

Oklahoma Law Review

Volume 36 | Number 4

1-1-1983

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Recommended Citation

James T. Pitts & J. J. Cranmore, *Considerations Under the Federal Banking and Securities Laws with Respect to Bank Mergers or Takeovers*, 36 OKLA. L. REV. 789 (1983), <https://digitalcommons.law.ou.edu/olr/vol36/iss4/3>

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CONSIDERATIONS UNDER THE FEDERAL BANKING AND SECURITIES LAWS WITH RESPECT TO BANK MERGERS OR TAKEOVERS

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Introduction

Successful mergers, consolidations, and tender-offers involving financial institutions require compliance with a complicated matrix of state and federal law, including corporate, securities, and banking regulations. Among the more important variables to be considered are: whether the institutions involved have state or federal charters; whether the vehicle utilized in the tender-offer or reorganization is a holding company; whether any of the institutions has a class of equity securities registered under the Securities Act of 1933 or the Securities Exchange Act of 1934; and whether the corporate entities involved have the same principal place of business or state of incorporation. In addition, the philosophies, regulations, and policies (published and unpublished) of the different regulatory agencies must be ascertained and taken into account. While this article will discuss transactions involving both state and national banks, it will concentrate on the legal requirements for transactions involving national banks and their parent bank holding companies.

I. *The Regulatory Framework*

The banking industry in the United States is composed of a dual system of national banks, chartered and examined by the Office of the Comptroller of the Currency,¹ and state banks, chartered and regulated by agencies established pursuant to state law.² Since the

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This article represents the views of the authors only and is in no way intended to reflect the official position of the Office of the Comptroller of the Currency.—*Ed.*

1. See 12 U.S.C. §§ 21-215b (1982).

2. Although the dual system has been praised for encouraging flexibility and innovation, it also has been condemned for promoting competition among agencies with the result that regulations are inadequately enforced. See J. WHITE, *BANKING LAW* 45 (1976); Golembe, *Our Remarkable Banking System*, 53 VA. L. REV. 1091, 1101 (1967).

passage of the National Bank Act of 1864,³ Congress has fostered a policy of competitive equality between national and state chartered banks. National banks are required to operate within the provisions of state law, except to the extent that such laws are inconsistent with federal law.⁴

One commentator has noted, "Since the depression federal supervision of banks has bordered on bureaucratic overkill."⁵ National banks are regulated by the Federal Reserve Board⁶ and the Federal Deposit Insurance Corporation (FDIC),⁷ in addition to the Office of the Comptroller of the Currency. Similarly, state chartered banks, although primarily regulated by the various state banking authorities, are allowed to apply for membership in the Federal Reserve System⁸ and for FDIC insurance.⁹ Thus, few banks avoid federal supervision entirely.¹⁰

Although Congress has recognized that more than one agency may be an "appropriate federal banking agency" and thereby exercise supervisory authority over a given institution,¹¹ it has generally provided for a "responsible agency" to exercise primary regulatory authority.¹² Under the Bank Merger Act,¹³ the Comptroller of the Currency is the responsible agency if the "acquiring, assuming or resulting" bank is to be a national bank or a bank operating under the laws of the District of Columbia (national banks); the responsible agency for state member banks is the Board of Governors of the

3. Ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C.). See 12 U.S.C. § 38 (1982).

4. See, e.g., *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980).

5. WHITE, *supra* note 2, at 45. See also *Fidelity Fed. Sav. & Loan Ass'n v. de La Cuesta*, 102 S.Ct. 3014, 3018 (1982) (the authority of federal bank regulatory agencies over financial institutions extends from "cradle to . . . corporate grave"), quoting *People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951). One justification for such extensive regulation is the special relationship banks have with the public. Banks are frequently regarded as quasi-public institutions, despite the fact that they are organized and operated by individuals in anticipation of profit, because of their profound impact on the economy and individual financial interests.

6. National banks are required to be members of the Federal Reserve System. 12 U.S.C. § 222 (1982).

7. All national banks are required to be insured by the Federal Deposit Insurance Act. 12 U.S.C. § 1814 (1982).

8. 12 U.S.C. §§ 321-22 (1982).

9. 12 U.S.C. §§ 1815-16 (1982).

10. By the end of 1973, only 207 banks were neither Federal Reserve System members nor insured by the FDIC. WHITE, *supra* note 2, at 45.

11. 12 U.S.C. § 1813(q) (1982).

12. 12 U.S.C. § 1828(c)(2) (1982). See also 12 U.S.C. § 1813(q) (1982) and 15 U.S.C. §§ 78c(a)(34), 781(i) (1982).

13. 12 U.S.C. § 1828(c) (1982).

Federal Reserve System; and the responsible agency for nonmember insured banks is the Federal Deposit Insurance Corporation.¹⁴

Because banks are relatively free to convert from state to national charters and vice versa,¹⁵ it is possible for a bank to select the regulatory authority that will have primary, if not exclusive, authority to rule upon its various applications, including applications for branches, operating subsidiaries, mergers, takeovers, and other changes in ownership. Because the various bank regulatory agencies sometimes have different and contradictory philosophies as to certain types of market- or product-extending activities, the choice of regulator determines the activities in which a bank may participate.¹⁶

II. *The Bank Holding Company Act*

A substantial number of banks have chosen to adopt a bank holding company form of operation. A "bank holding company" is defined as "any company which has control over any bank or over any company that is or becomes a bank holding company"¹⁷ For purposes of the Bank Holding Company Act (BHCA),¹⁸ a "bank" is defined as any institution that both accepts deposits the depositor has a legal right to withdraw on demand *and* which engages in the business of making commercial loans.¹⁹ Similarly, "company" is defined to include "any corporation, partnership, business trust, association, or similar organization, or any other trust."²⁰ Excluded from the definition, however, are corporations "the majority of the shares of which are owned by the United States or by any State."²¹ Neither an in-

14. 12 U.S.C. § 1828(c)(2) (1982).

