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Thirty Years, Give or Take: Reflections on My Life in Banking

JOSEPH A. SMITH, JR.¹

The better part of my professional career has been spent in and around banking: first as general counsel of a regional bank in the 1990s; then as North Carolina Commissioner of Banks in the 2000s; and finally, as Monitor of the National Mortgage Settlement in the 2010s.

These three decades saw a transformation in banking in the United States. At the beginning, in 1990, there were over 12,000 commercial banks in the United States.² By the end of 2025, that number had dropped to less than 4,000.³ The nature of banking changed as well, from a quasi-utility to a market-driven financial services business.

Over these years, the banking industry became more concentrated. In 1990, the largest banks (over \$10 billion in assets) comprised just 0.4% of the total number of banks and controlled about \$1.3 trillion in assets, which was 39% of total industry assets.⁴ By 2025, the largest banks comprised 4% of the total number of banks and held

1. The author is retired from the practice of law. During his career, he was general counsel of a regional bank and its holding company, North Carolina Commissioner of Banks, Chair of the Conference of State Bank Supervisors, and Monitor of the National Mortgage Settlement. The author would like to express his appreciation to Lissa Broome and the Editorial Board of Volume 30 of the North Carolina Banking Institute Journal for their help in turning a series of blog posts into this article. It is a memoir, so journal footnoting protocols have been relaxed. Errors and omissions are the sole and exclusive responsibility of the author.

2. See FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE: COMMERCIAL BANKING PERFORMANCE — FOURTH QUARTER 5 (1990), <https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/archive/qbp-1990-4q.pdf> [<https://perma.cc/8UFF-84BW>] (reporting 12,338 commercial banks as of the fourth quarter of 1990).

3. See FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE: THIRD QUARTER 2025 10 (2025), <https://www.fdic.gov/quarterly-banking-profile/quarterly-banking-profile-third-quarter-2025-pdf.pdf#page=1> [<https://perma.cc/HQK3-QWUL>] (showing 3,848 commercial banks as of the third quarter of 2025).

4. See FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE: COMMERCIAL BANKING PERFORMANCE — FOURTH QUARTER, *supra* note 2, at 6 (demonstrating that there were 49 banks with over \$10 billion in assets—out of the 12,338 total commercial banks—that had over \$1.3 trillion in assets combined).

over \$20 trillion, 82% of total industry assets.⁵ Thousands of community banks and small regional banks disappeared through failures or mergers and the largest banks dominated.

This was not an accident—it was the direct result of deliberate policy choices to remove Depression-era restrictions on banking. I had a front-row seat for this transformation. As a bank general counsel in the 1990s, I watched the walls between commercial banking, investment banking, and insurance crumble with the repeal of Glass-Steagall in 1999,⁶ along with what remained of restrictions on interstate banking and branching in 1994.⁷ As North Carolina Commissioner of Banks during the 2000s, I saw the consequences of deregulation play out in the Financial Crisis. And as Monitor of the National Mortgage Settlement, I helped clean up the mess that followed.⁸

I was not alone in watching these revolutionary developments and addressing their consequences. Over roughly the same thirty-year period, the North Carolina Banking Institute journal (“Journal”), and the talented lawyers (both law students and practitioners) who contributed to it, chronicled and debated the changes that were transforming banking. I am honored to have been a contributor to and reader of the Journal over the years. This memoir is a token of my appreciation and thanks. It will come as no surprise to the reader that much of it is based on Journal articles.

I. NORTH CAROLINA BANKING IN THE 1990S

A. *Industry Structure*

In the 1990s, during which I was general counsel of Centura Bank, the banking industry in the Southeast, particularly in North Carolina, was consolidating at an ever-accelerating pace. The industry

5. See FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE: THIRD QUARTER 2025, *supra* note 3, at 11 (combining asset size distribution statistics for banks with \$10 billion to \$250 billion in assets and banks with more than \$250 billion in assets).

6. See Gramm-Leach-Bliley Act § 102(a), 12 U.S.C. § 1843(k) (1999) (repealing the Glass-Steagall Act’s restrictions on commercial and investment bank affiliations).

7. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-238, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C.).

8. See *National Mortgage Settlements Digital Archive*, CAROLINA L. SCHOLARSHIP REPOSITORY, <https://scholarship.law.unc.edu/mortgage-settlements/> [<https://perma.cc/RU6X-EMDX>] (last visited Feb. 6, 2026), for a digital archive of the work of the National Mortgage Settlement.

in North Carolina was relatively consolidated to begin with because, unlike the laws in many other states, statewide branching had been permitted in North Carolina from the start.⁹ This allowed Tar Heel banks, led by North Carolina National Bank (“NCNB”) and First Union in Charlotte, to consolidate intrastate through mergers and acquisitions. Growth outside the state was limited by the Douglas Amendment to the Bank Holding Company Act,¹⁰ an exception being NCNB’s back-door entry into Florida in 1972.¹¹

Starting in the 1980s, several Southeastern states worked together to create a compact that allowed and led to mergers between banks in the region.¹² The Southeastern state legislatures adopted reciprocal statutes in 1984 and 1985,¹³ with North Carolina passing its statute on July 7, 1984.¹⁴ However, bank merger activity did not take off until after the Supreme Court considered the constitutionality of a similar regional interstate compact in Northeastern states.¹⁵ Ultimately, the Court found the state statutes implementing the compact permissible both under the Douglas Amendment and the Constitution.¹⁶ With the Supreme Court’s favorable ruling, banks in the Southeast began using the reciprocal interstate banking statutes to conduct mergers in the region.

9. See Lissa Lamkin Broome, *The First One Hundred Years of Banking in North Carolina*, 9 N.C. BANKING INST. 103, 103 (2005) (stating that, in 1805, the Bank of Cape Fear was located in Wilmington and had a branch in Fayetteville).

10. See Thomas D. Hills, *The Rise of Southern Banking and Disparities Among the States Following the Southeastern Regional Banking Compact*, 11 N.C. BANKING INST. 57, 57 (2007) (“This important merger of southern banking companies was enabled by mid-1980s changes to the banking laws of the states in the South.”).

11. HOWARD E. COVINGTON, JR. ET AL., *THE STORY OF NATIONSBANK: CHANGING THE FACE OF AMERICAN BANKING* 157 (1993). The NCNB purchased a trust business in Orlando, Florida, mere weeks before the Florida legislature passed a law prohibiting out-of-state ownership of banks in Florida. *Id.* The Florida legislature left an exception to this prohibition of out-of-state ownership for two companies, Royal Trust Co. of Canada and Northern Trust Co. of Chicago, which allowed those companies to retain ownership of their subsidiaries in Florida. *Id.* The NCNB interpreted the language of the exceptions to grandfather in its ownership of the trust company in Florida. *Id.*

12. Hills, *supra* note 10, at 65.

13. *Id.* at 66.

14. North Carolina Reciprocal Interstate Banking Act, N.C. GEN. STAT. §§ 53-209 to -218 (1994); see *Bank Links Set in North Carolina*, N.Y. TIMES (July 10, 1984), <https://www.nytimes.com/1984/07/10/business/bank-links-set-in-north-carolina.html> [https://perma.cc/398Y-PUD5].

15. Hills, *supra* note 10, at 66.

16. *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 472 U.S. 159 (1985).

