

COUNSELING FOREIGN BANKS ON UNITED STATES BANK ACQUISITIONS: THE FOREIGN BANKER MEETS HIS U.S. LAWYERS

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1. Introduction by Donald J. Yellon

If the United States banking system is baffling to those of us here in the U.S. [1], just think how impenetrable it must seem to a foreign banker or foreign investor interested in acquiring a U.S. bank. For that reason, when I was invited to participate in a Symposium on “Foreign Banking in the United States” to be held in Geneva, Switzerland [2], I thought the best way to communicate the U.S. regulatory system to a foreign audience would be through a dramatized meeting of a foreign banker with his U.S. lawyers. My fellow panel members encouraged me in this approach and I enlisted the services of an expert “playwright”, Gary Welsh, who developed our basic script. Thereafter, I met with the distinguished legal “cast” of Dennis J. Lehr, Cameron F. MacRae III, Cantwell (Chuck) F. Muckenfuss III, Neal L. Petersen, and John E. Shockey [3] and together we wrote a playlet which we presented to our Geneva audience. With the help of certain visual aids, our playlet received enthusiastic “first-night” reviews from our foreign audience.

With an increasing number of symposia, panels and conferences being held to acquaint foreign investors with the intricacies of the U.S. legal system, I think the bar needs to make greater use in these fora of more creative forms of instruction — such as representative playlets and workshops. Our favorable reception in Geneva leads me to conclude that such informal and practical methods of communication can be particularly helpful when dealing with a foreign audience, and can give a foreign client a better comparative understanding of the U.S. legal and regulatory system.

2. A playlet: A foreign banker meets his U.S. lawyers [4]

The scene is the European law office of Lehr, MacRae, Muckenfuss, Petersen, Shockey and Yellon, a multistate law firm with U.S. offices in New York, Chicago, and Washington.

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LMMPS & Y have made a special trip abroad to counsel a large foreign bank client that has expressed an interest in purchasing a U.S. bank. This client also has several wealthy individual customers who are also seeking his advice on whether to invest in U.S. banking institutions.

The client is Monsieur Caisse, a Managing Director of a large European bank, Banque Mutuel (BM). BM currently has branches in New York City and Chicago, an agency in San Francisco, and a representative office in Houston. It has affiliations with several European industrial companies, advises several wealthy oil sheiks, and aggressively competes with several other European banks that have either acquired or announced their intentions to acquire U.S. banks.

Mr. Caisse: Mr. Lehr, I have come to your firm to discuss the various problems we might face in the U.S. when we seek to acquire a large U.S. bank. You know, we hear all sorts of terrible stories about American feelings against foreign bank takeovers, and we also hear how one constantly needs a lawyer at one's side. Tell me, first, does it look as though the U.S. Congress is about to prohibit all foreign bank takeovers? I have read that it is presently considering a law to do so.

Mr. Lehr: The short answer to your question is "no". I don't believe that the Congress is about to act to prohibit takeovers by foreign banks. Senators Heinz and Proxmire have each introduced bills that would impose a temporary moratorium on foreign bank acquisitions, but there seems to be little support for these bills at this time [5]. I don't really see a serious legislative effort at a ban; the Government realizes the foreign investment and competitive benefits that can arise out of foreign bank acquisitions [6]. However, I can tell you that the whole subject is under study by the U.S. Government, and the General Accounting Office ("GAO") is due to release a report on the issue [7]. I think we can expect to see further Congressional interest and possibly new restrictions or limitations proposed [8]. I certainly wouldn't recommend rushing into anything, but, if business reasons warrant, it is better to act now rather than later since we never know what Congress may do.

Mr. Caisse: Thank you, that is very helpful. Now, let me tell you, we are exploring several possibilities, all of which look interesting. One is a state bank in New York with about \$ 600 million in deposits. Another is a bank holding company that owns a large

national bank — almost \$ 1 billion in assets — in Chicago. Finally, there is a \$ 1 billion bank in California, also state-chartered. I have been given a lot of confusing advice on the various interstate restrictions imposed under the International Banking Act [9]. Can you therefore answer a few simple questions for me. Could BM acquire more than one of the banks I mentioned? How do BM's existing branch and agency offices affect our choice of a bank to acquire? By acquiring a U.S. bank will we be limiting ourselves in our future branch and agency operations? And what is this "home state" I hear so much about?

Mr. Petersen: Let me take your first question, Mr. Caisse. Any company, whether domestic or foreign, that seeks to acquire a controlling interest in a U.S. bank has to apply to the Board of Governors of the Federal Reserve System to become a bank holding company [10]. The Board (or the Fed, as we call it) has interpreted the Bank Holding Company Act [11] as prohibiting the formation of a bank holding company which owns or controls banks in more than one state [12]. Thus, you could not seek to acquire more than one of the banks you mentioned. You could acquire only one of these banks. Also, it's fortunate that BM is a bank. The Federal Reserve Board proposed in April 1979 [13] that only companies principally engaged in banking outside the United States could qualify as "foreign bank holding companies" under our Act; a foreign commercial or other concern could not so qualify, and, under the proposal, would be effectively prohibited from acquiring a U.S. bank.

Mr. Yellon: I might point out, Neal, that if Mr. Caisse were lucky enough to find an existing American bank holding company that had banks in more than one state — and there are about seven around that were grandfathered from the prohibitions you mentioned — BM would be able to acquire such a company. In that case, the Fed views the situation as a change in control — not the formation of a holding company — and thus the prohibition doesn't apply. That's the *Financial General Bankshares* case [14], wherein Financial General owns banks in four states — New York, Tennessee, Virginia and Maryland — and the District of Columbia. This situation also raises some problems of state law that we can discuss later.

- Mr. Lehr: If I may pick up at this point, Don, the bank holding company rule that you cannot acquire controlling interests in banks in more than one state does have somewhat of a parallel under section 5 of the International Banking Act [15]. Under that section, BM cannot acquire more than a 5 percent voting equity interest in a bank located outside of its designated "home state" [16]. Thus, whichever bank you select, that bank's state of operations will become your home state of operations.
- Mr. Caisse: What does this "home state" mean? Can we keep our branches outside of this home state? Do we have a home state now?
- Mr. Shockey: First, let me give you a brief explanation of the home state concept. The International Banking Act, or IBA, says that "the home state of a foreign bank that has branches, agencies, subsidiary commercial lending companies, or subsidiary banks, or any combination thereof, in more than one state, is whichever of such states is so determined by election of the foreign bank, or, in default of such election, by the Board" [17]. Now, in order to answer your questions, Mr. Caisse, we need to know when BM opened its branches and agency in the United States.
- Mr. Caisse: Let's see, we opened our New York branch in 1972, and our California agency in 1975. We didn't open our branch in Chicago until 1979.
- Mr. Shockey: Do you remember when you filed for permission to open your Chicago branch?
- Mr. Caisse: I think it was in August, 1978.
- Mr. Lehr: Well, let's start to spell this out for you. First, as I mentioned, the IBA gives you the right to select a home state of your choice. No matter which state you choose, you will clearly have no trouble in keeping your New York branch, since it is exempted from the restrictions of the IBA, or, as we say, "grandfathered" [18]. You will also be able to keep your San Francisco, California, agency, because agencies are not affected by restrictions outside of a home state. If, however, you choose New York or California as your home state, the Fed will likely require you to limit deposit-taking at the Chicago

branch to internationally related deposits only. That is because under the IBA a foreign bank can establish or operate a branch outside of its home state only if it enters an agreement with the Fed to accept internationally related deposits at that branch [19]. Because your Chicago branch missed the grandfather date — July 27, 1978 — it would appear to be subject to the restriction [20].

Mr. Caisse: What if we decided to buy the Chicago bank and make Illinois our home state — what would happen to our Chicago branch then?

Mr. Petersen: That raises an interesting question. There is some legislative history from the Congressional debates and hearings on the IBA which says a foreign bank should not be permitted by the Fed to select a home state that would allow it to expand its domestic deposit-taking powers [21]. So, if you bought the Chicago bank, you might at the least have to eliminate the Chicago branch's domestic deposit-taking activity.

Mr. Yellon: Well, I tend to agree, but we have not yet had any formal guidance from the Fed [22]. The whole purpose of the choice of home state provision was to allow foreign banks to choose where they wanted to conduct the principal portion of their business. In any event, you would still have the privilege of operating the New York City branch, which is grandfathered, as well as the San Francisco agency and the Houston representative office. Hopefully, before you have to decide, we will have some more guidance from the Fed so that we can weigh the risks [23].