15. 12 U.S.C. §§ 35, 214a (1982). *See also* 12 C.F.R. § 5.24 (1983). The policy statement contained in that regulation provides that the Comptroller ordinarily will approve an application by a state bank or other financial institution for conversion to a national bank when such approval is consistent with the basic objective of maintaining a sound national banking system. An application to convert should not be motivated *solely* by supervisory pressures from other regulatory authorities.

12 C.F.R. § 5.24(a)(2) (1983) (emphasis added).

16. *Compare, e.g.,* Comptroller's regulations at 12 C.F.R. §§ 5.30-.31, 5.33-.34 (1983) *with* FDIC regulations at 12 C.F.R. § 333.1-.101 (1983).

17. 12 U.S.C. § 1841(a) (1982).

18. Ch. 240, 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. §§ 1841-50 (1982)).

19. 12 U.S.C. § 1841(c) (1982).

20. 12 U.S.C. § 1841(b) (1982). Such "other trust" is not a "company" if, by its terms, the trust must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust. *Id.*

21. *Id.*

dividual nor individuals acting in concert are a company for purposes of the BHCA.²²

The key factor in determining whether a bank holding company exists under the BHCA is the concept of "control."²³ A company is deemed to have control over a bank or over any company if: (1) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25% or more of any class of voting securities of the bank or company; (2) the company controls in any manner the election of the majority of the directors or trustees of the bank or company; or (3) the Federal Reserve Board (Board) determines after notice and opportunity for hearing that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.²⁴ Any company that directly or indirectly owns, controls, or has power to vote less than 5% of any class of voting securities of a given bank or company is presumed not to control that bank or company.²⁵ Similarly, in administrative or judicial proceedings,²⁶ a company may not be held to have had control over any given bank or company unless that company at the time in question directly or indirectly owned, controlled, or had power to vote 5% or more of any class of voting securities of the bank or company, or had already been found to have had control in a Board proceeding.²⁷

Under the ownership attribution rules, shares owned or controlled by any subsidiary of a bank holding company, or held or controlled directly or indirectly by trustees for the benefit of a company, the shareholders or the members of a company, or the employees of a company, are deemed to be controlled by such a company. Similarly, shares transferred by a bank holding company directly or indirectly to any transferee who is indebted to the holding company or which has one or more officers, directors, trustees, or beneficiaries in common with or subject to control by the transferring holding company are deemed to be indirectly owned or controlled by the bank holding company, unless the Board determines that the transferor is not in fact capable of controlling the transferee.²⁸

To assist in the determination of "control," the Board has adopted

22. See P. HELLER, FEDERAL BANK HOLDING COMPANY LAW 3 (1976).

23. "Control" is defined in 12 U.S.C. § 1841(a), (g) (1982); 12 C.F.R. § 225.2 (1983).

24. 12 U.S.C. § 1841(a)(2) (1982).

25. 12 U.S.C. § 1841(a)(3) (1982). See *infra* note 45.

26. Other than a hearing to determine whether a company directly or indirectly exercises controlling influence over the management or policies of the bank or company. See 12 U.S.C. § 1841(a)(2)(C) (1982).

27. 12 U.S.C. § 1841(a)(4) (1982).

28. 12 U.S.C. § 1841(g) (1982).

certain conclusive presumptions by regulation. Whenever the transferability of 25% or more of any class of voting securities of a company is conditioned in any manner upon the transfer of 25% or more of any class of voting securities of another company, the holders of both securities affected by the condition constitute, in their capacity as such, a "company" for purposes of the Act.²⁹ The regulation also sets forth five rebuttable presumptions of control³⁰ and establishes a procedure for determining control in any case where there is a rebuttable presumption, or in any case where it appears to the Board that a company is exercising a controlling influence over the management or policies of a bank or another company and the company has not complied with the provisions of the BHCA.³¹ In such cases, the Board may inform the company that a preliminary determination of control has been made and that the company has thirty days in which to:

- (1) indicate its willingness to terminate the control relationship; or
- (2) indicate that it will promptly seek Board approval to retain the control relationship; or
- (3) indicate that it will register as a bank holding company; or
- (4) if it is already a holding company, report the bank or other company as a subsidiary; or
- (5) provide the Board with such facts and circumstances as may support its contention that there is not a control relationship. A company may request a hearing to contest the Board's preliminary determination of control.³²

Bank holding company status subjects the holding company, its subsidiary banks, and its nonbank subsidiaries to additional regulation. For example, subsidiaries of bank holding companies may be affiliates of the other subsidiary banks in the holding company for purposes of the loan limitations to affiliates.³³ Moreover, the permissible activities of bank holding companies and their subsidiaries are regulated by both state and federal law. States may not permit bank holding companies to expand or engage in activities that would violate the BHCA, but states may restrict the permissible activities of bank holding companies within their jurisdictions.³⁴

On the federal level, bank holding companies are required to file a

29. 12 C.F.R. § 225.2(a) (1983). The presumption does not apply if one of the issuers of such securities is a properly identified subsidiary of the other.

30. 12 C.F.R. § 225.2(b) (1983).

31. 12 C.F.R. § 225.2(c) (1983).

32. *Id.*

33. 12 U.S.C. §§ 221a, 371c, 1828(j).

34. *See, e.g.*, 12 U.S.C. §§ 35, 36, 85 (1982).

registration statement with the Federal Reserve Board within 180 days of becoming a holding company.³⁵ The Board is authorized to require bank holding companies to submit reports under oath,³⁶ and by regulation bank holding companies are required to file annual reports updating their registration information.³⁷ The Board may also examine each bank holding company and its subsidiaries.³⁸ In addition, a bank holding company may be subject to Securities Act and Exchange Act registration and filing and disclosure requirements.³⁹

The BHCA prohibits any company from acquiring control of a bank without the prior approval of the Board.⁴⁰ It is also unlawful for any action to be taken that causes any company to become a bank holding company or that causes a bank to become a subsidiary of a bank holding company without such prior approval. Prior approval is also necessary before a bank holding company or a nonbank subsidiary thereof may acquire all or substantially all of the assets of a bank, or before any bank holding company may merge or consolidate with any other bank holding company.⁴¹

By statute, the Board, after receiving an application from a company seeking to become a bank holding company or seeking to do any of the activities enumerated in 12 U.S.C. § 1842(a), must give notice to either the Comptroller of the Currency or the appropriate state supervisory agency.⁴² If the Comptroller of the Currency or the state bank supervisory agency disapproves the application, the Board must so notify the applicant and further inform both the applicant and the disapproving agency of the hearing date.⁴³ The hearing must commence not less than ten nor more than thirty days after the notice; if

35. 12 U.S.C. § 1844(a) (1982).