In 1991, NNCB acquired C&S/Sovran to form NationsBank, a banking organization with a predominant market position in Virginia, North Carolina, and Georgia.¹⁷ This was the prelude to a decade of large-scale acquisitions. The enactment of the Riegle-Neal Banking and Branching Efficiency Act of 1994, which essentially eliminated restrictions on interstate banking and branching, opened the floodgates completely, permitting interstate branching as of 1997.¹⁸ The animal spirits had been released, and the law of the jungle applied: eat or be eaten, grow or die.

The acquisition game was also being pursued aggressively by smaller regional banks, led by Branch Banking and Trust Company (“BB&T”), then headquartered in Wilson, North Carolina. Peoples Bank and Planters National Bank, both headquartered in Rocky Mount, merged as a defensive measure, forming Centura Bank.¹⁹ Under the Centura banner, my colleagues and I went on an acquisition campaign, always a step behind BB&T. Beginning in 1991 and ending in 2000, we acquired 19 small banks and thrifts in North Carolina and one each in Virginia and South Carolina.²⁰ By the time Centura was acquired by Royal Bank of Canada (“RBC”) in 2001,²¹ it had grown from just over

17. Leslie Wayne, *C&S/Sovran Merger Set With NNCB*, N.Y. TIMES (July 23, 1991), <https://www.nytimes.com/1991/07/23/business/c-s-sovran-merger-set-with-ncnb.html> [<https://perma.cc/Z7LN-D8NM>].

18. *See generally* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C.). Interstate banking was permitted as of June 1, 1997. *Id.* Since branching was historically governed by state law, Congress implemented some state control through an “opt out” and “opt in” procedure. LISSA L. BROOME ET AL., REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES 99 (6th ed. 2022). One way to establish interstate branches was for bank holding companies with “adequately capitalized and managed” bank subsidiaries to merge their banks. *Id.* This authority was subject to state “opt out” if used prior to June 1, 1997. *Id.* Another method to establish interstate branches was to apply for a *de novo* branch or to acquire an existing bank’s branch. *Id.* This authority was subject to state “opt in.” *Id.*

19. *Predecessor Banks, Centura Bank*, PNC, <https://www.pnc.com/en/about-pnc/company-profile/legacy-project/predecessor-banks.html> [<https://perma.cc/Q6MR-A923>] (last visited Jan. 2, 2026).

20. *See id.* (“Centura . . . aggressively expanded its reach into North Carolina through other acquisitions and organic growth. By 1995, it provided its customers access to their accounts through a network of 250 full-service financial offices, telephone banking, an extensive ATM network, and online bill payment.”).

21. Press Release, Fed. Rsv. Sys., Order Approving Formation of Bank Holding Companies and Acquisition of a Bank and Nonbanking Companies (May 21, 2001), <https://www.federalreserve.gov/Boarddocs/press/bhc/2001/200105212/attachment.pdf> [<https://perma.cc/83LH-8RMB>].

\$2 billion in assets to \$11.5 billion.²² Meanwhile, NationsBank merged with Bank of America in 1998,²³ taking the M&A game to a new level.

I had left Centura by the time of its acquisition by RBC. What had my colleagues and I accomplished? Looking back from my current perch and based on my later experience, it's a mixed bag. We had put to rest several smaller institutions that were unable to compete, or, in the case of some small thrifts, were moribund. The capital freed up by these acquisitions was, in our opinion, put to more productive uses. On the other hand, we had removed from several small towns the financial institutions that were part of the fabric of their societies, along with schools, churches, and civic organizations. We gave these towns branch or regional managers and ATMs to replace the local bank.

On a larger scale, it should be remembered that the restrictions on interstate banking and branching that were circumvented in the 1980s and felled in 1994 weren't there by accident. They were intended to prevent undue financial concentration in money center banks, particularly in New York, and, secondarily, to "protect" small banks in small towns. The demise of these restrictions was political. The regional compacts were based on the decision by state legislatures to allow banks in their regions to bulk up in order to compete with the money center banks. Riegle-Neal eliminated barriers to interstate competition when it was clear that the "protected" regions didn't need help any longer.

In the end, resistance to the big banks failed. The banks that complained about big bank domination in the 1980s became big banks themselves. To preserve regional control of banking and finance, local control was decimated through M&A. Ultimately, industry consolidation and the regulatory restrictions that followed removed any vestige of regional or local "flavor" from banks that operated across multiple jurisdictions and lines of business. Regional bank leaders used to say that they "didn't want [their banks] to be NationsBank [(later, Bank of America)]." No longer.

22. Royal Bank of Can., Royal Bank of Canada to Acquire Centura Banks, Inc. (Form 425) 3 (Jan. 26, 2001), <https://www.sec.gov/Archives/edgar/data/352613/000089183601000031/0000891836-01-000031-0001.htm> [<https://perma.cc/DQM7-U3EB>].

23. Mitchell Martin, *Nations Bank Drives \$62 Billion Merger: A New BankAmerica: Biggest of U.S. Banks*, N.Y. TIMES (Apr. 14, 1998), <https://www.nytimes.com/1998/04/14/news/nations-bank-drives-62-billion-merger-a-new-bankamericabiggest-of-us.html> [<https://perma.cc/L8H2-MDMZ>].

B. *The Business of Banking*

In 1991, banking was essentially a quasi-utility. The “business of banking” was narrowly defined to include the taking of deposits and making of commercial loans. The privilege of conducting these activities required authorization (a “charter”) from a State or the United States and came with an extensive regulatory and supervisory regime—much like other utilities.

This special treatment was not arbitrary. As one classic discussion of the topic has argued, banks form the essential infrastructure of our commercial system through the creation of demand deposits redeemable at par, the backstopping of other financial activities, and operation as the transmission system for Fed monetary policy.²⁴ Some economists, particularly those associated with the University of Chicago, argued that banks should remain pure utilities, investing deposits only in low-risk instruments or Fed reserves.²⁵ But this view never prevailed, and traditional banks were permitted to invest deposits in longer-term loans and highly rated securities to pay the bills, with regulation serving as a check on risk-taking.

Industry consolidation wasn’t about improving banking’s utility functions. Instead, it aimed to create super-regional banks with the financial muscle to compete with money center banks for large client loans and major projects. Banking was increasingly viewed not as a utility but as an engine for economic development by Southern governors, legislators, and bankers.

Centura, where I served as general counsel, was an example of this shift from utility to business. Though we were a small regional bank in a modest market, we took advantage of a somewhat ambiguous provision of North Carolina banking law relating to other permissible businesses to establish securities and insurance brokerage services.²⁶

24. E. Gerald Corrigan, *Are Banks Special?*, in ANN. REP. OF THE FED. RSRV. BANK OF MINNEAPOLIS 2 (1982), <https://fraser.stlouisfed.org/title/473/item/18309> [<https://perma.cc/VAV7-Q8HH>].

25. See generally Albert G. Hart, *The “Chicago Plan” of Banking Reform: A Proposal for Making Monetary Management Effective in the United States*, 2 REV. ECON. STUD. 104 (1935) (proposing full-reserve banking measures).

26. N.C. GEN. STAT. § 53C-5-1 (providing the powers of banks organized under North Carolina law); see E.K. Proctor & Todd H. Evenson, *Sweeping Away the Cobwebs: North Carolina’s Banking Law Modernization Act*, 17 N.C. BANKING INST. 29, 54 (2013) (illustrating the ambiguity in North Carolina banking law that allowed banks to operate insurance agencies).

We implemented a “sales culture,” incentivizing employees to sell financial products beyond traditional banking services, following larger banks like Wells Fargo in treating banking as a retail business and customers as revenue sources. This change of focus brought with it some additional regulatory issues to address potential conflicts of interest. The prospect of additional fee income made compliance seem worth the price.