Mr. Lehr: Neal, I still don't think there is that much of a problem. Could you explain your reasoning? I also recall certain comments in the legislative history that might restrict Mr. Caisse to his grandfathered state.

Mr. Petersen: You must be referring to Illinois Senator Stevenson's remarks on Senate passage of the bill [24]. He indicated that if a foreign bank had a single grandfathered branch at the time of enactment, it could not go into an additional state and make that its home state. That same logic could lead the Fed staff to conclude that where a foreign bank has offices in several states and one of those offices was not grandfathered, permitting the

selection of the state with a nongrandfathered office would give such a foreign bank “additional” deposit-taking capability unintended by Congress [25].

Mr. Lehr: Well, let’s move on, since that’s all hypothetical anyway. I think there are several important things to understand at the present. First, the state of any U.S. bank that you acquire now or in the future will have to be your home state. Secondly, your existing branch in New York and agency in California will be unaffected by BM’s home state designation, the former because it is grandfathered, the latter because agencies are not affected [26]. Thirdly, if you choose New York or California, your Chicago branch will likely be limited in its deposit-taking to international deposits. Fourthly, there is at least some question about whether you can choose Illinois as your home state [27]. Fifthly, concerning future expansion outside of your designated home state, BM will be limited to establishing agencies and branches that take only international deposits.

Mr. Caisse: I am still somewhat confused. What are international deposits?

Mr. Yellon: International deposits are those from foreign sources and those related to international transactions. They are also the only deposits that Edge Act corporations can accept [28]. The Federal Reserve Board’s Regulation K explains this in greater detail [29]. Edge Act corporations are subsidiaries which banks are allowed to set up outside of their headquarter states for the purpose of conducting an exclusively internationally related banking business [30]. Foreign banks may establish such Edge Act subsidiaries if they obtain approval from the Fed. [31].

Mr. Caisse: I will look at Regulation K when I have a chance. Well, I think I understand this home state selection process a little bit better. But, is there a specific time period within which BM will have to choose its home state?

Mr. Lehr: We don’t know. The statute itself does not set forth any specific time period. The Fed will probably give us some guidelines eventually [32].

Mr. Caisse: Given the importance of home state selection, I would like to know how BM could expand each of the banks it is con-

sidering. What would be the branching powers of each of these banks?

Mr. Yellon: Well, the Chicago bank holding company and its subsidiary bank would be very limited. Illinois is a unit banking state, and by that we mean no branching is allowed. There is, however, some slight flexibility. Illinois law now permits a bank to locate a small number of automatic teller machines at limited distances from its main office [33]. It also permits banks in Illinois to have only two limited purpose facilities — one within 1500 feet of its main office and one within two miles [34]. These facilities are permitted only to receive deposits; cash and issue checks, drafts and money orders; change money; and receive payments on existing indebtedness. Loans could not be made out of those facilities.

Another noteworthy restriction in Illinois is that bank holding companies are permitted to own only one bank subsidiary [35]. Consequently, your Illinois bank holding company will not be able to acquire additional banks and its subsidiary Chicago bank will not be able to expand by anything that you would regard as real branching.

Mr. MacRae: But, your California [36] and New York banks [37] will not be restricted in that connection, since statewide branching is permitted in those states.

Mr. Caisse: I don't understand. Why these different branching restrictions? I thought my Chicago bank was a national bank. Shouldn't a national bank be allowed to branch anywhere?

Mr. Muckenfuss: Many people believe that as a matter of national policy they should be able to do so. However, while national banks (such as Bank of America, Chase Manhattan, Citibank and The First National Bank of Chicago) are chartered under federal law and derive their powers from federal law, Congress has in some instances seen fit to model these powers on those granted by the states to state-chartered banks. The most notable of these is branching. Within a given state a national bank has only the same branching powers as a bank chartered by that state, and it cannot branch outside of its headquarters state [38], except to go abroad [39], and except for a couple of grandfathered situations.

- Mr. Yellon: At the present time the Treasury Department is studying the McFadden Act [40], the branch-limiting statute.
- Mr. Caisse: I see. So the national bank in Chicago cannot branch because state banks in Illinois cannot branch. I take it therefore that state law would have to be changed to permit branching.
- Mr. Yellon: That is correct, and in fact a lot of people in Illinois have been trying to do just that. So far such attempts have been unsuccessful, except for the limited automatic teller machine and limited facilities I mentioned above.
- Mr. Muckenfuss: Another route would involve amending the McFadden Act to break national banks away from the state mold, perhaps also to give them authority to branch across state borders. However, given the types and variety of competing political considerations, action in that regard should not be expected soon.
- Mr. MacRae: I might add that there is still another, albeit theoretical, means by which the present federal law would allow limited interstate branching to occur. That is, two or more states could legislatively enter into reciprocal agreements that would permit banks in each of the given states to have (interstate) branches within each of the given states. Thus, for example, if the states of New York and California each adopted such legislation, a New York-based bank could have a branch in California, and a California-based bank could have a branch in New York. In recent years, initiatives along these lines have been proposed in both these states, but thus far they have not met with any legislative success [41].
- Mr. Caisse: This is all fascinating. Tell me: are national banks and state banks exactly alike then in every respect? Are all state banks alike?
- Mr. Muckenfuss: The answer to both your questions is "no". Each of the fifty states has its own set of banking laws, and those laws in turn are different from the federal provisions governing national banks. The point is that some federal provisions governing national banks specifically incorporate by reference the laws of the state where the national bank is located. Two of the most important of these federal provisions concern branching and usury.

- Mr. Caisse: Usury! Don't some of these state laws have terribly low ceilings? How does one cope in inflationary times?
- Mr. Shockey: Well, national banks do have somewhat of an advantage in certain states since under federal law a national bank is permitted to charge one percentage point above the Federal Reserve discount rate if it hits the state ceiling [42].
- Mr. Caisse: How about lending limits?
- Mr. Shockey: Here state and federal law are not intertwined. A national bank has a lending limit to any one customer of 10 percent of its unimpaired capital and surplus [43]. State banks in New York, California and Illinois, for example, have different limits. In New York, it is generally 10 percent of capital and surplus, but with certain types of secured loans the limit is 25 percent [44]. In California it is generally 10 percent of shareholder equity, capital notes and debentures, but it is 20 percent if the loan is secured [45]. In Illinois, it is 15 percent of capital and surplus [46]. In each case there are certain exceptions to the generally established limits.
- Mr. Caisse: So, if BM really wants to expand the lending capability of any of these banks we might very well have to put in additional capital. Are there any other potential cost differences between the state and national banks?
- Mr. Petersen: Well, state banks have the option of becoming members of the Federal Reserve System, while national banks are required to be members [47].
- Mr. Caisse: What difference does membership make?
- Mr. Muckenfuss: National banks and other member banks must hold non interest-bearing reserves with the Fed. State nonmember banks can usually hold their reserves in earning assets, that is, with another bank in the form of a correspondent bank balance. Member banks also have access to Federal Reserve services, such as clearing, and they are able to obtain credit from the Fed through the discount window.
- Mr. Yellon: Congress is currently reviewing the question of the costs of reserves because these have caused a large number of member

banks to leave the Federal Reserve System. The present legislative approach is to keep membership voluntary and to make it more attractive by reducing its costs, with the safety valve that if reservable deposits in the U.S. go below a certain benchmark, the Board could make reserve requirements mandatory for all depository institutions [48].

Mr. Caisse: How about FDIC insurance, isn't that an option?

Mr. Muckenfuss: Yes, it is an option for branches of foreign banks. Indeed, if they engage in any significant retail business, they must have deposit insurance [49]. Also, bank subsidiaries of a bank holding company must be insured [50], and BM would, of course, be a bank holding company if it acquired one of these banks.

Mr. Caisse: Yes, I understand that, but someone has told us that we are already subject to the Bank Holding Company Act even though we don't own a U.S. bank. Could that be right?

Mr. Petersen: Yes. Under the IBA, BM is now treated as if it were a bank holding company, but principally for purposes of nonbanking restrictions, because it already has a branch and an agency in the U.S. [51]. That means it is limited in the type of nonbank concerns that it can acquire in the U.S. [52]. Such business must come within the Fed's so-called laundry list of concerns that are closely related to banking; for example, finance companies, full-payout financial leasing firms, and so on [53].

Mr. Caisse: Ah, yes, the famous laundry list. How would BM's status change if it did acquire a U.S. bank?

Mr. Yellon: It would actually change very little. The main difference is that you would become subject to various provisions relating to expansion by acquisition of additional banking interests [54].

Mr. Caisse: You mean that if we buy the California bank and then later want to buy another California bank we would have to go back to the Fed a second time?