36. 12 U.S.C. § 1844(c) (1982).

37. 12 C.F.R. § 225.5(b) (1983).

38. 12 U.S.C. § 1844(c) (1982); 12 C.F.R. § 225.5(b) (1983).

39. See *infra* note 157.

40. 12 U.S.C. § 1842(a) (1982).

41. *Id.* There are certain exceptions enumerated in the statute.

42. Notice is required, according to the statute, "[I]n order to provide for the submission of the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be." 12 U.S.C. § 1842(b) (1982). Such views must be submitted within thirty days, or within ten days in the event that an emergency condition requires expeditious actions. The statute also provides the Board with the authority to dispense with notice requirements if the Board determines "that it must act immediately on any application for approval under this section in order to prevent the probable failure of a bank or bank holding company involved in a proposed acquisition, merger, or consolidation transaction . . ." *Id.*

43. *Id.* No hearing is required if the state bank supervisory agency or Comptroller recommends approval. See, e.g., *Northwest Bancorp. v. Board of Governors of Fed. Reserve Sys.*, 303 F.2d 832 (8th Cir. 1962).

the Board fails to act on any application for approval within ninety-one days, the application is deemed to have been granted.⁴⁴

The BHCA sets forth specific factors the Board must consider in reviewing applications for the formation of a bank holding company or any acquisition, merger, or consolidation pursuant to 12 U.S.C. § 1842. Specifically, the Board will not approve:

- (1) any acquisition or merger or consolidation . . . which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States; or
- (2) any other proposed acquisition or merger or consolidation . . . whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint o[f] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.⁴⁵

The legal standard the Board applies in reviewing applications pursuant to BHCA is the same as federal bank supervisory agencies apply in reviewing proposed merger transactions.⁴⁶ First, the Board must consider the anticompetitive effect of the proposed transaction as set forth in 12 U.S.C. § 1842(c). The standards are derived from, but not identical to, the Sherman Act and section 7 of the Clayton Act.⁴⁷ If the Board determines a proposed activity would violate the antitrust standards, it must deny the application unless the anticompetitive effects are clearly outweighed by the needs of the community to be served. Approval of a transaction by the Board does not free the transaction

44. 12 U.S.C. § 1842(b) (1982).

45. See 12 U.S.C. § 1842(c) (1982). It is important to remember that any company may acquire up to 5% of the voting shares of a bank, and maybe even as much as 24.99%, without becoming a bank holding company, so long as the acquiring company avoids other indicia of control. See 12 U.S.C. § 1841(a), (g) (1982); 12 C.F.R. § 225.2 (1983). Although persons seeking to form a bank holding company must obtain approval from the Board, the authority to approve the formation of certain bank holding companies has been delegated to the Federal Reserve Banks. 12 C.F.R. § 265.2(f)(22) (1983). If a proposed formation of a bank holding company involves the acquisition of two or more banks, applicants have a choice of filing either consolidated or separate applications. However, when the proposal to acquire several banks is contained in a single application, the Board may deny the entire proposal if it believes that the approval of even one of the acquisitions is unjustified. See *Southland Bank Corp.*, 60 FED. RESERVE BULL. 669 (1974). "If the applicant files for one bank at a time, the applicant may be more successful in obtaining the bank most sought after." HELLER, *supra* note 22, at 84.

46. Compare 12 U.S.C. § 1842(c) (1982) with 12 U.S.C. § 1828(c)(5) (1982).

47. *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1975).

from litigation on antitrust grounds. The Board is required to notify the Attorney General immediately of its approval of a proposed acquisition, merger, or consolidation transaction under 12 U.S.C. § 1842.⁴⁸

A transaction may be consummated immediately on approval by the Board if the Board has found that "it must act immediately in order to prevent the probable failure of a bank or bank holding company involved in any such transaction."⁴⁹ Similarly, if the Board has advised either the Comptroller of the Currency or the state supervisory authority "of the existence of an emergency requiring expeditious action and has required the submission of views and recommendations within ten days," the transaction may be consummated within five days of Board approval.⁵⁰ The statute specifically provides, however, "In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the Board."⁵¹ The statute further provides:

Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction approved under section 1842 of this title shall be commenced prior to the earliest time under this subsection at which the transaction approval under section 1842 of this title might be consummated. The commencement of such an action shall stay the effectiveness of the Board's approval unless the court shall otherwise specifically order.⁵²

It is therefore possible in transactions involving bank holding companies that three federal agencies will have an opportunity to express their policies with regard to both anticompetitive effects and whether such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.⁵³ In assessing the anticompetitive effects

48. 12 U.S.C. § 1849(b) (1982).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. The Federal Reserve Board issued a Proposed Policy Statement on Bank Acquisitions, Feb. 26, 1982. That statement was criticized by the Justice Department as allowing some applications "to escape careful Board scrutiny." *AM. BANKER*, Apr. 20, 1982, at 1. The Board had previously argued that it had the authority to deny a proposed transaction based on findings that the anticompetitive effects would thwart the convenience and needs of the community, even if these effects are insufficient to constitute a violation of the antitrust standards. However, this view has been rejected by several circuits. *See Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255 (5th Cir. 1981); *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459 (9th Cir. 1973) (concerning the language in the Bank Merger Act, 12 U.S.C. § 1828(c)(5) (1982)). It should be noted that despite the "commerce" language in section 7 of the Clayton Act, 15 U.S.C. § 18 (1982), and the historical distinction between banking and commerce, the Supreme Court

of any particular transaction, competition from the thrift industry has not historically been considered. The Supreme Court, in *United States v. Connecticut National Bank*,⁵⁴ stated:

[D]espite the strides that savings banks in that State have made toward parity with commercial banks, the latter continue to be able to provide a cluster of services that the former cannot, particularly with regard to commercial customers, and this Court has repeatedly held that it is the unique cluster of services provided by commercial banks that sets them apart for purposes of [the anti-trust laws].