The culmination of this transformation came with the 1999 Gramm-Leach-Bliley Act, which dismantled the Depression-era Glass-Steagall Act’s restrictions on bank securities activities.²⁷ For smaller banks like Centura, this meant modest changes to our existing brokerage operations. But for large banks, it was revolutionary—allowing them to return to higher-risk securities trading and underwriting after a sixty-six-year prohibition. Capital markets operations flourished not just in traditional centers like New York and San Francisco, but in emerging financial hubs like Charlotte and Atlanta.

The Glass-Steagall restrictions, like the geographic limitations discussed previously, were not arbitrary. They were put in place after hard lessons from the Great Depression showed how risky trading could destroy banks’ capital and threaten their essential payment and liquidity functions. But in the late 1990s, the drive for profit and growth overwhelmed these historical lessons. The victory of capital markets over prudential regulation would prove costly: the financial crisis that emerged less than a decade later demonstrated that Mr. Market had not learned the lessons of the past.

This transformation from quasi-utility to aggressive financial services business represented more than just expanded activities—it fundamentally altered the risk profile of the banking system and the relationship between banks and their customers. The promise of higher profits through deregulation came with the shadow of systemic risk that would eventually materialize with devastating consequences.

27. See Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, § 103, 113 Stat. 1338, 1342 (codified at 12 U.S.C. § 1843(k)(4)) (repealing the Glass-Steagall Act’s restrictions on bank securities activities).

II. BANKING IN THE 2000S: THE RUN-UP TO THE FINANCIAL CRISIS

When I first assumed office as the North Carolina Commissioner of Banks in 2002, my top priority was supervision and regulation of eighty-seven commercial and savings banks chartered under state law.²⁸ My office also had responsibility for regulating mortgage lenders, consumer finance companies, and money transmitters. This was important work, but the health of North Carolina banks was paramount, crucial to the well-being of local economies and the State's overall growth and development.

My colleagues in the North Carolina Office of the Commissioner of Banks ("NCCOB") and I took our supervisory obligations seriously but were aware that we were operating in an environment of which we were only a small part. Our banks held \$106 billion in assets in a total banking market of just under \$1 trillion in assets for FDIC-insured institutions headquartered in North Carolina.²⁹ The remainder was held by national banks and thrifts, organized under U.S. law and supervised by the Office of the Comptroller of the Currency ("OCC") or the Office of Thrift Supervision.

The North Carolina banking market was highly concentrated. Eighty-eight percent (88%) of total assets were held by two national banks headquartered in Charlotte: Bank of America and Wachovia.³⁰ The "Bank of America" headquartered in Charlotte was the product of the 1998 acquisition of "legacy" Bank of America (headquartered in California) by NationsBank (headquartered in North Carolina), with NationsBank being the predominant party in terms of management and culture. In like manner, First Union had merged with Wachovia in September 2001,³¹ keeping the Wachovia name but with First Union management, culture, and headquarters (Charlotte versus Winston-

28. See *Quarterly Banking Profile, State Tables*, FED. DEPOSIT INS. CORP. (Nov. 24, 2025), <https://state-tables.fdic.gov/> [<https://perma.cc/T2CP-Z6YN>] (showing eighty-seven North Carolina state-chartered institutions as of June 30, 2002).

29. *Id.*

30. See *id.* (showing a total of just under \$975 billion total assets held by FDIC-insured institutions in North Carolina); see also *Merger Decisions: 2002 Annual Report to Congress*, FED. DEPOSIT INS. CORP. (June 12, 2003), <https://www.fdic.gov/analysis/merger-decisions-2002-annual-report-congress-13> [<https://perma.cc/DTP6-G5FX>] (indicating \$562 billion in assets for Bank of America and \$301 billion in assets for Wachovia in 2002).

31. *First Union Is Now Wells Fargo*, WELLS FARGO (Sep. 1, 2001), <https://www.wellsfargo.com/about/corporate/firstunion/> [<https://perma.cc/SC2Z-DXBA>].

Salem) predominating. The scope of these two giants was national and, unlike most other banks in North Carolina, most of their operations were out-of-state. Because they were national banks, I had no jurisdiction over them.

North Carolina banking in 2002 was a more concentrated example of U.S. banking as a whole: a dual system with national banks, regulated by the OCC, and state-chartered banks, supervised jointly by state agencies and either the Federal Reserve (the “Fed”) or the Federal Deposit Insurance Corporation (“FDIC”). While these two systems overlapped in some areas—national banks being subject to state laws on matters such as usury and branching, and state-chartered banks adhering to federal regulations on consumer protection and money laundering—their structures were distinct. The largest institutions, though fewer in number, were generally national banks, while state-chartered banks were more numerous but significantly smaller in scale.

Although overshadowed by the big banks in Charlotte, North Carolina, state-chartered banks played an important role in the State’s growth and development. If you “normalized” the market by counting only deposits in North Carolina, the relationship between state-chartered and national banks became more balanced. While the national banks were larger in total deposits, state-chartered banks had a significant deposit share and a much larger number of branches. My banks weren’t all small: BB&T was a fast-growing organization in the super-regional category, RBC Centura was following suit, and First Citizens was a solid regional bank that was a stealth grower. The remainder of our banks were community banks in smaller markets. Regardless of their size, every North Carolina bank played a vital role in the communities it served.

So, how were my colleagues and I to maintain and strengthen the banks under our supervision? As a matter of first importance, we had to establish our independence and competence to several stakeholders. We had to convince our federal partners—the Fed and FDIC—that our examination reports and other supervisory actions were of at least equal quality to theirs and that we had not been captured by the banks we regulated. We had to convince the industry that we had its interests at heart, particularly when we told them things they didn’t want to hear. And we had to convince the Governor, General Assembly, and public that we were acting first and foremost in the public interest, not

as an industry skill. These challenging and somewhat contradictory objectives were made easier because NCCOB had a long tradition of integrity, and the workforce I inherited from my predecessor was highly competent, hard-working, and experienced.

NCCOB's main job regarding banks was supervision: oversight through a formal examination process, and, from time to time, informal counseling of bank management and boards. We were less "cops on the beat" than we were a medical team, taking the patient's vitals every so often, diagnosing potential problems, and recommending (or in some cases requiring) lifestyle adjustments to keep the patient healthy. Our role in this joint activity with the Fed and FDIC was generally restricted to "safety and soundness," with consumer compliance the responsibility of our federal colleagues.

As I took office, my colleagues and I had a clear picture of the banking landscape in North Carolina and a sense of mission about our place in it. We had five or so good years. After that, the deluge.

A. *The Banking Market in Indian Summer*

The early years of my tenure as Commissioner of Banks (2002-2007) were promising. The banking industry overall was healthy, and new banks were being formed, adding a note of dynamism to the market by increasing competition. There was, however, an undercurrent of danger in the real estate market that threatened to end the good times. Looking back on it, we were in "Indian Summer" during those early years: good weather concealing impending danger.

Between January 1, 2002, and the end of 2007, the number of banks under my jurisdiction saw a modest increase, from 71 to 79—making North Carolina a positive outlier against national trends.³² During the same period, the total number of banks and thrifts across the

32. See *BankFind Suite: Find Annual Historical Bank Data*, FED. DEPOSIT INS. CORP., https://banks.data.fdic.gov/explore/historical/?displayFields=STNAME%2CTOTAL%2CB RANCHES%2CNew_Char&selectedEndDate=2008&selectedReport=CBS&selectedStartDate=2002&selectedStates=0&sortField=YEAR&sortOrder=desc [https://perma.cc/NRX3-UARY] (last visited Jan. 2, 2026) (demonstrating an increase in the total number of North Carolina commercial banks from 2002 to 2007).

