. This type of regulation also brings back the historical system of regulation that was a long-standing aspect of the United States banking system. Banks have long been state chartered institutions, and now is the time to return to state regulation over community banks.

### B. *Benefits and Shortcomings of This Approach*

The benefits of this new approach to state regulation is that it would substantially decrease the costs of regulation on community banks, but it would also continue to impose the strictest oversight over the largest banking institutions. This would allow community banks to maximize profits in order to maintain competitiveness. Therefore, banks would then begin lending again and focus on the individual, rather than the credit report. This could boost economic growth on a local level, but, as noted previously, this has a multiplicative effect.<sup>109</sup>

Yet, there are some shortcomings to this proposal. This system requires a complete overhaul of the current framework, and thus would only be possible by congressional authority. Congress should act to create this new framework because it will enhance the viability of community banks and boost the economy on a local level throughout the country. However, under this framework, each state would have to also pass a version of the uniform bill, similar to the UCC, which takes time and could create some unpredictable results. Some states may incorporate different versions of this proposed Uniform Community Banking Act, which could lead to non-uniform banking practices, depending on the state. However, the Act could solve these by mandating certain portions to be incorporated by the states.

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109. See CMTY. BANKING CONNECTIONS, *supra* note 29, at 12-13.

### C. *Other Reform Proposals*

Dodd-Frank has been a controversial law since its passage. Any law that substantially increases the regulatory oversight over a single industry will inevitably bring disagreement. There is considerable literature by commentators, industry analysts, law review contributors, and both private and publicly sponsored studies on the effects of Dodd-Frank. Depending on the internal bias of the commentator, such reports have drawn differing conclusions about the successes and shortcomings of Dodd-Frank. Many liberal commentators have argued that Dodd-Frank is working and that the regulations provide an adequate safety net for the financial system.<sup>110</sup> Their main argument is that Dodd-Frank allows regulators to potentially prevent another financial crisis such as the one experienced globally during the Great Recession of 2007.<sup>111</sup> Conservative economists and commentators typically find the regulation to be overly burdensome, which stifles economic activity.<sup>112</sup> They also argue that Dodd-Frank is an attempt to micromanage banks and the financial markets, when a free market approach is what leads to economic development.<sup>113</sup> There are pros and cons to both sides. Free markets are a benchmark of capitalism, and they certainly allow for the creation of capital and economic development. However, there are risks in a total laissez-faire system, and it is possible that regulation, to some extent, can help curb these risks and allow for sustainable market growth.<sup>114</sup>

Regulation is not likely going to be eliminated, but this fact should not make regulators or lawmakers complacent. The best way for the financial sector to develop and the economy to grow is to have sustainable regulation of high quality. Thus, good regulation should be the ultimate aim. One of the major problems with Dodd-Frank is that

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110. See, e.g., Paul Krugman, *Obama's Other Success: Dodd-Frank Financial Reform Is Working*, N.Y. TIMES (Aug. 3, 2014), [https://www.nytimes.com/2014/08/04/opinion/paul-krugman-dodd-frank-financial-reform-is-working.html?\\_r=0](https://www.nytimes.com/2014/08/04/opinion/paul-krugman-dodd-frank-financial-reform-is-working.html?_r=0).

111. *Id.*

112. See, e.g., Jeb Hensarling, Opinion, *After Five Years, Dodd-Frank Is A Failure: The Law has Crushed Small Banks, Restricted Access to Credit, and Planted the Seeds of Financial Instability*, WALL ST. J. (July 19, 2015, 5:50 P.M.), <https://www.wsj.com/articles/after-five-years-dodd-frank-is-a-failure-1437342607>.

113. See *id.*

114. See generally Diego Valderrama, *FRBSF Economic Letter: Financial Development, Productivity and Economic Growth*, FED. RESERVE BANK SF 2 (June 27, 2003), <http://www.frbsf.org/economic-research/publications/economic-letter/2003/june/financial-development-productivity-and-economic-growth/#subhead3> (noting that a common finding of various studies show that a positive impact of financial development on growth depends on the quality and supervision of financial regulations).

it allows regulators broad power to do as they please because the rules written by these regulating agencies are often short sighted.

One commentator argued that the best alternative to Dodd-Frank is to create a tiered system of regulation.<sup>115</sup> Arthur E. Wilmarth argues that Dodd-Frank does not adequately address the regulatory needs of community banks, and it also fails to curb the risks posed by megabanks.<sup>116</sup> Wilmarth's argument presents a solution that the regulatory approach should instead be two-tiered approach, an approach compatible with this Article. However, the proposal in this Article differentiates itself on the basis of who the regulatory bodies are for community banks. Wilmarth argues that there should be a substantial loosening of community bank regulation,<sup>117</sup> but there should also be increased requirements for megabanks. In order to keep community banks a vital resource for the economy, a new regulatory approach is vital. However, the best method to regulate community banks is through local and regional regulatory oversight so that the regulation can be focused on the needs of the community banks and the banking sectors in the states.