With the passage of the Depository Institutions Deregulation and Monetary Control Act of 1980,⁵⁵ however, the historical distinctions between thrifts and commercial banks, at least as to the locally limited retail customer, has been virtually eliminated.

In addition to the anticompetitive effects, the Board is required to evaluate the so-called "banking factors."⁵⁶ As discussed by the Supreme Court in *Board of Governors of the Federal Reserve System v. First Lincolnwood Corp*⁵⁷:

The Board has regularly treated deficiencies in the financial and managerial resources of holding companies and their banking subsidiaries as sufficient grounds for denying an application. Moreover, Congress has been made aware of this practice, yet

has expressly held that bank mergers are subject to the Clayton Act. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

54. 418 U.S. 656, 664 (1974).

55. Pub. L. No. 96-221, 94 Stat. 132 (1980). Thrifts are increasingly viewed as competitors in gauging the anticompetitive impact on market share. *United States v. First Nat'l State Bancorporation*, 499 F. Supp. 793, 800 (D.N.J. 1980). The reluctance of the Board to include most non-bank competition in its definition of product market has led to extensive criticism. See Note, *Commercial Bank Mergers: The Case for Procedural and Substantive Deregulation*, 95 HARV. L. REV. 1914, 1919 (1982):

[I]n delineating the market in which to assess the competitive impact of bank mergers, the Board, by failing to include most nonbank competition, has produced an unrealistically narrow definition of the product market. The resulting inflation of concentration ratios renders the guidelines more stringent for bank mergers than for mergers in other industries.

See also Savage, *The Line of Commerce: Does it Apply to Thrift Institutions?*, ISSUES IN BANK REGULATION 31 (Autumn 1982).

56. 12 U.S.C. § 1842(c) (1982). "In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served." *Id.* Pursuant to the Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901-2905 (1982), federal financial supervisory agencies are required to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institutions, and . . . take such record into account in its evaluation "of applications involving merger transactions. 12 U.S.C. § 2903 (1982). See 12 U.S.C. § 2902(3)(E) (1982).

57. 439 U.S. 234 (1978).

four times has "revisited the Act and left the practice untouched." We therefore agree with the Court of Appeals that the Board can disapprove formation of a bank holding company solely on grounds of financial or managerial unsoundness.⁵⁸

The choice of charter, Federal Reserve System membership, and FDIC insurance, as well as use of bank holding companies, has led at least one observer to conclude:

The inability of the agencies to dispose uniformly of merger applications further undercuts claims of agency expertise. A bank can choose its regulator through its decision to organize as a national or as a state bank, with or without membership in the Federal Reserve System. A bank can thus select the agency that promulgates regulatory policies, including merger approval policy, most favorable to the transactions desired by the bank. This opportunity to choose produces a "race of laxity" as agencies deny increasingly fewer bank proposals in order to retain banks within their jurisdiction.⁵⁹

III. *Banking Law Considerations*

The supervisory framework for regulating mergers and takeovers of banks is subject to the criticism that under the current regulatory framework, bank mergers receive duplicative, inconsistent, and inefficient treatment from the agencies and from the courts.⁶⁰ In addition to the issues raised by the structure of federal bank regulation in the United States and its effect on mergers and acquisitions, the substantive laws under which banks, bank holding companies, and their nonbank subsidiaries must operate present additional considerations that may have an impact on both geographic and product-market extensions, as well as on the ability of individuals and entities to control the financial institutions.

A bank's choice to operate pursuant to a state or a national charter, as well as the choice (in the case of a state bank) to become a member of the Federal Reserve system can affect the scope of the permissible activities of that bank and any of its subsidiaries. Furthermore, the choice to conduct activities through a bank, bank subsidiary, or a nonbank subsidiary of a bank holding company can affect not only the

58. *Id.* at 248, quoting in part *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974). The Court further held that "the Board may deny applications for holding-company status solely on grounds of financial or managerial unsoundness, regardless of whether that unsoundness would be caused or exacerbated by the proposed transaction." *Id.* at 252.

59. Note, *Commercial Bank Mergers: The Case for Procedural and Substantive Deregulation*, 95 HARV. L. REV. 1914, 1926-27 (1982).

60. *Id.*

range of permissible activities available to the institution but can also influence the ability of the institution to expand its geographical markets.

The range of permissible activities for state chartered banks is regulated primarily by their respective state laws. The powers of national banks are set forth in 12 U.S.C. § 24.⁶¹ That statute grants certain express powers and further authorizes banks to exercise "subject to law, all such incidental powers as shall be necessary to carry on the business of banking. . . ." ⁶² The seminal case interpreting this language is *First National Bank v. National Exchange Bank*.⁶³ There, the Supreme Court interpreted section 24(7) as granting such powers

as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor.⁶⁴

In interpreting these incidental powers, one commentator has stated that:

First, the function cannot be specifically prohibited by law. Secondly and possibly most important today, is the concept of safety. The courts will not sanction a speculative business activity which threatens the security of the bank. Thirdly, the activity must be reasonable or appropriate. Although the measure of reasonableness is nowhere explicitly stated, the cases suggest that reasonableness should be measured by customary practices of other financial institutions or nonfinancial institutions, or even by the frequency with which other banks are following the questioned practice.⁶⁵

It should be noted, however, that the activities of nonbank subsidiaries of bank holding companies are permissible if they are found to be "so closely related to banking or managing or controlling banks as to be a proper incident thereto."⁶⁶ In determining whether a particular activity is a proper incident to banking, the Board considers

61. 12 U.S.C. § 24 (1982).

62. 12 U.S.C. § 24, ¶ 7 (1982).

63. 92 U.S. 122 (1875).