Mr. Petersen: Yes. Unless you decided to go the bank merger route, in which case you would have to get approval from the Federal authority supervising the surviving bank [55].

- Mr. Caisse: You mean, if we acquired the California bank and later wanted to merge another bank into it, we would have to go to someone other than the Fed to get approval for this merger?
- Mr. Muckenfuss: Not necessarily. If the surviving bank is a national bank, you would have to apply to the Comptroller of the Currency; if it is a state member bank, you would have to apply both to the Fed and to the state authorities; and if it is a state nonmember bank, you would have to apply to the Federal Deposit Insurance Corporation and to the state authorities [56].
- Mr. Caisse: This all sounds amazingly complicated. Well, first things first. How would BM get Fed approval to acquire any of the banks it is considering? How long would it take to obtain the approval?
- Mr. Petersen: From the day you started to work on the application, it would take probably nine months or longer.
- Mr. Caisse: Why so long?
- Mr. Lehr: Well, first you have to develop a great deal of detailed information — both as to the acquiring bank and as to the bank to be acquired — in order to fill out the application. Then you have to go to the Reserve Bank of the district where the bank to be acquired is located — in your case, New York City, Chicago, or San Francisco — and file a draft application. The Reserve Bank reviews it and makes comments. Then you file it again, and if the Reserve Bank is satisfied that all the necessary information is there, the application is accepted and sent on to the Federal Reserve Board in Washington. The Fed in Washington reviews it again. If the Fed is then satisfied that the application contains all the necessary information, it accepts the application and publishes a public notice that says the application has been received.
- Mr. Muckenfuss: And don't forget that the Fed will be wanting a lot of information about your home office, and even overseas activities.
- Mr. Caisse: When you refer to a public notice, you mean our competitors will know that we are buying a bank?
- Mr. Petersen: Everyone will know. In fact, under the Community Reinvest-

ment Act [57], notices will have to be published ahead of time in the local community where the bank to be acquired is located [58].

Mr. Caisse: What happens after notice of the Fed's receipt of our application is published?

Mr. Yellon: Well, the Fed will try to act on it within ninety days after that date if they can, and their record overall is pretty good. That process can get slowed down, however, if they decide they need more information or if someone protests. You must count on it as a strong probability that the staff of the Fed will want more information than you submitted with your application.

Mr. Petersen: I should point out that the ninety days Don mentioned is purely an internal schedule. There is a statutory ninety-one-day period for the Fed to act, but that doesn't begin until the close of the public comment period [59]. And that ninety-one day period can be tolled — that is, suspended — if there are protests or additional information requests [60].

Mr. Caisse: You keep on mentioning all of this information that BM will have to provide. What type of information?

Mr. Petersen: BM will have to describe how it proposes to acquire the bank and discuss in some detail how it proposes to finance the acquisition. In particular, the Fed looks closely at any premium being paid for bank stock and the ability of the acquiring foreign bank to service any debt it may incur. As a result of recent Board policy changes, BM will also have to provide extensive information on its organizational and financial structure. The Board's official policy is that a foreign bank seeking to acquire a U.S. bank must be a source of financial strength to the U.S. Bank [61]. In order to determine that, the Board will want a complete picture of everything BM owns all over the world. In this regard, BM will have to go to each of its subsidiaries — defined by the Fed to be every firm in which BM has a direct or indirect interest of 25 percent or more of the voting shares [62] — and have each of those subsidiaries compile lists of all their shareholdings in excess of 5 percent of the outstanding stock of the companies involved.

- Mr. Caisse: Why in heaven's name does the Fed need all of this?
- Mr. Petersen: Well, under various U.S. banking laws restricting insider transactions and dealings with affiliates [63], the Board feels that it needs to know all about what you might call the proposed "cousins" of a U.S. bank to make sure it isn't going to be used solely to fund commonly owned related enterprises. Also, because of bank holding company restrictions on U.S. activities [64], the Board needs to know whether any subsidiary of BM might either directly or indirectly be engaging in business in the U.S.
- Mr. Caisse: Well, you know we have many subsidiaries and other affiliates all over the world, some of which are engaged in commercial operations.
- Mr. Yellon: We will have to examine those carefully for any U.S. activities. If any of your subsidiaries or other affiliates are engaged in business in the U.S., either directly or indirectly, we will have to determine whether their activities qualify for exemption under our laws and regulations [65]. For example, suppose you have Company A — a steelmaker — in which your bank holds a 51 percent interest. Company A in turn holds a majority in a small U.S. steel firm B. Probably, your investment in firm B can be maintained, since it is in the same general line of business as Company A. If B were a U.S. sauerkraut producer instead of a steel company, however, the answer would be different — that is, the lines of business are different [66].
- Mr. Petersen: The Fed will also want detailed financial information. For BM itself, and for its major subsidiaries, subsidiaries that can have an effect on BM's condition because of their size and importance, the Fed will want detailed financial statements for the past five years. The figures on those statements will have to be translated into U.S. dollars and reconciled with generally accepted U.S. accounting principles. In particular, the Fed will want detailed information on earnings, capital, charge-offs, and reserves. They will also ask the central bank of BM's country for its views regarding BM's condition and the effect of the acquisition [67].
- Mr. Caisse: This sounds like a major undertaking.

- Mr. Lehr: It is. And, in fact, if you are concerned about timing, I suggest you have someone at BM begin working now at putting some of this basic information together.
- Mr. Caisse: Is there anything else in this application that we have to worry about?
- Mr. Yellon: Well, you have to fill out a rather detailed section on competitive effects of the acquisition. We will have to give this very careful legal antitrust analysis, and also engage a first-class economist right at the beginning to help deal with U.S. anti-trust considerations.
- Mr. Caisse: Ah, yes, your antitrust laws. Tell me, do you see any problems?
- Mr. Yellon: There is a well-developed body of federal banking/antitrust law. Last July, the Department of Justice issued a statement describing how it applies this body of law to U.S. bank acquisitions by foreign banks [68]. The key part of this statement is this: “. . . an acquisition by a foreign banking institution of a domestic bank is most likely to raise significant competitive problems where the foreign bank already serves markets in which the offices of the bank to be acquired are located, or is one of a few significant potential entrants into concentrated markets in which the bank to be acquired holds a substantial position” [69]. Dennis Lehr will have more to say about this in a moment. It is important to understand at the outset that the procedure which the Fed uses in competitive analysis is really a two-step process.
- Mr. Shockey: Yes, first, and most importantly, you have to get the Fed to agree that there are no competitive problems, or, if there are, that they are outweighed by other public interest factors [70]. If the Fed agrees and approves the acquisition, then you have a thirty-day waiting period before you can consummate the acquisition [71]. During that time the Department of Justice, which is wholly separate from the Fed, can go to court and block the transaction if it believes it has a good case. Moreover, the mere filing of the complaint results in an automatic stay, or delay [72].
- Mr. Caisse: What sorts of competitive issues are likely to arise?

- Mr. Lehr: Well since each of the banks that BM is looking at is located in a state where BM already conducts business, the Fed will first define the appropriate geographic market within that state for purposes of considering the acquisition. This is usually approximated by what we call a Standard Metropolitan Statistical Area, or SMSA — a kind of commercially and demographically unified urban area. Within that state as a whole, and within that market, the Fed will look to see to what extent the acquisition will further concentrate banking resources, and how much existing or potential competition may be eliminated as a result. If it finds a substantial increase in concentration or the elimination of a substantial amount of existing or potential competition, BM will bear the difficult burden of having to show that those anticompetitive effects are outweighed by other public benefits [73].
- Mr. Muckenfuss: Given what I take to be the limited wholesale/international nature of BM's branch and agency activities in the states concerned, the size of the markets being considered, and the great number of competitors in each of the markets, it is unlikely that any of the acquisitions being considered would raise problems of a substantial increase in the concentration of banking resources. Looking at elimination of any existing competition between BM and any of the banks concerned, the U.S. Supreme Court has defined the cluster of services known as "commercial banking" to be the relevant product market to be considered within the applicable geographic market area [74]. However, the Fed and the Justice Department sometimes look beyond this broad product market to relevant submarkets, such as wholesale or international banking services. This narrowing of the product market is sometimes offset by the broader geographic market for many services. Commercial loans often have to be judged in terms of statewide or nationwide markets [75].
Concerning potential competition, the Fed and Justice Department will want to know why you don't acquire a de novo bank, that is, set up your own new subsidiary, or perhaps acquire a smaller bank, a so-called toehold entry.
- Mr. Caisse: That would not be practicable for us. We don't have the people familiar with all aspects of the U.S. market. Also, in these markets, it is very hard to start new, especially if you are a foreign bank.