United States dropped from 9,613 to 8,533, an 11% decline.³³ The Southeast Region, including North Carolina, experienced similar industry consolidation, with the number of banks plunging 12.4%, from 1,392 at the beginning of the period to 1,220 by the end.³⁴ Unlike the country as a whole, where new chartering efforts (895 nationally) were exceeded by bank closures and mergers,³⁵ North Carolina managed to sustain a dynamic banking environment. Notably, during this 6-year span, only 21 banks failed nationwide—5 in the Southeast—and, remarkably, none failed in 2005 or 2006.³⁶

North Carolina's good relative performance was the result of a variety of factors. In the first place, North Carolina had a smaller number of banks than many other states. Statewide branching had been part of our banking system since its inception, so consolidation started early, and the trend accelerated after interstate banking and branching restrictions fell. Continued consolidation left many communities without a local or even a regional bank around which to focus economic development activities. And it had created what I came to think of as a reserve army of unemployed or underemployed bank executives.

So, my colleagues and I received a lot of applications for new bank charters from the reserve army, mostly for "community banks," with this designation often included in the proposed bank's name. Applications were usually accompanied by a visit from an organizing

33. See FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE: FDIC-INSURED INSTITUTIONS — FOURTH QUARTER 5 (2002), <https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2002dec/qbp.pdf> [<https://perma.cc/PR9W-6V2X>] (stating that there were 9,613 banking institutions at the end of 2001); FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE: INSURED INSTITUTION PERFORMANCE — FOURTH QUARTER 6 (2007), <https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2007dec/qbp.pdf> [<https://perma.cc/XVG8-6QLR>] (stating that there were 8,533 banking institutions at the end of the fourth quarter of 2007).

34. See FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE: COMMERCIAL BANK PERFORMANCE — FOURTH QUARTER 6 (2001), <https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/archive/qbp-2001-4qtr.pdf> [<https://perma.cc/UA8A-5E49>] (reporting 1,392 banks in the Southeast region at the end of 2001).

35. See AM. BANKERS ASS'N, INSTITUTIONS, NEW CHARTERS, & MERGERS (2025), <https://www.aba.com/-/media/documents/reference-and-guides/1-number-institutions-new-charters--mergers.pdf?rev=f1ae5ad73f964842a59c18a28fe4c4de> [<https://perma.cc/4EF6-4DE7>] (summing the number of new charters for the total number of institutions from 2002 to 2007).

36. See *Bank Failures in Brief — Summary*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/resources/resolutions/bank-failures/in-brief/index> [<https://perma.cc/BW39-NJQV>] (last visited Dec. 12, 2025) (graphically demonstrating the low level of bank failures from 2002-2007).

group that included local businesspeople and an experienced bank executive who was to be the new bank's president. The reasons for formation were consistent: national and regional banks were not meeting the needs of the community. Regional or local executives of big banks had little or no discretion, particularly on credit matters, without approval from a remote headquarters. Decisions, when ultimately made, came slowly and with no appreciation of local market needs. A local bank, said the organizers, would fill the void.

Senior colleagues of mine evaluated new bank applications to determine whether their organizational plans were viable and, if so, set the level of initial capital the new bank had to raise for us to grant it permission to open. Once launched, every new bank faced initial losses, with the expectation that profitability would follow as deposits and loans from its target market grew. The challenge in setting initial capital lay in forecasting the likely "burn rate" from early losses and pinpointing the "crossover point" at which the bank would break even. David Hanson and Ray Grace were masters of this craft. They set capital levels that were stiff but achievable. It is a testament to their skill that our banks performed relatively well in the aftermath of the 2008 Financial Crisis.

Once the applications were approved, the organizers faced two initial challenges: raising the required capital and establishing a corporate governance structure. Guidance on governance was easily available to the banks that sought it. In the aftermath of the savings and loan ("S&L") crisis in the late 1980s, my predecessor as Commissioner and the FDIC Atlanta office established a Directors' College to educate state bank board members about the duties and responsibilities of corporate directors, particularly bank directors.³⁷ New bank directors weren't required to attend the college. To their credit, a substantial number of them did without prompting.

Once a new bank was up and running, its success over the long term required support from its community. The new bank investors needed to be "patient money," accepting little or no return in the short-term and modest returns over time. Savers had to accept slightly lower

37. From 2002 to 2012, the Center for Banking and Finance assisted with this program, providing an important source of revenue for the Center. The Directors' College has been held only on an occasional basis in recent years due to the lack of new bank charters.

deposit rates than they could get from larger banks or money market funds. New bank directors had to understand that getting loans from their bank was harder than it would be from a competitor.³⁸ Business borrowers generally had to accept the fact that, notwithstanding the new bank's allegedly superior market knowledge, "character loans" had to be backed by sound underwriting and good collateral.

Events that followed would show that some boards, managements, and communities passed these tests and some did not. The difference, often, was commercial real estate.

B. *Commercial Real Estate*

As the name implies, commercial real estate ("CRE") loans are loans secured by real estate for (a) construction, land development, and other land loans; (b) multifamily residential properties; and (c) nonfarm nonresidential properties. They are not home mortgages to individuals; rather they are loans to businesses that build housing developments, apartment buildings, or other buildings used in commercial enterprises.

CRE loans were a significant part of the business of large community and small regional banks, those with \$10 billion to \$100 billion in assets.³⁹ During Indian Summer, such loans accounted for around one-third of total assets of such banks nationally.⁴⁰ In the Southeast, the CRE share of total assets was higher than that. Supporting economic development in the region involved the financing of office buildings, production facilities, residential developments, and vacation resorts. Banking in the Southeast was commercial real estate lending.

Among the banks under my supervision, loans to developers to finance the acquisition and development of real estate projects ("A&D loans") were particularly important. A&D loans were relatively large,

38. See 12 C.F.R. § 215 (1994) ("Regulation O") (governing how banks may lend to their insiders, including executive officers, directors, and principal shareholders).

39. See *Community & Regional Financial Institutions*, FED. RSRV. (July 31, 2025), <https://www.federalreserve.gov/supervisionreg/community-and-regional-financial-institutions.htm> [<https://perma.cc/7GJV-XFQZ>] (defining community and regional banking organizations).

40. FED. DEPOSIT INS. CORP., FDIC COMMUNITY BANKING STUDY 4-1 (2020), <https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf> [<https://perma.cc/QFT2-RJPE>] (showing community banks' share of the banking industry's assets and CRE loans).

brought significant fee income, and, if the development succeeded, they were profitable. Real estate developments had a significant impact on local economies, particularly at the coast and in the mountains. And, truth be told, A&D loans fed the egos of bank presidents, many of whom were former commercial loan officers at larger banks.

Concentration in CRE loans was of concern to bank regulators and led to the issuance of supervisory guidance on that topic in 2006 (“the Concentration Guidance”).⁴¹ In its preliminary form, the Concentration Guidance established quantitative benchmarks and suggested steps to manage the risks related to it.⁴² It noted in particular the growth in CRE concentration in small and mid-size banks and the potential damage to such institutions in a downturn.⁴³ After substantial industry pushback, the Concentration Guidance was watered down, removing the quantitative standards and opting for a “bank-by-bank” approach.⁴⁴ It retained guidance on risk management techniques and capital levels; good advice but advice only.⁴⁵

The Concentration Guidance was a well-intended and prescient attempt by regulators to prevent a bloodbath in banking if the commercial real estate market, which was beginning to look frothy in some parts of the country, crashed. It was ineffective because its timing

41. Concentrations in Commercial Real Estate Lending, Sound Risk Management Practices, 71 Fed. Reg. 74580 (Dec. 12, 2006).