64. *Id.* at 127.

65. WHITE, *supra* note 2, at 308.

66. 12 U.S.C. § 1843(c)(8) (1982).

whether the activity to be performed by the affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced *de novo* and activities commenced by acquisition, in whole or in part, of a going concern.⁶⁷

The scope of permissible activities for nonbank subsidiaries of bank holding companies is further defined in 12 C.F.R. § 225.4.⁶⁸ That regulation sets forth a “laundry list” of activities that have been found to be permissible. It further sets forth procedures for filing applications to engage in nonbanking activities both through *de novo* entry⁶⁹ and through acquisitions of going concerns.⁷⁰ That an activity is on the list, however, does not mean prior Board approval is not required for the acquisition of shares of the company engaged in the activity, nor does it mean a holding company is free to engage in the list of nonbanking activities without approval for the formation of a newly organized company. If a proposed activity is listed in 12 C.F.R. § 225.4 and the bank holding company is planning to engage in such activity through a *de novo* operation and no substantive adverse comments have been received, the Board will consider the application in light of the “public benefits” test set forth in 12 U.S.C. § 1843(c)(8).⁷¹

Historically, the scope of the “closely related” language of the BHCA was believed to allow nonbank subsidiaries of bank holding companies to engage in a broader range of activities than would be permissible for banks or for the subsidiaries of banks pursuant to the incidental powers clause of the Glass-Steagall Act.⁷² Thus, regulatory

67. 12 U.S.C. § 1843(8) (1982).

68. 12 C.F.R. § 225.4 (1983).

69. 12 C.F.R. § 225.4(b)(1) (1983).

70. 12 C.F.R. § 225.4(b)(2) (1983).

71. That subsection provides:

In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced *de novo* and activities commenced by the acquisition, in whole or in part, of a going concern.

12 U.S.C. § 1843(c)(8) (1982).

choices such as charter, membership in the Federal Reserve system, and the proposed corporate structure for the contemplated activity can greatly affect the scope of permissible activities. This is especially evident with regard to the increase in bank activities in the securities area.

The securities activities of national banks are greatly limited by section 16 of the Glass-Steagall Act,⁷³ which limits

[t]he business of dealing in securities and stock by [an] association . . . to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock [subject to certain exceptions]⁷⁴

Similarly, section 21 of the Glass-Steagall Act prohibits any entity "in the business of issuing, underwriting, selling, or distributing . . . securities, to engage at the same time to any extent whatever in the business of receiving deposits."⁷⁵ By its terms, section 21 does not prohibit an entity that is receiving deposits from affiliating with an entity that is underwriting, selling, or distributing securities for its own account.⁷⁶ Section 20 of the Glass-Steagall Act⁷⁷ prohibits affiliations between member banks that are members of the Federal Reserve system and firms that are "engaged principally" in certain specified securities activities. Thus, state banks that choose not to be members of the Federal Reserve system are arguably far freer from the restrictions imposed by the Glass-Steagall Act. A contention is frequently raised that savings and loan associations are not "banks" within the meaning of the Glass-Steagall Act and are therefore not subject to the wall it attempts to create between commercial and investment banking.⁷⁸

72. Ch. 89, § 16, 48 Stat. 162, 184 (1935) (codified as amended at 12 U.S.C. § 24, ¶ 7 (1982)). While this is generally true, it is no longer universally the case. The Comptroller approved futures commission merchant and discount brokerage activities for national banks before the Federal Reserve Board approved such activities for bank holding companies and their nonbank subsidiaries. *BANKING EXPANSION REP.*, Feb. 21, 1983, at 6. *See, e.g.*, Application of Security Pacific Nat'l Bank, [1982-1983] *FED. BANKING L. REP. (CCH)* ¶ 99,284, at 86,255 (Aug. 26, 1982); Application of Bank America Corp. to acquire Charles Schwab & Co., [1982-1983] *FED. BANKING L. REP. (CCH)* ¶ 99,475, at 86,631 (Jan. 7, 1983).

73. Ch. 89, § 16, 48 Stat. 162, 184 (1935) (codified as amended at 12 U.S.C. § 24, ¶ 7 (1982)).

74. *Id.* Section 5(c) of the Glass-Steagall Act, 12 U.S.C. § 335 (1982), extends these same provisions to state banks that have become members of the Federal Reserve System. However, these provisions do not apply to state chartered banks that are not members of the Federal Reserve System.

75. 12 U.S.C. § 378(a)(1) (1982).

76. *See* H.S. Scott, *What Should be Done About the Glass Steagall Act*, 6 (preliminary draft, Nov. 1, 1981).

77. 12 U.S.C. § 377 (1982).

78. Scott, *supra* note 76, at 6.

IV. *Interstate Mergers and Acquisitions*

The decision to structure an activity through a bank, bank holding company, or a nonbank subsidiary of a bank holding company may have an effect on the ability of a corporation to operate on an interstate basis. In 1927, Congress passed the McFadden Act,⁷⁹ which was intended to establish competitive equality between national banks and state banks that were members of the Federal Reserve system by allowing national banks to branch within their municipalities to the extent permitted by state branching laws.⁸⁰ Furthermore, the Glass-Steagall Act permits national banks to branch on a statewide basis to the extent that state law permits such branching.⁸¹

Historically, however, state statutes almost universally prohibited out-of-state banks from establishing branches; thus the McFadden Act operated as a bar to most interstate banking. Similarly, the BHCA prohibits interstate bank holding company acquisitions of a "bank" unless that acquisition is explicitly permitted by the statute of the state.⁸² In recent months, however, those prohibitions have come under increasing attack.⁸³

By its terms, the BHCA only prohibits bank holding companies

79. Ch. 191, 44 Stat. 1224 (1933) (codified in scattered sections of 12 U.S.C.).

80. Ch. 191, § 7, 44 Stat. 1224, 1228 (1933) (codified at 12 U.S.C. § 36(c) (1982)). The McFadden Act is said to be an outgrowth of A.P. Giannini's (Bank of America's founder) ambition to branch nationwide. He attempted to buy the predecessor of Citibank and his designs on the New York market led to a "celebrated" meeting with J.P. Morgan at which an agreement was reached that was described as "New York for J.P., the West for A.P." Wall St. J., Apr. 26, 1983, at 4, col. 2.