Mr. Yellon: You will need to strengthen your case on that, because the authorities prefer the more competitive routes of de novo or toehold entry. In its July statement, for example, the Justice Department said that, generally speaking, de novo entry is competitively preferable to market entry by acquisition of an existing competitor, because it increases consumer options for banking services and may reduce concentration in the market [76].

Mr. Petersen: While we have been raising issues, I think you should understand this: the Fed has yet to deny any foreign acquisition on competitive grounds, and, in fact, has often seen very real benefits in the acquisition of sluggish U.S. banks by strong foreign banks [77].

Mr. Caisse: You mentioned public benefits. How are these defined?

Mr. Yellon: Primarily, the Fed looks to expanded or improved banking services to the public. Sometimes it wants to see reliable projections of lower costs to the public, for example reduction of interest charges on some types of consumer loans. In foreign bank cases, the Fed has often recognized the benefits of expanding international banking services [78]. I suggest that you have your management team look at the bank to be acquired and at what other U.S. banks are doing in that bank's market. BM should determine specific ways in which the bank's services can be improved, and determine which improvements BM can commit itself to make.

Mr. Muckenfuss: And, as a result of the Community Reinvestment Act [79], I suggest that BM take a close look at the bank's local mortgage portfolio and its retail loans in the local community. You may have to consider strengthening and expanding its activities in those fields if the U.S. bank's performance is rather weak there [80].

Mr. Caisse: This whole thing sounds as if it is going to cost a lot of money. But, I guess once we are through with the Fed we are home free.

Mr. MacRae: Not quite. If the bank to be acquired is a state-chartered bank, you would also have to get the independent approval of the state bank regulatory agency as well. For example, in New

York you would have to file an application with the New York State Superintendent of Banks in order to obtain approval to vote the shares and exercise control of the acquired bank [81]. Indeed, New York has its own form of bank holding company law, and approval under this law would be required [82].

Mr. Caisse: Are the standards for approval in New York similar to the federal standards?

Mr. MacRae: The New York State bank holding company law requires that the Superintendent consider such general factors as the "character, responsibility and general fitness" of the acquiring bank or bank holding company, to determine whether the proposed exercise of control would be consistent with the safe and sound conduct of the business of the acquired bank [83]. In addition, there are broad policy guidelines contained in the New York Banking Law which include such factors as prevention of unsound and destructive competition and general protection of the public interest [84]. The New York Banking Department has interpreted these criteria to require consideration of many of the same issues that are considered by the federal regulatory agencies, including, in particular, antitrust policies. In most instances the New York State Banking Department and its Superintendents have reached the same conclusions as the Federal regulators. But there have been some significant and well-publicized exceptions — such as a previous New York State Superintendent's denial of the application of Barclays Bank to acquire the Long Island Trust Company (a medium sized bank in New York-State) and the very recent difficulties the present Superintendent had with the application of the Hong Kong and Shanghai Banking Corporation to acquire the Marine Midland Bank [85].

Mr. Caisse: Ah yes, that brings us to the current Superintendent of Banks, Ms. Siebert. Perhaps you can explain to me why she was going to turn down the Hong Kong and Shanghai application, especially in light of the fact that your federal regulatory agencies had given their approval.

Mr. MacRae: That is a very complicated question. Superintendent Siebert publicly cited a number of reservations, including such factors as the particular nature of the Hong Kong and Shanghai institution and the precedential effect that approving such a large-

scale foreign takeover would have. Another major reason the Superintendent articulated for her proposed denial was her conclusion that there was a long-standing New York State policy prohibiting large New York City-based banks from acquiring large upstate banks [86]. Although Hong Kong and Shanghai only had two branches in New York City, she considered it to be the equivalent of a large New York City bank when the worldwide resources of Hong Kong and Shanghai were taken into consideration. This theory, and especially the conclusion that Hong Kong and Shanghai was the equivalent of a large New York City bank, has been widely criticized. I would point out, however, that both the Hong Kong and Shanghai and Barclays Bank turndowns represent instances in which the New York State Superintendents have based their disapproval on essentially the grounds that a similar acquisition would be prohibited for a similarly large New York State bank or bank holding company. Also, underlying the whole matter is Ms. Siebert's very deep concern about foreign acquisitions of New York and United States banks generally [87]. I might add that her concern is not limited just to large acquisitions; indeed it might interest you to know that she has also disapproved, albeit on somewhat different grounds, a proposed acquisition of a rather small New York City bank by a foreigner [88].

- Mr. Caisse: Does this mean that the New York Superintendent will give us a hard time if we buy a New York bank?
- Mr. MacRae: Although I believe that the Superintendent will give any foreign acquisition proposal the most careful scrutiny, I also believe that at this particular point in time she would ultimately be receptive to a proposal by a responsible foreign bank, such as yours, which did not involve the acquisition of a very large New York bank. In short, I believe that the New York State Banking Department would in the end approve an acquisition of a New York bank of the sort you have in mind.
- Mr. Yellon: Of course, for the national bank in Chicago, you don't have to worry about state approval.
- Mr. Petersen: I think you will have to obtain separate approval in California as well.

- Mr. Caisse: Are any states off-limits; for example, how about a bank in Houston?
- Mr. Yellon: In the case of some other states, I believe you run into state laws that may prohibit the acquisition. For example, the Fed turned down a foreign group's attempt to acquire Financial General Bankshares, because one of its banks was in Maryland, which has a statute that, in effect, prohibits unfriendly takeovers [89]. This matter is now being reviewed in the U.S. Court of Appeals in Washington [90].
- Mr. Caisse: Well, we seem to have discussed every possible U.S. regulator – the Fed, Comptroller, FDIC, Department of Justice, and state authorities. How did we miss the Securities and Exchange Commission? I thought they regulated everything.
- Mr. Lehr: Well, the Commission, or the SEC, as we call it, tries to if they can get away with it. Generally, no matter which bank you acquire, you will be faced with securities law considerations. Given the size of the banks concerned, the shares of the Chicago bank holding company are likely to be registered with the SEC, and the shares of the state banks are likely to be registered with the FDIC or the Fed [91]. Such registration makes solicitation of proxies from holders of the shares and tender offers and exchange offers subject to our federal securities laws [92]. The SEC would have jurisdiction in the case of the Chicago bank holding company, and the Fed or the FDIC in the case of the state banks [93]. The tender offer and proxy solicitation rules set out certain timing requirements and govern what must be disclosed to existing shareholders [94]. Statements in these documents will be subject to antifraud provisions of the Exchange Act [95].
- Mr. Caisse: What type of disclosures are required?
- Mr. Lehr: Well, of course the facts and circumstances concerning the the transaction, and particularly the terms of the tender offer or exchange offer, must be set out. Also, if the shareholders will be receiving debt or equity securities, detailed financial statement disclosure is required. Other types of disclosure include the identity and background of the acquiring company and the source of funds that will be used to carry out the

transaction. In general, all material information will have to be disclosed [96].

Mr. Caisse: Material! How can anyone determine what his responsibilities are when the standard is something as subjective as materiality?

Mr. Yellon: You're right there, but if something goes wrong and there is litigation, a judge is going to decide what was or wasn't material. With the benefit of hindsight, he may see things a bit differently from the way the company did at the time it prepared the documents. Under the antifraud provisions of the U.S. securities laws, it is unlawful for any person to make any untrue statement of a material fact or to omit any material fact necessary in order to make the statements made, in the light of circumstances under which they are made, not misleading, in connection with the purchase or sale of a security or a proxy solicitation [97]. The prevailing standard of materiality as decided by our courts in proxy solicitation matters is this: an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote [98].

Mr. Caisse: Well, I can see that the U.S. securities laws are very murky. Are there any other securities law considerations?

Mr. Lehr: There are other reporting and insider transaction provisions that may be applicable, and of course there are state securities laws that must also be considered. The securities laws are so technical and the liabilities, in terms of money as well as time, are so great that I strongly recommend we pay careful attention to them. For example, under the Williams Act amendments to the Securities Exchange Act, any person who directly or indirectly becomes the beneficial owner of more than 5 percent of any equity security registered under the Exchange Act must file with the SEC, the issuer and each exchange where the security is traded, a statement on Schedule 13D containing certain detailed information [99]. The rules concerning the definition of "beneficial owner" and whether a group of individuals may constitute a "person" are quite complex [100]. This, by the way, is the area which Bert Lance and the Arab investors are contending with in their attempt to acquire Financial General Bankshares. You should also be aware that, once a person beneficially owns more than 10 percent of any

class of a registered equity security, there is another set of rules called the "short swing profit" rules [101]. These require that he give up to the company any profit he realizes on the purchase and sale, or sale and purchase, of the securities within any period of less than six months [102].