42. *See id.* at 74581 (“[T]he proposal set forth two thresholds to identify institutions with CRE loan concentrations that would be subject to greater supervisory scrutiny. The proposal provided that such institutions should have in place the heightened risk management practices and capital levels set forth in the proposal.”); H. Gary Pannell & Robert L. Carothers Jr., *Regulatory Guidance on Concentrations in Commercial Real Estate Lending*, 11 N.C. BANKING INST. 33, 38–41 (2007) (describing the proposed Guidance’s supervisory thresholds and risk management principles).

43. Concentrations in Commercial Real Estate Lending, Sound Risk Management Practices, 71 Fed. Reg. at 74580 (“In particular, small to mid-size institutions have shown the most significant increase in CRE concentrations over the last decade.”).

44. *See* Press Release, Off. of the Comptroller of the Currency, Federal Banking Agencies Issue Final Guidance On Concentrations in Commercial Real Estate Lending (Dec. 6, 2006), <https://occ.gov/news-issuances/news-releases/2006/nr-ia-2006-131.html> [<https://perma.cc/Z5FV-HAWX>] (“While the fundamental principles . . . remain unchanged, the agencies have revised the guidance to . . . [e]mphasize that the guidance does not limit banks’ commercial real-estate lending”); Pannell & Carothers, Jr., *supra* note 42, at 42 (explaining the “vast majority” of comments expressed “strong opposition” to the Concentration Guidance).

45. *See* Pannell & Carothers, Jr., *supra* note 42, at 51, 53 (explaining that the final Concentration Guidance kept the numerical thresholds and risk management measures with some adjustments based on comments); *see also* Concentrations in Commercial Real Estate Lending, Sound Risk Management Practices, 71 Fed. Reg. at 74580.

wasn't very good. The banking industry was healthy; most banks were more than adequately capitalized under the federal agencies "prompt corrective action" standards;⁴⁶ and, as noted above, there were no bank failures in the US in either 2005 or 2006. The pushback from industry had both the feds and their state colleagues on their back feet.

Herewith is an example of the problem we faced with CRE/A&D loan concentration. As my colleagues and I reviewed the call reports of banks under our supervision, it came to our attention that a relatively new bank at the coast had a very high concentration of A&D loans—let's call it 60%, although I think it was actually higher. Assuming that the bank in question had capital of 10% of total assets, barely well-capitalized under the prompt corrective action rules, a 5% loss in its CRE portfolio would, other things equal, reduce the capital level to 7%, making it undercapitalized. A 10% loss would have reduced the bank's capital level to 4% and its prompt corrective action rating to "significantly undercapitalized." Undercapitalized status would involve enhanced oversight by my colleagues and our federal partners. Significantly undercapitalized status would lead to greater and more intrusive oversight and probably to resolution (a polite word for failure) or a shotgun wedding with a healthier institution.

The situation was serious enough that my chief deputy and I decided to make a personal call on the bank to express our concern. We arrived at the bank's attractive new headquarters and were greeted by its president as follows: "Nice to see you. When you called me about our concentrations, I thought you had made a mistake. So, I checked with my CFO and Chief Lending Officer and doggone if you aren't right!" The conversation went downhill from there.

Here was our problem: the bank had more than adequate capital and no losses. The real estate market at the beach was on fire. Putting down the regulatory hammer on the bank, whose management was clearly deficient, would bring political backlash and require me, as the overbearing regulator, to claim clairvoyance about the economy and real estate market. And the bank in question wasn't the only one at the coast riding high on bad judgment and a real estate bubble.

In the end, I decided to keep a close watch on the bank I had just visited and avoid confrontation. If I was right, my innings would be coming, and the shareholders and employees of the bank would pay the

46. See 12 U.S.C. § 1831o (providing the prompt corrective action standards).

price. If not, not. I had more than enough to occupy me in the residential mortgage market in any event.

So, all was well. Until it wasn't. The Concentration Guidance was honored more in the breach than in the observance. Supervisors and regulators were in Indian Summer; bankers were in denial. Regulatory concern was ultimately vindicated, after a lot of heartbreak. I wish I felt better about that.

III. THE DELUGE: 2008 AND THEREAFTER

Indian Summer ended abruptly. The chronology of events that ended it—from the collapse of a Bear Stearns fund invested in subprime mortgages in June 2007 through the Lehman Brothers bankruptcy in September 2008—has been well and extensively recounted by others. Which is a good thing, because I do not have a clear recollection of the moment when I knew the party was over.

What I do remember is a sudden and intense implosion in the North Carolina real estate market. It was as if a margin call had been handed to every over-levered person and entity in my world—homeowners, developers, and banks—and they couldn't pay up. The image that keeps coming back to me is a glass rolling off a table and shattering.

The melt-down created two separate and related emergencies in my world: distressed banks and distressed home mortgage borrowers.

A. *The Banks*

All of the banks under my supervision were damaged by the market meltdown, some more than others. Commercial real estate loans went into “non-performing” status or outright default. Losses, write-downs, and increases in provision for loan losses were charged against and reduced bank capital. Depositor confidence was shaken. Had it not been for FDIC deposit insurance, there would almost certainly have been bank runs wiping out all but our strongest banks.

My colleagues and I went into triage mode, separating our banks into survivors (bloody but unbowed), zombies (badly and probably fatally damaged), and the critical list (salvageable with time and care). We engaged in what the regulatory literature called “heightened

supervisory activity” with all of them: more intense examinations and ratings downgrades.

We were not alone in our efforts. Our banks were subject to dual supervision: NCCOB and either the Fed or the FDIC. As most of our banks were nonmember banks (not shareholders in the regional Federal Reserve Bank who would have been subject to federal supervision by the Fed), most of our shared authority was with the FDIC, the federal regulator of state nonmember banks. NCCOB’s relationship with the FDIC was a long and strong one that the market meltdown stress tested.

The source of tension between NCCOB and its federal partners, particularly the FDIC, was the “prompt corrective action” regime mandated by the Federal Deposit Insurance Corporation Improvement Act of 1991 (“FDICIA”).⁴⁷ Enacted in the wake of the S&L crisis, FDICIA put in place a system of supervision designed to remove discretion from supervisory agencies in working out problem banks, as delays in resolutions (closing banks) were seen to have increased the cost of cleaning up the S&Ls.⁴⁸ FDICIA also mandated a “least cost resolution” regime designed to minimize the financial burden clean-up put on the deposit insurance fund, which was financed by bank deposit insurance premiums, backed up by a line of credit from the Treasury.⁴⁹

Our FDIC colleagues were under orders to enforce prompt corrective action vigorously and “by the book.” My colleagues and I, on the other hand, were trying to give local institutions every reasonable chance to survive. Small banks weren’t systemically significant to the United States as a whole, but they were very significant to the markets they served. The tensions between our point of view and that of our federal partners led to a number of discussions that were, in diplomatic locution, “frank and candid.” And sometimes loud.