81. Ch. 89, § 23, 48 Stat. 162, 189 (1935) (codified at 12 U.S.C. § 36(c) (1976)). Despite the congressional goal to foster competitive equality, it must be noted that state banking authorities and the Comptroller of the Currency have not always agreed on either their interpretation of the state banking laws with regard to branching or with regard to the method by which a bank will be allowed to branch. *See, e.g.,* First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966).

82. 12 U.S.C. § 1842(d) (1982).

83. Some have criticized these statutory restrictions as fostering disparity between the powers of foreign and domestic banks because foreign banks were allowed to establish offices in more than one state. *See, e.g.,* Halbrook & Savage, *Interstate Commercial Banking; the Anti-Trust Issues*, 98 BANKING L.J. 747, 748 (1981). The International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 (codified in scattered sections of 12 U.S.C.), "attempted to equalize the competition between U.S. and foreign banks mainly by restricting interstate expansion by foreign banks rather than increasing the expansion powers of domestic banks." *Id.* Further, sections 112 and 121 of the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469-1541 (codified as amended at 12 U.S.C. § 1464 (1982) permits certain acquisitions of endangered institutions by out-of-state banks or bank holding companies. The law requires prior consultation with the state bank supervisor and includes a preference for extraordinary acquisitions by in-state rather than out-of-state institutions. These provisions are limited to closed banks with total assets of at least \$500 million and mutual banks of that size that are either closed or in danger of closing.

from having "bank" subsidiaries in more than one state (unless specifically authorized by state law), but does not prohibit bank holding companies from having nonbank subsidiaries in multiple states. Therefore, the definition of "bank" becomes crucial for a bank holding company.⁸⁴ A bank holding company may be able to engage in interstate activity that is functionally similar to the business performed by "banks" through the use of nonbank subsidiaries that are engaged in permissible nonbanking activities pursuant to 12 U.S.C. § 1843(c)(8). Such activities must be "so closely related to banking or managing or controlling banks as to be a proper incident thereto."⁸⁵ In this regard, bank holding companies have attempted to charter or acquire limited-purpose banks that arguably are not "banks" for purposes of the BHCA because they do not both accept demand deposits and engage in the business of making commercial loans.⁸⁶

84. Congress has twice modified the definition of "bank" under the BHC Act. The original definition included all national banks, state banks, and savings banks. Act of May 9, 1956, ch. 240, § 2(c), 70 Stat. 133. In 1966, the definition was narrowed to encompass only those domestic institutions which "[accept] deposits that the depositor has a legal right to withdraw on demand." Act of July 1, 1966, Pub. L. No. 89-485, § 3, 80 Stat. 236, 237. The current definition was enacted in 1970: "(c) 'Bank' means any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c) (1982).

Wilshire Oil Co. v. Board of Governors of Fed. Reserve Sys., 668 F.2d 732, 733 (3d Cir. 1981), *cert. denied*, 457 U.S. 1132 (1982).

85. *See, e.g., In re Crocker Nat'l Corp.*, 66 FED. RESERVE BULL. 66 (1979), in which the Federal Reserve Board allowed the acquisition of an Hawaiian trust company by a California bank holding company. The Board opined that the trust company would not function as a bank because such trust company activities are permissible *nonbanking* activities described in Federal Reserve Board Reg. Y, 12 C.F.R. § 225.4(a) (1983).

86. *See Wilshire Oil Co. v. Board of Governors of Fed. Reserve Sys.*, 668 F.2d 732 (3d Cir. 1981), *cert. denied*, 457 U.S. 1132 (1982). The Comptroller of the Currency, in 1981, allowed Household Finance Corporation to acquire a small California bank, which divested its commercial loan portfolio. Following that and several other similar acquisitions, the definition of "commercial loan" was reevaluated by the Board. The Board now considers a commercial loan to be any loan other than a loan the proceeds of which are used to acquire property or services used by the borrower for personal, family, household, or charitable purposes. This definition of commercial loan is very broad and includes the purchase of such instruments as commercial paper, bankers' acceptances and certificates of deposit, the extension of broker call loans, the sale of federal funds, the deposit of interest-bearing funds, and similar lending vehicles. Letter from William W. Wiles, Secretary of the Federal Reserve Board, to Joseph Diamond, Esq., Dec. 16, 1982, regarding the proposed acquisition by the Dreyfus Corporation, New York, N.Y., of Lincoln State Bank, East Orange, N.J.

The Board also has strictly construed the term "demand deposit." The *Wilshire Oil Company of Texas* was unable to keep its New Jersey banking subsidiary even though it changed its official policy to restrict withdrawals from demand deposits to fourteen-day requests. *Wilshire Oil Co.*, 668 F.2d at 734. (Wilshire also informed bank customers that it would continue to honor demand withdrawals. *Id.*) The court, in sustaining the Board's order of divestiture, did not rely on the Board's reasoning that Wilshire had granted depositors a continuing legal right

During 1982 the Comptroller of the Currency allowed ten nonbanking companies to obtain national bank charters for subsidiaries. In each case, the companies claimed the subsidiaries technically were not "banks" within the meaning of the BHCA because they did not offer both demand deposit accounts and commercial loans.⁸⁷ The Comptroller of the Currency, however, has "declared a moratorium for [much of 1983 and at least part of 1984] in letting nonbanking companies establish banking subsidiaries."⁸⁸

There are, of course, additional ways for bank holding companies to establish an interstate presence. A bank holding company is free to acquire up to 5% of the voting shares of a bank regardless of state boundaries, and may, so long as it does not exercise some direct or indirect control, increase to 24.99% its interest in bank or bank holding companies located in other states.⁸⁹ Further, bank holding companies have sought to purchase interest by means other than voting securities, such as nonvoting preferred stock, thus avoiding incidents of control.⁹⁰ Such purchase agreements typically provide for conversion into common stock upon relaxation of the "ban" on interstate banking.⁹¹

of withdrawal on demand under the doctrine of promissory estoppel. *Id.* at 735. The court, rather, relied on the legislative history of the BHCA, which evidenced a congressional intention to cover financial institutions that accept the "functional equivalent" of a demand deposit. *Id.* at 738.