The counterargument to state regulation of community banks is that the banking industry is, for the most part, removed from state boundary identification. While banks certainly may not want to cope with fifty different regulatory bodies, the proposed approach argued here is to have these different regulatory bodies regulate the banking industry within their state, but only the community banks. This would not apply to the largest banks in the United States. These banks would still have to be regulated on a federal level, simply from a practical point. "The 10 banks with the most branches together accounted for almost one-third of all locations in the U.S."<sup>118</sup> This will have a limited impact on community banks. The largest banks in the U.S. are truly engrossed in interstate commerce; however, community banks operate primarily within limited geographic locations. Thus making this regulatory approach truly viable.

This type of regulatory approach would also allow for the distribution of regulatory costs to be allocated to the states and away from the federal government. This would decrease a substantial regulatory

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115. See Arthur E. Wilmarth, Jr., *A Two-Tiered System of Regulation Is Needed to Preserve the Viability of Community Banks and Reduce the Risks of Megabanks*, 2015 MICH. ST. L. REV. 249, 249-370 (2015).

116. See *id.*

117. See *id.*

118. Alexander E.M. Hess, *Banks With the Most Branches*, USATODAY (Oct. 5, 2014, 7:00 AM), <http://www.usatoday.com/story/money/business/2014/10/05/24-7-wall-st-banks-with-most-branches/16648133>.

burden on the federal government, and federal regulators would be better able to shift their focus and attention on the largest banks. The largest banks require significantly more regulation than community banks, due to their size and economic footprint. Community banks do not pose the same systemic economic risks that large banks pose on the financial system. Further, states are most apt to regulate community banks by providing for certain measures that could be favorable in one state, but not in another. This would allow the regulatory practices to be hyper-focused, which would lead to growth and productivity. Further, overall regulatory costs would diminish because the regulations would be specific to community banks and the megabanks, respectively.

Continuing to have federal regulators authority over the largest banks allows them to focus on rulemaking that affects these banks while state regulators would be able to focus on rulemaking that impacts community banks. This focus is important because it allows the regulation to be more effective and less burdensome. Further, since community banks have a much smaller economic footprint, there is no great risk that even a substantially deregulated industry would have negative consequences. The opposite is more likely. By drawing a clear line as to what type of banking institution qualifies for the exemption based on size may give borderline banks pause if considering a merger or further takeovers. This allows the community banking industry to flourish and increases competition throughout the industry.

## VI. CONCLUDING REMARKS

Dodd-Frank has a disproportionate impact on the regulation of community banks. It has helped to continue the trend of consolidation and centralization of the banking industry. It is clear that if the trend of consolidation continues, community banks will not be viable competitors in the banking industry. This result is not good for local communities that depend on community banking. Further, this could lead to increased standardization of banking practices, which ultimately leaves the consumer at the mercy of institutional banks. Dodd-Frank has failed to curb the “too big to fail” banks, and in the years since its passage, these banks have grown larger than ever before. Regulators have attempted to write rules that apply equally to community banks and institutional banks, but these rules fail to grasp the significance of size disparity and capital requirements. It is necessary for Congress to act to remedy this problem and stabilize the



banking sector through regulation designed to address the specific needs of community banks as well as the needs of megabanks.

This Article argued for a new regulatory framework under which banks would have to make a choice between merging (and increasing their regulatory burdens) and remaining under the \$10 billion threshold. This proposal would promote community bank competition and would also enhance regulations by streamlining and focusing on the unique demands that different-sized banking institutions have. This process could take time to implement, and, therefore, it is imperative that Congress acts quickly to resolve this problem. Community banks continue to suffer from increased regulatory burdens imposed by the thousands of Dodd-Frank rules and requirements even though they played no substantial role in the development of the economic crisis. These rules are meant for banking institutions that have significant economic footprints and pose a risk to the overall economy. Community banks pose no such risk, and it is time for immediate action to remedy this problem and allow community banks to remain viable competitors. If Congress fails to act, community banks will continue to disappear at rapid rates.

In order for regulation to work effectively, it must be focused and specialized. The current regulatory system composed under Dodd-Frank is not specialized or focused. It fails to adequately attend to the regulatory needs of community banks. The number of regulators has increased substantially, but the systemic risk posed by the megabanks has not been diminished. These costs are ultimately borne by taxpayers, yet taxpayers are actually paying for ineffective shortsighted regulation. Instead, regulation should be divided between the federal government and the states by allowing the states the responsibility and authority to regulate community banks chartered in their state. Federal regulators would maintain responsibility over megabanks, and this would allow them to redouble their focus on providing rules that build an adequate safety net against economic collapse. This two-tiered approach would be beneficial for both community banks, as well as federal regulating agencies.