The prompt corrective action regime was based on banks’ capital strength. As noted above, most, if not all, of the banks under my

47. Pub. L. No. 102-242, 105 Stat. 2236 (1991) (codified in scattered sections of 12 U.S.C.).

48. See Noelle Richards, *Federal Deposit Insurance Corporation Improvement Act of 1991*, FED. RSRV. HIST. (Dec. 19, 1991), <https://www.federalreservehistory.org/essays/fdicia> [https://perma.cc/9MZA-XKCA] (discussing the “prompt corrective action” and “least cost resolution” provisions of the FDICIA designed to step in when banks showed signs of failure).

49. See *id.* (“The least-cost resolution provisions require that the FDIC choose the resolution method that minimizes the cost to taxpayers of a bank failure.”); 12 U.S.C. § 1823(c)(4) (providing the least-cost requirement).

jurisdiction had seen their capital depleted, some critically. Banks needed more capital, but where could they get it? Local investors were not, as a rule, willing to step up. Distressed banks discovered what their business clients already knew: money is hardest to get when you need it most. So, I flew off to New York City and met with a variety of investors discussing the banking and business climate in North Carolina. Not exactly a sales pitch for investing in our banks, but as close as I could come to it. My federal colleagues didn't like this approach at all; private equity was anathema to the Fed in particular. I understood the reservations but felt I had to do what I had to do to keep my banks alive.

Try as we might, some of our banks were too badly damaged to continue independent operations. When we couldn't arrange mergers with healthier banks, resolution was inevitable. My colleague Ray Grace would form a team and meet an FDIC resolution crew at a doomed bank's headquarters on a Friday afternoon. After close of business, Ray would walk in, take the keys from the bank president, and turn them over to the FDIC. Our team would then work with the FDIC to get the resolution process started. I was grateful to have a person of Ray's experience and professionalism to handle this work but regretted the toll it took on him. Ray took the failures personally.

Our efforts overall were, given the circumstances, successful. On December 31, 2011, shortly before I left the Office of Commissioner of Banks, the number of North Carolina state-chartered banks had fallen from 93 at year-end 2007 to 80,⁵⁰ with the failure or consolidation of 20 banks offset by the chartering of 7 new ones.⁵¹ The total assets of our banks during this period actually grew from \$210 billion in 2007 to \$256 billion in 2011.⁵² While that was good news, the other news was that banking in North Carolina, like in the rest of the United States, was highly concentrated. The average asset size of a North Carolina state-chartered bank increased from \$2.3 billion to \$3.2 billion, with BB&T,

50. N.C. COMM'R OF BANKS, ANNUAL REPORT 53 (2008) (providing the number of state banks as of December 31, 2007).

51. Between December 31, 2007, and December 31, 2011, seven *de novo* banks were chartered and twenty banks were either merged or closed. N.C. COMM'R OF BANKS, ANNUAL REPORT 53 (2008); N.C. COMM'R OF BANKS, ANNUAL REPORT 53 (2009); N.C. COMM'R OF BANKS, ANNUAL REPORT 43 (2010); N.C. COMM'R OF BANKS, ANNUAL REPORT 37 (2011); N.C. COMM'R OF BANKS, ANNUAL REPORT 35 (2012).

52. N.C. COMM'R OF BANKS, ANNUAL REPORT 3 (2008); N.C. COMM'R OF BANKS, ANNUAL REPORT 3 (2012).

our largest bank, accounting for 66% of total state bank assets all by itself.⁵³

B. Foreclosure Prevention

Like many states throughout the country, North Carolina saw a spike in home mortgage foreclosures during and in the aftermath of the Financial Crisis.⁵⁴ To its credit, the General Assembly enacted The Emergency Program to Reduce Home Foreclosures Act in June 2008.⁵⁵ The statute directed NCCOB to establish, in coordination with the North Carolina Housing Finance Agency (“NCHFA”), a foreclosure tracking database and call center and to create a network of housing counselors and lawyers to advise distressed borrowers.⁵⁶ The statute required that mortgage servicers provide 45 days’ notice before the commencement of foreclosure proceedings and laid the groundwork for negotiation of loan modifications.⁵⁷ The statute applied only to subprime loans but was amended in 2010 to apply to all “home loans.”⁵⁸

I don’t recall that the emergency legislation caused much political uproar nor do I have much of a recollection of its implementation. Under the leadership of my Senior Deputy at the time, Mark Pearce, NCCOB had taken steps to enhance its consumer assistance work and so, when confronted with the challenges of the emergency legislation, I am sure I turned implementation over to him and his team. I do recall that they did a terrific job.

The final report of NCCOB required by the emergency legislation contains a significant amount of detail about the Foreclosure

53. N.C. COMM’R OF BANKS, ANNUAL REPORT 9 (2012) (providing the total assets for BB&T bank in 2011).

54. See N.C. RURAL ECON. DEV. CTR., RURAL NORTH CAROLINA IN THE AFTERMATH OF THE GREAT RECESSION 13 (2011), <https://leadershipnc.org/wp-content/uploads/2018/10/XXV%20Program%20Resources/XXV%20HHS%20Resource--Living%20on%20the%20Margins%20by%20Yolanda%20Burwell.pdf> [https://perma.cc/N526-THM5] (finding that home foreclosure filings in western North Carolina counties rose more than 50% between 2007 and 2009).

55. 2008 N.C. Sess. Laws 226; see also Carolyn E. Waldrep, *North Carolina’s Emergency Measures to Reduce Home Foreclosures*, 13 N.C. BANKING INST. 453 (2009) (discussing the benefits and drawbacks of North Carolina’s measures).

56. See N.C. COMM’R OF BANKS, REPORT TO THE GENERAL ASSEMBLY ON THE EMERGENCY PROGRAM TO REDUCE HOME FORECLOSURES 3–7 (2011) (describing the establishment and goals of the program).

57. *Id.* at 3.

58. *Id.*

Prevention Project overall, including an estimate that more than 5,700 foreclosures were prevented, with an avoidance of direct losses of \$350 million and associated losses (to neighbors) of \$40 million.⁵⁹ The report says that this estimate is conservative, and I have been told by a former Executive Director of NCHFA that the real number is more than 15,000 foreclosures prevented. Whatever the number, the result is gratifying.

By the time I left office as Commissioner of Banks in April 2012, the destructive tide of the mortgage tsunami was receding, leaving a lot of wreckage in its wake. Through the hard work of its competent and dedicated people, NCCOB had more than done its part to limit the damage and lay the foundation for recovery. If, in going, I didn't leave the financial services market in the Tar Heel State better off, it could have been much worse.

C. *After the Tsunami*

The mortgage market meltdown of 2007/2008 brought with it a foreclosure tsunami. Mortgage servicing (collection) systems of the largest financial institutions, which had been set up on the assumption that a 1.5% default rate was a bad year, were overwhelmed by default rates that were much higher than that. The efforts of banks and non-depository mortgage servicers to address deficiencies in their capacity to handle distressed loans were way too little and way too late, and the impact on borrowers and the legal process was severe. Trillions of dollars in household wealth evaporated. Millions of homeowners were “underwater,” owing more in mortgage debt than their houses were worth.⁶⁰

The public was furious and demanded accountability, meaning perp walks and prosecutions. The S&L crisis had brought jail terms to

59. *Id.* at 2.