87. By offering either demand deposits or commercial loans, but not both, the "nonbank" banks attempt to avoid the BHCA definition of bank, thus avoiding regulation by the Board. Wall St. J., Apr. 6, 1983, at 4, col. 1.

88. *Id.* Before the moratorium, however, a dispute developed between the Comptroller and the Federal Reserve Board. In February 1983, the Comptroller granted a charter to J. & W. Seligman & Company to establish a national bank subsidiary in New York. The Federal Reserve Board warned that Seligman could face fines of \$1,000 a day if it proceeded. The Comptroller then informed Seligman that it should ignore the Federal Reserve Board. "The Comptroller's decision is entitled to great weight and isn't subject to review by another agency after the fact." Wall St. J., Apr. 7, 1983, at 3, col. 3.

89. Compare 12 U.S.C. § 1841 (1982) with 12 U.S.C. § 1842(d) (1982).

90. See, e.g., letter from William H. Wiles, Secretary of the Federal Reserve Board, to William R. Hichman, Jr., Executive Vice President, Chase Manhattan Corporation, New York, N.Y., June 21, 1982, concerning the purchase by Chase Manhattan Corporation, a New York bank holding company, of \$25 million of Equimark Corporation (Pittsburgh, Pa.) nonvoting Series B preferred stock and \$25 million of nonvoting preferred stock of Equimark's subsidiary bank, Equibank.

91. See generally "Fed Shows Frustration in Latest Investment Guides," Legal Times of Washington, Aug. 9, 1982, at 34. Because of the proliferation of such "nonvoting" acquisitions, the Federal Reserve Board, on July 8, 1982, issued a Policy Statement seeking to provide guidance regarding the consistency of such agreements with the BHCA. 47 Fed. Reg. 30,965 (July 16, 1982) (codified at 12 C.F.R. § 225.143 (1983)). The Board emphasized that such agreements could be consistent with the BHCA if indicia of control were not present. The Board observed, however, that in some agreements it reviewed, the bank holding company had sought to protect its investment by placing restrictions on the operations of the acquiree bank. The Board was critical of those arrangements and outlined several steps that should be taken to preclude control, including: (1) specific covenants allowing incumbent management discretion in operating

Finally, various states are amending their banking laws to allow at least some interstate banking, frequently on a reciprocal basis.⁹² For example, Alaska permits out-of-state bank holding companies to acquire in-state banks.⁹³ Delaware permits the establishment of limited-purpose, wholesale-oriented, single-office banks by out-of-state bank holding companies.⁹⁴ Iowa effectively permits certain bank holding companies to engage in interstate activities.⁹⁵ Maine permits bank holding company acquisitions on a reciprocal basis.⁹⁶ Massachusetts and Connecticut permit branch banking and bank holding company acquisitions on a reciprocal basis, but only with other New England states.⁹⁷ New York permits bank holding company acquisitions on a reciprocal basis.⁹⁸ South Dakota permits limited-purpose banks to be acquired by out-of-state bank holding companies.⁹⁹

V. *The Change in Bank Control Act*

The Change in Bank Control Act of 1978 (CBCA)¹⁰⁰ prohibits the acquisition by any person of control of any federally insured bank, including a bank holding company, without sixty days' prior written

the business of the bank; (2) a "call" provision allowing the acquiree bank to liquidate the investment at its option (thus making the transaction more a loan than an equity investment); and, (3) covenants allowing the acquiree the right of first refusal to purchase any warrants or options issued in connection with the transaction. 12 C.F.R. § 225.143(d) (1983).

92. Congress is not expected to repeal the McFadden Act because of the political influence of the nation's 14,500 commercial banks. Relaxations on interstate banking will probably come on a case-by-case basis. Wall St. J., Apr. 26, 1983, at 4, col. 2.

93. ALASKA STAT. § 06.05.235(e) (1982).

94. DEL. CODE ANN. tit. 5, § 803 (Supp. 1982).

95. IOWA CODE ANN. § 524.1805 (West Supp. 1982-83).

96. ME. REV. STAT. ANN. tit. 9-B, § 1013 (1980).

97. MASS. GEN. LAWS ANN. ch. 167A, § 2 (West Supp. 1983). For a discussion of the constitutional issues presented by this proposal, see J. HAWKE & N. PETERSON, *BANK ACQUISITIONS AND HOLDING COMPANY EXPANSIONS* 460-87 (1980); Hawke, *Of Legal Bogs and New England Clam Chowder: A Rejoinder*, BANKING EXPANSION REP., Mar. 7, 1983, at 1, 12; Golembe, *Massachusetts and Interstate Banking*, BANKING EXPANSION REP., Jan. 17, 1983, at 1, 11.

98. N.Y. BANKING LAW § 142-b (McKinney Supp. 1982-83).

99. S.D. COD. LAWS ANN. § 51-16-40 (1980). See BANKING EXPANSION REP., Jan. 3, 1983, at 5. The state of Tennessee is also considering a relaxation on its prohibition against out-of-state bank holding company acquisitions but would limit those acquisitions to "troubled" institutions. Pressure is currently being brought because of the agreement in principle executed between Jake F. Butcher, 93% owner of United American Bank of Chattanooga, Tennessee, and the First Union Corporation, a North Carolina holding company. The agreement was reached in the wake of the failure of United American Bank, Knoxville, Tennessee, also owned by Butcher. Wall St. J., Apr. 6, 1983, at 25, col. 2. Similarly, the state of Washington recently enacted legislation that would allow out-of-state acquisitions once the state banking commissioner determined that the Washinton bank is in danger of "closing, failing or insolvency." That legislation was apparently enacted to allow Bank America Corporation to acquire Seafirst Corporation, a troubled Washington bank holding company. Bank America Corporation continues to oppose a reciprocal bill pending in the California legislature.