Mr. Caisse: This has all been very interesting. I can see we will have a great deal of work ahead of us if we decide to go on. If BM decides not to go ahead, you know we still have several individual customers who may be interested in these opportunities. Could they buy these banks?

Mr. Yellon: There is no federal prohibition against foreign ownership; however, it is important to check the state law. Illinois, New York and California do not have any ownership restrictions. However, regardless of whether the acquiring parties are BM or individuals you will want to check on nationality restrictions concerning the directors of the bank sought to be acquired. For the national bank in Chicago, only a minority of the directors may be non-U.S. citizens [103].

Mr. Caisse: Could a group of individuals avoid all of these federal and state approval problems?

Mr. Shockey: No. If they formed a corporation or partnership to buy any of the banks, such an entity would be a bank holding company and would have to obtain Board approval [104]. If they proceeded strictly on an individual basis, they would still be subject to the recently enacted Change in Bank Control Act [105]. That Act provides that no person, acting directly or indirectly through or in connection with one or more other persons, may acquire control of any insured bank or bank holding company unless the relevant federal agency has been given sixty days prior written notice and has not issued a notice disapproving the acquisition or extended for up to thirty days the period during which the disapproval may be issued [106]. The period may be extended further if the relevant agency determines that it is not getting certain information required by law, or that the information it is receiving is inaccurate [107]. In that regard, individuals must include in their notice to the agency a great deal of information similar to that which is provided by a bank holding company [108].

- Mr. Lehr: I should point out that in the case of acquisitions by individuals, no affirmative approval is formally required. Instead, as John pointed out, it is a right to disapprove. There is thus a slightly greater burden on the agency, for it must show certain adverse effects of the acquisition [109].
In addition, the individuals will have to comply with all relevant securities law provisions, and will have to be especially careful of the tender offer provisions of our securities laws if they decide to act together.
- Mr. MacRae: I might also add that under Federal banking law an individual, unlike a company, would theoretically be permitted to acquire banks in more than one state. Thus, there is a tiny loophole in the law for acquisition of banks in more than one state by an individual.
- Mr. Caisse: Well, it seems to me there is no way of avoiding lawyers in acquiring a U.S. bank. I think the next thing I must do is have us firm up our plans, and then have you explore all possible problems with any of the particular acquisitions we are considering. And, of course, we will have to involve our tax lawyers, as well, right from the beginning.
- Mr. Lehr: I think if you involve the lawyers from the very beginning you can prevent a lot of wasted effort and can speed up the whole approval process.
- Mr. Caisse: Thank you, gentleman. I will be in touch with you shortly.
- [Collectively]: Thank you.

Notes

[1] See Hackley, *Our Baffling Banking System*, 52 Va.L.Rev. 565 (Part I), 771 (Part II) (1966).

[2] *Foreign Banking in the United States*, a symposium sponsored by the International Faculty for Securities Regulation (in cooperation with the Center for Study of Financial Institutions of the University of Pennsylvania Law School), Geneva, Switzerland (October 15–17, 1979). The International Faculty is the founder and the Board of Advisory Editors of the *Journal of Comparative Corporate Law and Securities Regulation*.

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The views expressed herein are those of the individual participants, and do not necessarily reflect the views of the respective firms or government agencies with which the participants are associated.

[4] The playlet was presented in Geneva, Switzerland at the symposium described in n.2, *supra*. Gary Welsh, the "playwright", has provided appropriate citations and supplemented the playlet with detailed footnotes describing regulatory or other actions occurring subsequent to its presentation that should be read in connection with the dialogue. Events in this area are changing so rapidly that at the time of publication it is likely in many cases that even these supplementary footnotes will be outdated by succeeding events.

[5] Senator Heinz proposed his moratorium legislation on November 1, 1979, as an amendment to H.R. 4986, an unrelated domestic banking bill. See Amendment No. 715 of H.R. 4986, 96th Cong., 1st Sess., 125 Cong. Rec. S 15665 (daily ed. Nov. 1, 1979). Senator Proxmire proposed his moratorium legislation on July 18, 1979. See S. 1539, 96th Cong., 1st Sess., 125 Cong. Rec. S. 9782 (daily ed. July 18, 1979).

The Heinz amendment was accepted without a record vote and became part of a complicated and controversial Conference Committee on differing House and Senate versions of H.R. 4986. In the spirit of compromise which dominated the Conference, the Conferees agreed to a temporary moratorium on foreign takeovers of U.S. financial institutions which extended until July 1, 1980. See S. Conf. Rep. No. 96-640, 96th Cong., 2d Sess. 84–85 (1980). The Conference bill passed both Houses and was signed into law on March 31, 1980 as the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) [hereinafter cited as the "Deregulation Act"]. Title IX of the Deregulation Act prohibits the Federal Reserve Board, Comptroller of the Currency, Federal Deposit Insurance Corporation, and Federal Home Loan Bank Board from approving any application involving a foreign takeover of a domestic financial institution until July 1, 1980. However, a number of exceptions were made to this general prohibition, including specifically for the takeover of any financial institution with deposits of less than \$ 100 million. See section 902 of the Deregulation Act, 94 Stat. 193. The Conference Committee Report takes the position that the moratorium "is not designed to prejudice the case one way or the other but to provide a period for study and review by the Federal Reserve, the Administration and the Congress". S. Conf. Rep. No. 96-640, 96th Cong., 2d Sess. 85 (1980). Both the General Accounting Office, *see n. 7 infra*, and the Federal Reserve Board, *see letter from Senators William Proxmire and John Heinz to Federal Reserve Chairman Paul Volcker (April 22, 1980)*, have been requested to furnish Con-

gress with studies prior to the expiration of the moratorium. The Federal Reserve issued its Report on July 1, 1980, and took the position that a moratorium on foreign entry would not be in the national interest. See letter from Chairman Volcker of the Federal Reserve to Senator Proxmire (July 1, 1980) and accompanying Study of the Staff of the Federal Reserve Board, *Foreign Acquisitions of the U.S. Banks* (June 30, 1980). At this writing, it is unclear whether a serious attempt will be made to extend the moratorium in light of Midland Bank Ltd.'s plan to acquire a controlling interest in Crocker National Bank of San Francisco. See also discussion in *infra* n. 8 regarding the activities of Representative Benjamin S. Rosenthal who introduced his own moratorium bill in the House of Representatives. H.R. 5937, 96th Cong., 1st Sess. 125 Cong. Rec. H 11012 (daily ed. Nov. 16, 1979).

[6] See *Hearings on Oversight on the International Banking Act, the New Edge Act Regulations and the Issue of Foreign Acquisition of United States Banks before the Senate Committee on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. (July 16, 1979) [hereinafter cited as Edge Act Hearings] at 7-10 (statement of Henry C. Wallich, Governor, Federal Reserve Board) and at 18-20 (statement of Robert Carswell, Deputy Secretary, Dept. of the Treasury).

[7] The Honorable Fernand J. St. Germain, Chairman of the House Banking Subcommittee on Financial Institutions, Regulation, and Insurance requested the GAO to conduct the study. See [1979] 10 Wash. Fin. Rep. (BNA) at A27. The GAO filed a statistical report on foreign bank activity in the United States on August 1, 1979. See Comptroller General of the United States, *Considerable Increase in Foreign Banking in the United States Since 1972* (August 1, 1979). The GAO recently issued its substantive report on August 26, 1980, and recommended a limited moratorium on the foreign acquisition of U.S. banks with total assets in excess of \$ 100 million. The GAO recommended this moratorium to continue until basic policies regarding interstate banking, antitrust, and foreign acquisitions of U.S. banks are fully addressed. See Report by the Comptroller General of the United States, *Despite Positive Effects, Further Foreign Acquisitions of U.S. Banks Should be Limited Until Policy Conflicts are Fully Addressed* (August 26, 1980).