60. NAT'L COMM. ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., THE FINANCIAL CRISIS INQUIRY REPORT 403 (2011), <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [<https://perma.cc/NH3G-RZ4V>] (explaining that roughly 10.8 million households, or 22.5% of those with mortgages on their homes, were “underwater” in the wake of the 2008 financial crisis, owing more on their mortgage than the market value of their house).

miscreants in the C-Suite; why not now?⁶¹ There were good reasons in both law and policy not to pursue what Treasury Secretary Geithner called “Old Testament justice.”⁶² The legal foundations for criminal prosecutions were weak.⁶³ The Obama Administration Justice Department brought a criminal case against two Bear Stearns fund managers and lost: after that, crickets on the prosecution front.⁶⁴ On the policy front, the Administration had to deal with the possibility of a collapse of the financial system with consequences to rival the Great Depression. Instead of perp walks, the TARP program provided capital infusions to banks, particularly the biggest ones.⁶⁵

The Administration, filled with extraordinarily high achievers, never fully appreciated or addressed the anger of the public. Average folks didn’t accept the failure to prosecute allegedly bad actors or give relief to people who had borrowed more than they could handle. The argument that saving your neighbor from foreclosure preserved your own home equity didn’t sell. Rick Santelli’s famous “tea party” rant on CNBC was predicated on the idea that people who “played by the rules” by paying their mortgages on time were cheated when their neighbors got help.⁶⁶

61. Justin Rex & Spencer Headworth, *The Global Financial Crisis and White-Collar Crime*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/display/document/obo-9780195396607/obo-9780195396607-0291.xml> [<https://perma.cc/4H22-6QFZ>] (Feb. 24, 2021) (“No senior Wall Street executives were imprisoned for actions that contributed to the [2008] global financial crisis. The few criminal prosecutions . . . were reserved for executives at small and regional financial firms. This stands in stark contrast to the approximately 1,000 executives jailed after the 1989 savings and loan crisis. It also runs counter to public support for criminal accountability post-crisis . . .”).

62. Ben White, *Why Geithner Drives Liberals Nuts*, POLITICO (May 23, 2024), <https://www.politico.com/story/2014/05/tim-geithner-107030> [<https://perma.cc/U8A5-VYXL>].

63. Samuel W. Buell, *The Limits of Individual Prosecutions in Deterring Corporate Fraud*, 59 WAKE FOREST L. REV. 557, 570 (2024) (“Studying the litigation record in a selection of these cases will demonstrate the difficulties in proving criminality of traders of financial products, especially on the dimension of intent . . .”).

64. Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), <https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html> [<https://perma.cc/9ZPK-27WV>] (quoting a “former federal prosecutor” as stating that the November 2009 acquittals in the first two criminal cases stemming from the 2008 financial crisis “put a chill” on further investigations).

65. Aidan Lawson & Adam Kulam, *U.S. Capital Purchase Program (CPP)*, 3 J. FIN. CRISES 821, 821 (2021).

66. *Squawk Box* (CNBC television broadcast Feb. 19, 2009), <https://www.youtube.com/watch?v=zp-Jw-5Kx8k>.

Public anger extended to the regulators who were supposed to have prevented the disaster. Responding to the public's mood and its own anger, Congress acted to redress perceived regulatory failure. The Housing and Economic Recovery Act of 2008 ("HERA") replaced the Office of Federal Housing Enterprise Oversight ("OFHEO"), the underfunded agency that had been unable to exercise effective supervision and regulation of Fannie Mae and Freddie Mac, with a new Federal Housing Finance Agency ("FHFA"), a fully empowered and funded agency with supervisory, regulatory, and resolution powers.⁶⁷ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") put the Office of Thrift Supervision to rest; took consumer protection with regard to financial products away from federal banking agencies and gave it to the newly formed Consumer Financial Protection Bureau ("CFPB"); and reduced the discretionary authority of federal agencies with regard to distressed financial institutions.⁶⁸ Prudential supervision was out; hard-nosed enforcement and "no more bailouts" were in.

Grisly as it is to say, the states had a pretty good crisis. State attorneys general continued their enforcement activities against subprime lenders, servicers, and the firms that packaged and sold subprime loans. State mortgage regulators, set up a Nationwide Multi-State Licensing System ("NMLS") under which licensing and enforcement information could be shared among the states and made available to law enforcement and the public.⁶⁹ NMLS was expensive and its financing precarious; a looming shortfall at one point funded by a last-minute investment from proceeds of a settlement with a major bank. As a member of the NMLS board, I tipped my hat in thanks to the AGs and my colleague Mark Pearce for saving the day.

The states also came out well under the federal legislation mentioned above. The SAFE Act, Title V of HERA, incorporated NMLS into a national system of mortgage licensing and registration, that was itself based on existing licensing systems in many states

67. Pub. L. No. 110-289, 122 Stat. 2654 (codified in scattered sections of 12 and 42 U.S.C.).

68. Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of 12 U.S.C.).

69. *NMLS Reference Guide: About NMLS*, CONF. OF STATE BANK SUPERVISORS, https://mortgage.nationwidelicencingsystem.org/knowledge/products/nmls/pubs/aboutNMLS/reference/aboutNMLS/maps/topics/aboutNMLS_infoSharing.html [<https://perma.cc/THF7-N3FG>] (last visited Dec. 31, 2025).

(including North Carolina).⁷⁰ HERA increased the scope of NMLS and ensured its solvency by adding to the required licensure of non-bank mortgage brokers and lenders the further requirement that all bank employees involved in mortgage lending be registered under the system.⁷¹ When the number of non-bank mortgage brokers and lenders contracted during and after the Financial Crisis, bank registration fees kept the NMLS afloat.

The states also did well under Dodd-Frank, which preserved their rights to establish consumer protection standards higher than federal ones and of state attorneys general to keep up their good work.⁷²

All this was to the good, but the question remained about accountability for the firms thought to have caused the crisis and its related devastation. I played a part in one such effort.

D. *The National Mortgage Settlement*

Because of the interrelationship of federal and state laws in the origination and sale of residential mortgages, abuses in the market that led to the Financial Crisis violated both state and federal law.⁷³ Sorting out these claims in federal and state courts would have involved the expenditure of many millions of dollars and years of effort with little certainty of outcome. So, the federal government, 49 State Attorneys General, and the five largest mortgage servicers negotiated a settlement (“Settlement”).⁷⁴

The Settlement, initially comprising five separate consent judgements, was staggering in scope. Four of the five servicers who were parties to it—Bank of America, JPMorgan Chase, Wells Fargo,

70. Pub. L. No. 110-289, 122 Stat. 2656 (codified in scattered sections of 12 and 15 U.S.C.).

71. Pub. L. No. 110-289, § 1502, 122 Stat. 2656.

72. 12 U.S.C. § 5511(a)(2).

73. The author previously published an article in the North Carolina Banking Institute Journal providing a review and assessment of the Settlement’s impact following the completion of the first five consent judgements. Joseph A. Smith Jr., *A Review of the National Mortgage Settlement by Its Monitor*, 21 N.C. BANKING INST. 29 (2017).

74. Press Release, Off. of Pub. Affs., Fed. Gov’t & State Att’ys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing & Foreclosure Abuses (Feb. 9, 2012), <https://www.justice.gov/archives/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest> [https://perma.cc/L4ET-XMKX]; *National Mortgage Settlements Digital Archive*, *supra* note 8.

Citigroup—were the largest banks in the US.⁷⁵ The fifth—Ally Financial, Inc., Residential Capital LLC, and GMAC Mortgage, LLC (“Ally”)—was the successor of a financial subsidiary of General Motors that had gotten so deeply into mortgage finance that there were years when GM made more money from mortgages than from cars and trucks. These organizations collectively serviced more than half of all residential mortgages in the United States.⁷⁶

The Settlement required that the servicers pay \$5 billion in cash penalties and provide \$20 billion in “soft dollar” relief to distressed borrowers: loan modifications, refinancing assistance, and other forms of aid.⁷⁷ It also imposed over 300 detailed servicing standards governing how these institutions could interact with borrowers in distress; this at a time when the CFPB had not been fully stood up and did not have a confirmed Director.

The Settlement also required appointment of a monitor to review and report on compliance with its term.⁷⁸ The monitor had to be agreed upon by the five servicers, 49 State Attorneys General, and the United States government. The author of this memoir has the honor of having been selected as monitor. I was, it seems, the least bad choice of all those considered. I pulled together a network of accounting and law firms and went to work.

The oversight my Settlement colleagues and I conducted was based solely on the “systems of record” of the servicers. As a first step, we did due diligence on the makeup of such systems. This turned out to be an exercise in corporate archeology. Bank of America’s problem loans were substantially contributed to by its acquisitions of Countrywide and Merrill Lynch. JP Morgan Chase was atoning not only for its own sins but for those of Bear Stearns and Washington Mutual. Wells Fargo was paying for the activities of Wachovia (for which read: First Union and Golden West). Citi was paying for misconduct by its subsidiary Citi Financial, formerly the Associates. As it turned out, the

75. *Federal Reserve Statistical Release Large Commercial Banks*, FED. RSRV., <https://www.federalreserve.gov/releases/lbr/current/default.htm> [https://perma.cc/8CPP-G82N] (last visited Dec. 30, 2025).

76. See U.S. GOV’T ACCOUNTABILITY OFF., *NONBANK MORTGAGE SERVICERS: EXISTING REGULATORY OVERSIGHT COULD BE STRENGTHENED* 10 (2016) (indicating that, in 2012, Bank of America, JPMorgan Chase, Wells Fargo, Citigroup, and Ally accounted for 53.9% of all home mortgages in the US).

77. Off. of Pub. Affs., *supra* note 74.

78. *Id.*

M&A boom that preceded the Financial Crisis had consequences for the purported “winners.”

Bank of America, Chase, Citi, and Wells Fargo exited the Settlement in 2016, having provided \$50 billion in gross dollar relief to over 600,000 families.⁷⁹ Thirty-seven percent of credited relief came through first lien principal forgiveness, 15% through second lien principal forgiveness, 17% through refinancing assistance, and 31% through other forms of relief including short sales and deeds in lieu of foreclosure.⁸⁰ And, at the time of exit, the big banks had all achieved consistent compliance with the Settlement’s servicing standards.

Although out of the Settlement, these banks remained subject to mortgage servicing rules issued by the CFPB in January 2014.⁸¹ For a two-year period, the banks had been subject to both the Settlement standards and CFPB regulations. There were significant differences between the two, which created operational complexity for both the banks and my monitoring team. We put shoulders to the wheel and worked our way through to the end.

My work as monitor continued after the big banks’ exit through servicing settlements with SunTrust, HSBC, and Ocwen Financial Corporation and Ocwen Loan Servicing LLC (“Ocwen”). The consent judgments in the SunTrust and HSBC matters followed the same format as the originals, so they were pretty easily accomplished. If we had any problems with these settlements, they were high-class—the economy and the market were returning to health and the number of loans available to modify was falling.

Looking back on it, I believe the Settlement was an effective public intervention that provided both needed relief to borrowers and a temporary standard for mortgage servicing that brought some order out of what would otherwise have been chaos. It laid the foundation for a more permanent solution to servicing abuses and did so in a flexible way, unencumbered by the restrictions on regulatory action by federal

79. JOSEPH A. SMITH, JR., THE NATIONAL MORTGAGE SETTLEMENT MONITOR’S FINAL CREDITING REPORT 2 (2014).

80. *Id.*

81. *CFPB Adopts Mortgage Servicing Rules*, HINSHAW (Feb. 11, 2013), <https://www.hinshawlaw.com/en/insights/hinshaw-alert/cfpb-adopts-mortgage-servicing-rules> [https://perma.cc/A79M-KL2F].

and state agencies. Having done its work, the Settlement and its monitor faded away.

IV. LESSONS LEARNED

As noted at the outset, the nature of banking has changed from a community-based quasi-utility to a market-driven business. The largest institutions now own over half of all bank assets.⁸² They are too big and interconnected to fail. You are not a person to them; you are data in their systems of record.

Public policy regarding banking has been manic depressive. Deregulation, beginning with Jimmy Carter, set the thrift industry up to fail and led to a tightening up of regulatory restrictions and reduction of supervisory discretion after it did. Interstate banking and branching restrictions were dismantled, leading to the concentration noted above. Repeal under the Clinton Administration of the Glass-Steagall Act's separation of banking and securities may have contributed to the Financial Crisis, which, in turn, led to a tightening up and greater regulation under Dodd-Frank. In each case, I think it's fair to say, policy has been pro-cyclical—ineffective in addressing market excesses before a crisis and overly restrictive during the cleanup afterward.

Prudential supervision and regulation—oversight by agencies with the power of visitation—was insufficient to maintain financial stability over time. This is not because supervisors were corrupt or incompetent; rather, it is because they had an impossible task. It is all very well to think that a wise supervisor can spot and prevent disasters in the making, but taking the punch bowl away while the party is ongoing and the sky is clear is more easily said than done. So, failure happens, and the cry goes out: Where were the regulators? There follows legislation that overcorrects to prevent what just happened “from ever happening again.” Chastened, supervisory agencies proceed to the battlefield and shoot the wounded.

The most effective public interventions during the S&L and 2008 Financial Crises were enforcement actions taken by state and federal prosecutors. These actions were based on relatively simple

82. See LISSA L. BROOME ET AL., REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES 264 (6th ed. 2022) (containing a table showing the asset share across varying sizes of banks).

statutes, particularly state “mini-FTC” laws prohibiting unfair or deceptive acts and practices. They resulted in at least some recoveries to aggrieved consumers and vindicated the public desire for accountability, or, if you prefer it, retribution. A substantial argument can be made that failure to prosecute the leadership of Countrywide, Bear Stearns, Lehman Brothers, and other subprime enablers was a policy error that undermined public trust and confidence in government.

So, where does that leave us now? Excesses in crypto/stablecoins, shadow banking, or real estate (again) could lead to another crisis, as could climate change or viruses (again). Choose your horrible. What should we do to prepare?

In thinking over what to write next, a long-ago TV interview of the hotelier Conrad Hilton came to mind. In it, he was asked what important message he had for the American people after reflecting on his long and distinguished career. Hilton paused and, with great gravity, turned to the camera and said, “Please, put the shower curtain inside the tub!”⁸³

I’m with Conrad. No one knows what the next crisis will be or when it will occur. As noted above, there are some widely discussed potential causes. It is in the public’s interest to address them by legislation and regulation if possible, and to place enforcement in the hands of independent government agencies that can take unpopular actions when necessary. Banks and other systemically significant financial institutions should carry 20% to 50% more capital than Mr. Market tells them they need and should engage in robust risk management conducted by independent staff. And the federal government should prepare to perform its role as insurer of last resort by running fiscal surpluses in good times and deficits when needed.

The foregoing is, of course, a fantasy. The ultimate lesson of this reflection is: we never learn. Having left the scene, I will root from the sidelines for good sense to return to us sooner or later and keep faith that we will ultimately do the right thing after trying everything else.

83. Robert Sutton, *When There’s No Simple Solution at Work, Learn to Embrace the Mess*, FAST CO. (Mar. 5, 2012), <https://www.fastcompany.com/1822686/when-theres-no-simple-solution-work-learn-embrace-mess> [<https://perma.cc/Q9Y5-FZ7N>].