[8] As discussed *supra* in n. 5, a temporary moratorium on foreign takeovers of domestic financial institutions was enacted on March 31, 1980 and was in effect until July 1, 1980. In addition to the efforts of Senators Proxmire and Heinz, and Representative St. Germain, discussed *supra* in notes 5 and 7, Representative Benjamin S. Rosenthal of New York, Chairman of the House Subcommittee on Commerce, Consumer and Monetary Affairs of the House Government Operations Committee has raised a number of public policy issues concerning foreign bank takeovers, especially the acquisition of Marine Midland Bank in Buffalo, New York, by the Hong Kong and Shanghai Banking Corp. of Hong Kong. See generally *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States (part 4-Foreign Investments in U.S. Banks), Hearings Before a Subcommittee of the Committee on Government Operations, U.S. House of Representatives*, 96th Cong., 1st Sess., (July 31 and August 1, 1979), and [1979] 49 Wash. Fin. Rep. (BNA) at T4-T7. Rep. Rosenthal recently held a hearing on June 25, 1980 at which he explored the actions of the Federal Reserve in approving Hong Kong and Shanghai's application under the Bank Holding Company Act to acquire Marine Midland Bank, 65 Fed. Res. Bull. 354, and the Comptroller of the Currency's decision permitting Marine Midland to convert to a national bank charter, *Opinion of the Comptroller of the Currency on Application of Marine Midland Bank, Buffalo, New York, To Convert From a Banking Institution Chartered Under the New York Banking Law to a National Banking Association*, Comptroller of the Currency, Administrator for National Banks (January 28, 1980) [1980] 26 Wash. Fin. Rpts. (BNA) at A-18.

[9] International Banking Act of 1978, Pub.L. No. 95-369, 92 Stat. 607 (1978) [hereinafter cited as IBA].

[10] 12 U.S.C. § 1842(a) (1976).

[11] Bank Holding Company Act of 1956, 12 U.S.C. § 1841 et seq. (1976) [hereinafter cited as BHCA].

[12] See Board Order of September 13, 1974 approving the application of The Mitsui Bank, Ltd., of Tokyo, Japan, to form a bank holding company through acquisition of 100 percent of the voting shares of The Mitsui Bank of California, of Los Angeles, California, 39 Fed. Reg. 34117 (1974). At the time of its original application, the Mitsui Bank owned 15 percent of the shares of City Bank, a state-chartered bank in Honolulu, Hawaii. Because of the configuration of the Hawaiian bank's shareholders, there was a strong possibility that Mitsui's 15 percent interest afforded it the ability to exercise a controlling influence over the bank. Consequently, Mitsui reduced its share ownership to 4.9 percent. Mitsui also had a director interlock with the Hawaiian bank, which it was required to terminate.

[13] See 44 Fed. Reg. 24865 (1979). The Fed has retained and amplified this proposal in its recently announced proposed revisions to its regulations concerning the nonbank operations of foreign banking organizations, 45 Fed. Reg. 30082 (1980). Under the proposed revisions, to qualify for the special nonbanking exemptions afforded foreign banking organizations under sections 2(h) and 4(c)(9) of the BCHA, 12 U.S.C. § 1841(h) and 1843(c)(9), a foreign organization would be required to be principally engaged in the banking business outside the U.S. (*i.e.* more than half of its business must be banking and more than half of its banking business must be outside the U.S.). Proposed § 211.23(b) of Regulation K, 45 Fed. Reg. 30084-85 (1980).

[14] See Board Order of February 16, 1979 dismissing the application of Credit and Commerce American Holdings, N.V. of Netherlands Antilles, and Credit and Commerce American Investment, B.V. of the Netherlands to form a bank holding company through acquisition of 100 percent of the voting shares of Financial General Bankshares, Inc. of Washington, D.C., 65 Fed. Res. Bull. 254 (1979).

[15] Pub.L. No. 95-369, § 5, 92 Stat. 613 (1978).

[16] Pub.L. No. 95-369, § 5(a)(5), 92 Stat. 613 (1978).

[17] Pub.L. No. 95-369, § 5(c), 92 Stat. 614 (1978).

[18] "[A] Foreign bank . . . may establish and operate, outside its home State, any State branch, State agency, or bank or commercial lending company subsidiary which commenced lawful operation or for which application to commence business had been lawfully filed with the appropriate State or Federal authority, as the case may be, on or before July 27, 1978." Pub.L. No. 95-369, § 5(b), 92 Stat. 614 (1978).

[19] Pub.L. No. 95-369, § 5(a), 92 Stat. 613 (1978).

[20] In October, 1979 the Board proposed home state regulations for foreign banks under the IBA, *see* 44 Fed. Reg. 62903 (1979). Under the proposed regulations, BM would have to choose either New York or California as its home state; and within a year after its home state has been determined, it would have to close or convert its Illinois branch into an agency or enter into an agreement with the Board limiting the deposits received at the Illinois branch to those permissible for an Edge Act International Banking Corporation. *See* §§ 211.8(a) and 211.8(a)(2) of the proposed regulations. *See also* Legal Division Memorandum to the Board, *Subject: Interstate Banking Restrictions of the International Banking Act of 1978* (Oct. 29, 1979) at 11 and Table D [hereinafter cited as Board Staff Home State Memo]. *But see infra* n.23 for discussion concerning the possibility of BM's changing its home state.

[21] See S.Rep. No. 95-1073, 95th Cong., 2d Sess. 11-12 (1978) and 124 Cong.Rec. S 13395-96 (daily ed. Aug. 15, 1978) (remarks of Sen. Stevenson).

[22] The Fed. has released proposed regulations for determining a home state. *See* discussion at n. 20 *supra*.

[23] Under the Fed's proposed regulations, BM would have to choose New York or California as its home state. *See* n. 20 *supra*. However, § 211.8(b) of the proposed regulations would permit BM to change its home state *one time* only. BM could use up its change of home state option and designate Illinois as its home state in order to acquire the Chicago bank. If it did this, it could then maintain its grandfathered New York branch and California agency with no downgrading of their respective activities. *See* Board Staff Home State Memo *supra* n. 20. If

it did not acquire an Illinois bank, BM could still change its home state to Illinois in order to prevent downgrading of the Illinois branch. Such advantage, however, would have to be weighed against other disadvantages. For instance, BM would be limited to expansion by means of agencies or limited branches in New York, California and other states; it would be able to have only one branch in Illinois; and it would not be able to acquire a bank outside of Illinois. The Board has already permitted a foreign bank with a branch in Chicago to acquire a bank subsidiary in Illinois. See *Board Order on Algemene Bank Nederland, N.V.*, 65 Fed. Res. Bull. 658 (1979).

[24] 124 Cong. Rec. S 13395-96 (daily ed. Aug. 15, 1978).

[25] As discussed in n. 20 *supra*, the Board's proposed regulations would, in fact, limit BM to choosing its home state from among those two states — New York and California — in which it has grandfathered offices.

[26] As discussed in notes 20 and 23 *supra*, under the Board's proposed regulations, BM initially would have to choose either New York or California as its home state, and it could change its home state one time only without affecting its grandfathered New York branch or California agency. If BM chose to establish additional branches in New York after the grandfather date, those offices would have to be downgraded to agencies or limited branches if New York was not BM's designated home state. Proposed § 211.8(b) of Regulation K, 44 Reg. 62906 (1979).

[27] See discussion regarding the selection of Illinois through a change of home state procedure at n. 23 *supra*.

[28] An Edge Act Corporation is one that is organized and operated under Section 25(a) of the Federal Reserve Act, 12 U.S.C. § 611-631 (1976).

[29] 44 Fed. Reg. 36009, § § 211.4(e)(1) and (2) (1979).

[30] Many Edge Act corporations do not conduct a banking business in the U.S. but rather serve as holding companies for their parents' foreign investments.

[31] See Pub. L. No. 95-369, § 3(f), 92 Stat. 609 (1978) and 44 Fed. Reg. 36009, § 211.4(b)(2) (1979).

[32] Under the Board's proposed home state regulations, see n. 20 *supra*, a foreign bank with more than one office as of July 27, 1978 (the grandfather date), one of which accepts domestic deposits, will be required to select a home state within ninety days after the regulations become final. 44 Fed. Reg. 62905 (1979), § 211.8(a) of Regulation K. For special rules concerning foreign banks with only one deposit-taking office or no deposit-taking offices, see § 211.8(a), *supra*, and the Board Staff Home State Memo, *supra* n. 20 at 7-10.

[33] Ill. Ann. Stat. ch. 16 1/2, § 105(16) (Smith-Hurd) (Supp. 1979).

[34] Ill. Ann. Stat. ch. 16 1/2, § 105(15) (Smith-Hurd) (Supp. 1979).

[35] Ill. Ann. Stat. ch. 16 1/2, § 73 (Smith-Hurd).

[36] Cal. Fin. Code, § 500 (Deering) (Supp. 1979).

[37] N.Y. Banking Law, § 105 (McKinney) (Supp. 1979-80).

[38] See 12 U.S.C. § 36 (1976) which details the conditions upon which a national bank may establish or retain domestic branches.

[39] See 12 U.S.C. § 601 (1976).

[40] 12 U.S.C. § 36 (1976). Section 14 of the IBA requires the President, in consultation with the Attorney General, the Secretary of the Treasury, the Fed, the Comptroller, and the FDIC to transmit a report to the Congress containing his recommendations concerning the applicability of the McFadden Act to the present environment, including an analysis of the effects of any proposed amendments. 92 Stat. 625. The report, due by law on September 18, 1979, has yet to be released.

[41] See a bill introduced in the New York State Senate on April 2, 1979, by Sens. Rolison, Flynn and Beatty (at the request of the New York State Banking Department) that would add a new Article III-C to the New York Banking Law, and California State Assembly Bill No. 1926 (introduced by Assemblymen Berman and Papan), both reprinted in *The Sixth Annual Con-*

ference on *Legal Problems of Bank Regulation* (Law Journal Seminars Press, Inc., New York, 1979) at 154-59.

[42] 12 U.S.C. 85 (1976). Effective, April 1, 1980, Section 521 of the Deregulation Act, *supra* n. 5, amended the Federal Deposit Insurance Act to permit State-chartered federally insured banks to also charge a rate up to one percentage point above the local Federal Reserve discount rate, 94 Stat. 164. Section 525 of the Deregulation Act allows the states to explicitly override this preemption of state law at any time. 94 Stat. 167. *See generally* Title V of the Deregulation Act for other federal preemptions of state law usury limits, including a three-year preemption of state usury laws for business and agricultural loans in the amount of \$ 25,000 or more, beginning April 1, 1980. Sections 511 and 512 of the Deregulation Act, 94 Stat. 164. During the period of preemption, any person may charge interest on such loans at the rate of 5 percent in excess of the local discount rate, including any surcharge thereon. Section 511, 94 Stat. 164. The preemption may be overridden by a state sooner than the end of the three-year period. Section 512, 94 Stat. 164.

[43] 12 U.S.C. § 84 (1976).

[44] N.Y. Banking Law, § 103 (McKinney) (1966).

[45] Cal. Fin. Code, § 1221 (Deering) (Supp. 1979).

[46] Ill. Ann. Stat. ch. 16 1/2, § 132 (Smith-Hurd) (1967).

[47] 12 U.S.C. § 222 (1976).

[48] Title I of the Deregulation Act *supra* n. 5, is entitled the "Monetary Control Act of 1980" [hereinafter cited as the "MCA"], and gives the Fed authority to establish universal, uniform reserve requirements for all depository institutions in the U.S. 94 Stat. 133. In general, the reserve requirement provisions of the MCA, which became effective September 1, 1980, require all depository institutions to maintain reserves on their transaction accounts and non-personal time deposits as prescribed by Fed regulations. Section 103 of the MCA, 94 Stat. 133. Reserves for commercial banks may be in the form of vault cash, a balance maintained at the Federal Reserve Bank of which the institution is a member or at which it maintains an account, or a balance maintained with another institution that passes it through to the Federal Reserve. Section 104 of the MCA, 94 Stat. 138. *See* 45 Fed. Reg. 56009-56027 (1980) for the Fed.'s regulations implementing these requirements.

[49] Pub.L. No. 95-369, §§ 6(a) and (b), 92 Stat. 614 (1978). *See* Regulations of the Federal Deposit Insurance Corporation, § 346.4, 44 Fed. Reg. 40056 (1979).

[50] BHCA, § 3(e), 12 U.S.C. 1842(e) (1976).

[51] Pub.L. No. 95-369, § 8(a), 92 Stat. 622 (1978).

[52] *See generally*, BHCA, § 4, 12 U.S.C. § 1843 (1976); Federal Reserve System Regulation Y, 12 C.F.R., Part 225 [Bank Holding Companies and Change in Bank Control] (1980) [hereinafter cited as Regulation Y] [full text reprinted in 3 Fed. Banking L. Rep. (CCH), ¶33,111-33,239].

[53] *See* BHCA, § 4(c)(8), 12 U.S.C. § 1843(c)(8) (1976) and Regulation Y, 12 C.F.R. § 225.4 (1980).

[54] *See generally* BHCA, § 3, 12 U.S.C. § 1842 (1976).

[55] *See* Federal Deposit Insurance Act, § 18(c), 12 U.S.C. § 1828(c) (1976).

[56] *Id.*

[57] Pub.L. No. 95-128, 91 Stat. 1147 (Title VIII of the Housing and Community Development Act of 1977, Pub.L. No. 95-128, 91 Stat. 1111 (1977)).

[58] Federal Reserve System Rules of Procedure, 12 C.F.R. § 262.3(b) (1980).

[59] "In the event of the failure of the Board to act on any application . . . within the ninety-one day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted." BHCA § 3(b) and 4(c), 12 U.S.C. §§ 1842(b) and 1843(c) (1976). The ninety-one day rule has been a favorite subject of litigation, particularly in the Seventh Circuit. *See, e.g.,* North Lawndale Economic Development Corp. v. Board of Governors of the Federal Reserve System, 553 F.2d

23 (7th Cir. 1977) (construing § § 1842(b) and 1843(c)); *First Lincolnwood Corp. v. Board of Governors of the Federal Reserve System*, 546 F.2d 718 (7th Cir. 1976) (construing § 1842(b)), *modified en banc on other grounds*, 560 F.2d 258 (1977), *rev'd*, 439 U.S. 234 (1978); and *Tri-State Bancorporation, Inc. v. Board of Governors of the Federal Reserve System*, 524 F.2d 562 (7th Cir. 1975) (construing § § 1842(b) and 1843(c)). The Seventh Circuit rule appears to be that the time clock starts when "the final material for the Fed's decision is received from the various interested sources outside of the Fed . . .". 524 F.2d at 566. In discussing the Seventh Circuit rule, the Second Circuit noted that "it would appear that in that Circuit the time period could start earlier than the close of the comment period [citation omitted]", *Citicorp v. Board of Governors of the Federal Reserve System* 589 F.2d 1182, 1187 n.9 (2nd Cir. 1979). Recently, the U.S. Supreme Court denied review of a Second Circuit case construing the 91-day rule under § 1843(c)(8) for non-banking activities. That case held that "ordinarily, the 91-day period does not begin until at least expiration of the period for comments upon the application". 589 F.2d at 1187, *cert. denied*, 99 S. Ct. 2860 (1979).

[60] The Board has been upheld in repeated decisions in which it asserted that new information from sources outside of the Board started the 91-day period over again. *See* 546 F.2d at 721; *Central Wisconsin Bankshares, Inc. v. Board of Governors of the Federal Reserve System*, 583 F.2d 294, 296-98 (7th Cir. 1978) (construing § 1842(b)). *But see* 553 F.2d at 27, where the court rejected the Board's argument that an oral conference between representatives of the applicant and Board personnel started the time period running again. In that case, however, the Board had conceded that no new facts were presented at the conference. In *Citicorp supra* n. 59, the court discussed various pros and cons of a "tolling" doctrine, as an alternative to starting the whole 91-day period over again, but it left resolution of this question to "another day". 589 F.2d at 1189.

[61] Board of Governors of the Federal Reserve System, *Statement of Policy on Supervision and Regulation of Foreign Bank Holding Companies* (Feb. 23, 1979 Press Release) [hereinafter cited as Board Policy Statement].

[62] BHCA, § 2(d), 12 U.S.C. § 1841 (1976).

[63] *See* 12 C.F.R. Part 215 [Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks] (1980) and Federal Reserve Act, § 23A, 12 U.S.C. § 371c (1976).

[64] BHCA § 4(a)(2), 12 U.S.C. § 1843(a)(2) (1976).

[65] *See generally* § 2(h) of the BHCA, 12 U.S.C. 1841(h), *as amended by* § 8(e) of the IBA, 92 Stat. 623 (1978); § 4(c)(9) of the BHCA, 12 U.S.C. 1843(c)(9); § 225.4(g) of the Fed's Regulation Y, 12 C.F.R. § 225.4(g) (1980); and Fed interpretation at 12 C.F.R. § 225.124 (1980). In light of the amendments made by § 8(e) of the IBA, 92 Stat. 623, the Fed recently proposed a complete revision of its BHCA regulations governing the nonbank operations of foreign banking organizations. *See* 45 Fed. Reg. 30082 (1980).

[66] *See* Pub.L. No. 95-369, § 8(e), 92 Stat. 623, and S. Rep. No. 1073, 95th Cong., 2nd Sess. 14-17 (1978). *See also* the Fed's recently proposed regulations at proposed § 211.23(f)(6), 45 Fed. Reg. 30085 (1980). Lines of business are proposed to be determined by reference to the four-digit categories under the *Standard Industrial Classification Manual*, Executive Office of the President, Office of Management and Budget (1972).

[67] *See* Federal Reserve Forms Y-1 and Y-2 (December, 1979); Board Policy Statement, *supra* n. 61; Board of Governors of the Federal Reserve System, Division of Banking Supervision and Regulation, *BHC Letter 156* addressed to all Reserve Banks. Recently, the Board published for public comment a proposed new Annual Report Form (FR Y-7) for all foreign bank holding companies and foreign banks covered by IBA § 8, such as BM. It would require detailed types of financial and other information from covered foreign banks on an annual basis, irrespective of whether they plan to acquire a major U.S. bank. 44 Fed. Reg. 64906 (1979). Needless to say, the form has aroused a storm of protest from banks in BM's position. *See* Wiegold, *New Fed Disclosure Plan Worries Foreign Bankers*, *Am. Banker*, Nov. 26, 1979 at 1.

[68] See *Hearings*, *supra* n. 6 at 21–23 (statement of Donald L. Flexner, Deputy Assistant Attorney General, Antitrust Division, Dep't of Justice).

[69] *Id.* at 23.

[70] BHCA, § 3(c), 12 U.S.C. 1842(c) (1976).

[71] BHCA, § 11(b), 12 U.S.C. § 1849(b).

[72] *Id.*

[73] See generally Heller, Handbook of Federal Bank Holding Company Law, ch. 3 (1976) for a discussion of the competitive and other factors considered by the Board in acting on bank acquisitions.

[74] *United States v. Philadelphia National Bank*, 374 U.S. 321 (1962) at 356.

[75] See n. 68 *supra* at 22.

[76] See n. 68 *supra* at 23 and 46.

[77] See 65 Fed. Res. Bull. 350 (*Standard Chartered Bank, Ltd.*); 65 Fed. Res. Bull. 354 (*The Hong Kong and Shanghai Banking Corporation*); and 65 Fed. Res. Bull. 357 (*National Westminster Bank, Ltd.*) (1979).

[78] *Id.*

[79] See n. 57 *supra*.

[80] See Board Regulation BB, 12 C.F.R. § 228.8 (1980).

[81] N.Y. Banking Law, § 143-b (McKinney) (1966).

[82] N.Y. Banking Law, Article 111-A (McKinney) (1966).

[83] N.Y. Banking Law, § 143-b(3) (McKinney) (1966).

[84] N.Y. Banking Law, § 10 (McKinney) (1966).

[85] Marine Midland recently converted to national bank status in order to exclude New York State jurisdiction over the matter. See *Comptroller's Opinion*, *supra* n. 8.

[86] [1979] 27 Wash. Fin. Repts. (BNA) at A20-21. In later testimony before the Office of the Comptroller of the Currency on Marine Midland's application to convert to a federal charter, Superintendent Siebert claimed that the financial statements submitted by the Hong Kong and Shanghai Banking Corporation, while satisfying the SEC disclosure requirements, were "inadequate to properly analyze the Hong Kong and Shanghai Banking Corporation group as an economic entity" and thus made it impossible for her to approve the application. [1979] 42 Wash. Fin. Repts. (BNA) at A22-23.

[87] See Letter from Muriel Siebert to the Honorable Henry S. Reuss, U.S. House of Representatives (Feb. 16, 1979).

[88] See *Alvarez-Stelling v. Siebert*, 415 N.Y. S.2d 378 (1979).

[89] See Board Order, *supra* n. 14.

[90] *Credit and Commerce American Investment et al. v. Board of Governors of the Federal Reserve System*, filed in March 1979 with U.S.C.A. for the District of Columbia.

[91] With certain exceptions, any company which has assets in excess of \$ 1,000,000 and a class of equity securities held by more than 500 holders of record must register such securities under Section 12(g) of the Securities Exchange Act of 1934, 15 U.S.C. § 781(g) (1976). In the case of a bank holding company, registration would be with the SEC. In the case of an insured U.S. bank, registration is with the appropriate federal banking agency – state member banks with the Federal Reserve Board, national banks with the Comptroller of the Currency, and state nonmember banks with the Federal Deposit Insurance Corporation. Section 12(i) of the Exchange Act, 15 U.S.C. § 781(i), (1976).

[92] See Section 14 of the Securities Exchange Act, 15 U.S.C. § 78n (1976). Sections 14(a)–(c) govern proxy solicitations and Sections 14(d)–(f) govern tender and exchange offers.

[93] Section 12(f) of the Exchange Act, 15 U.S.C. § 781(f) (1976).

[94] For SEC requirements on proxy solicitations, see Regulation 14A, 17 C.F.R. § 240.14a (1979); for filings made after Dec. 30, 1979, see Exchange Act Release no. 16356, [Current] Fed. Sec. L. Rep. (CCH) ¶ 82,358. For SEC requirements on tender offers, see Regulation 14D, 17 C.F.R. § 240.14d (1979) and amendments to Regulation 14D and new Regulation 14E,

effective Jan. 7, 1980, Release Nos. 33-6158 and 34-16384, 44 Fed. Reg. 70326 (1979). Under Exchange Act, § 12(i), 15 U.S.C. § 78 1(i), the federal banking agencies must adopt "substantially similar" regulations as the SEC on proxy solicitations and tender offers, unless they find that implementation of substantially similar regulations with respect to insured banks are not necessary or appropriate in the public interest or for protection of investors. For state member banks, see Federal Reserve System Regulation F, 12 C.F.R. Part 206 (1979) and amendments effective Dec. 31, 1979, 44 Fed. Reg. 67961 (1979); for national banks see 12 C.F.R. Part 11 (1979) and amendments effective Dec. 31, 1979 and Jan. 1, 1981, 44 Fed. Reg. 69614; for insured state nonmember banks, see 12 C.F.R. Part 335 (1979) and amendments effective Dec. 31, 1979 and Jan. 1, 1981, 44 Fed. Reg. 67627 (1979).

[95] See Section 14(c) of the Exchange Act, 15 U.S.C. § 78n(e) (1976) and SEC Regulations 14a(9), 17 C.F.R. § 240.14a9 (1979) and 14E, 44 Fed. Reg. 70326 (1979); for the federal banking agencies, see 12 C.F.R. § 11.5(h) (1979) (Comptroller), 12 C.F.R. § 206.5(h) (1979) (Board), and 12 C.F.R. § 335.5(h) (1979) (FDIC).

[96] See generally regulations enumerated at n. 94, *supra*.

[97] See n. 95 *supra*.

[98] TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1975) at 449.

[99] Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d) (1976) and Regulation 13D of the SEC, 17 C.F.R. § 240.13d (1979). Under Section 12(i) of the Exchange Act, 15 U.S.C. § 78 1(i) (1979), the federal banking agencies administer Section 13(d) for the registered equity securities of insured banks and must adopt "substantially similar" regulations, unless they can make certain findings discussed *supra* in n. 94. For banking agency rules pertaining to the acquisition in similar circumstances of any registered equity security of a bank, see generally banking agency regulations in n. 94 *supra*.

[100] See Section 13(d)(3) of the Exchange Act, 15 U.S.C. § 78m(d)(3) (1976), and SEC Regulation 13D, 17 C.F.R. § 240.13d-3 (1979). For registered equity securities of banks, see federal banking agency regulations, n. 94 *supra*.

[101] See Sections 16(a) and 16(b) of the Exchange Act, 15 U.S.C. § 78p(a)-(b) (1976). Under Section 12(i) of the Exchange Act, 15 U.S.C. § 78 1(i) (1979), the federal banking agencies administer these provisions for the registered equity securities of insured banks and must adopt "substantially similar" regulations unless they can make certain findings discussed *supra* in n. 94. For federal banking agency regulations, see generally n. 94 *supra*.

[102] Section 16(b) of the Exchange Act, 15 U.S.C. § 78p(b) (1976). For registered equity securities of banks, see federal banking agency regulations, n. 94 *supra*.

[103] 12 U.S.C. 72 (1976) as amended by 92 Stat. 608 (1978).

[104] BHCA, § 2(b), 12 U.S.C. 1841(b) (1976).

[105] Title VI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub.L. No. 95-630, 92 Stat. 3683 (1978).

[106] 12 U.S.C. 1817(j)(1) (1976). See also Board Regulation Y, 12 C.F.R. § 225.7 (1980); Comptroller of the Currency regulations, 12 C.F.R. 15 (1979); and FDIC Regulations, 12 C.F.R. § 303.15 (1980).

[107] *Id.*

[108] See 12 U.S.C. § 1817(j)(6) (1976) and federal banking agency regulations, n. 106 *supra*.

[109] See 12 U.S.C. § 1817(j)(7) (1976) and federal banking agency regulations, n. 106 *supra*.

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