100. Pub. L. No. 95-630, 92 Stat. 3683 (codified at 12 U.S.C. § 1817 (1982)).

notice to the appropriate federal banking agency.¹⁰¹ Before passage of the CBCA, acquisitions of controlling interest in banks and bank holding companies by individuals generally were not subject to scrutiny by federal regulatory agencies. The CBCA changed that by defining a person as an "individual or corporation, partnership trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed herein."¹⁰² Through the CBCA, Congress now requires entities attempting to acquire control of a federally insured financial institution to undergo prior review by a bank supervisory authority.¹⁰³ At the same time, Congress recognizes that a traditional application procedure, such as that provided by the Bank Holding Company Act¹⁰⁴ or Bank Merger Act,¹⁰⁵ might prove unacceptably disruptive to acquisition plans. Congress has been sensitive to the undesirable implications of overburdening individual property rights by eliminating the transferability of bank securities, which could have resulted in an unnecessary infringement upon the banking system's ability to raise capital.¹⁰⁶

In light of these considerations, the CBCA was carefully tailored to avoid the creation of needless barriers to the consummation of legitimate business transactions. Rather than an approval procedure, the CBCA only granted federal supervisors the authority to "disapprove" changes in control. Because of concerns for the property rights of shareholders of financial institutions, Congress limited administrative discretion by merely requiring notice to the supervisory agency with time constraints on agency action, rather than requiring the supervising agency to approve an application. Administrative discretion was further limited by specific statutory standards under which the agency may disapprove changes in control and by review procedures.¹⁰⁷ The CBCA explicitly exempts transactions that are sub-

101. 12 U.S.C. § 1817(j) (1982).

102. 12 U.S.C. § 1817(j)(8)(A) (1982).

103. "Control" is defined in the Act as the "power, directly or indirectly, to direct the management or policies of an insured bank or to vote 25 per centum or more of any class of voting securities of an insured bank." 12 U.S.C. § 1817(j)(8)(B) (1982). The Comptroller, by regulation, adopted a rebuttable presumption of control at the 10% ownership level if the 10% owner is, by virtue of the acquisition, the single largest shareholder. 12 C.F.R. § 5.50(h)(3)(i)(B) (1983). Compare similar regulations adopted by the FDIC and Federal Reserve Board, 12 C.F.R. § 303.15(a)(2) (1983) and 12 C.F.R. § 222.7(a)(2) (1983), respectively.

104. 12 U.S.C. §§ 1841-50 (1982).

105. 12 U.S.C. § 1828 (1982).

106. See REPORT TO THE CONGRESS ON THE CHANGE IN BANK CONTROL ACT OF 1978, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Mar. 9, 1981) [hereinafter CBCA REPORT]. A copy of the CBCA Report can be secured from the Comptroller of the Currency, Communications Division.

107. *Id.* In certain respects, the Act's procedures are similar to the premerger notification review procedures of § 201 of the Hart Scott Rodino Antitrust Improvements Act of 1976, Pub.

ject to section 3 of the Bank Holding Company Act¹⁰⁸ or section 18 of the Federal Deposit Insurance Act¹⁰⁹ because they are covered by existing regulatory approval procedures.¹¹⁰

Pursuant to the CBCA, a proposed acquisition may proceed if the appropriate regulatory agency does not, within sixty days, either: (1) issue a notice disapproving the proposed acquisition, or (2) extend for up to thirty days the period during which disapproval may be issued.¹¹¹ The CBCA requires that notices to the agency contain specific personal and biographical information, detailed five-year financial information, a description of the proposed transaction, information of any structural or managerial changes contemplated, and any other relevant information required by the agency.¹¹²

The CBCA specifies certain bases for disapproval of a proposed acquisition.¹¹³ These factors include:

(1) potential anticompetitive factors that are not clearly outweighed in the public interest by the probable effect of the acquisition in meeting the convenience and needs of the community to be served; or

(2) the financial condition of the acquiring person is such as might jeopardize the financial stability of the bank or prejudice the interest of the depositors of the bank; or

(3) the competence, experience, or integrity of any acquiring person indicates that it would not be in the interest of the public to permit such person to control the bank; or

(4) the acquiring person fails to furnish the appropriate federal banking agency with the requisite information.¹¹⁴

L. No. 94-435, 90 Stat. 1390, 15 U.S.C. § 18a (1982). However, before acquisitions governed by Hart Scott Rodino may be consummated, notification must be filed and a thirty-day waiting period must expire, affording the Department of Justice the opportunity to determine whether such acquisitions may, if consummated, violate the antitrust laws.

108. 12 U.S.C. § 1842 (1982).

109. 12 U.S.C. § 1828 (1982).

110. See 12 U.S.C. § 1817(j)(16) (1982) For national banks, the Comptroller has promulgated regulations that provide a separate exception for transactions described in 12 U.S.C. §§ 1841 or 1842 (1982) such as foreclosures by institutional lenders, acquisitions of securities by banks in a fiduciary capacity, and increases of majority holdings by bank holding companies. While these transactions do not require prior approval of the Board of Governors of the Federal Reserve Board pursuant to the Bank Holding Company Act, they are nonetheless exempted because they are subject to § 3 of the Bank Holding Company Act, 12 U.S.C. § 1842 (1982). There are also regulatory exemptions that apply to acquisitions of additional shares by persons already deemed to be lawfully controlling national banks. See CBCA REPORT, *supra* note 106.

111. 12 U.S.C. § 1817(j)(1) (1982).

112. 12 U.S.C. § 1817(j)(6) (1982). The appropriate agencies are also specifically authorized to amend the type of information required in a CBCA notice.

113. 12 U.S.C. § 1817(j)(7) (1982).

114. *Id.*

In enacting this legislation, Congress was concerned with the continued stability of financial institutions.¹¹⁵ "Indeed, one of its primary purposes was to insure the safety and soundness of the target institution and the banking industry as a whole."¹¹⁶ The CBCA

was designed to provide information and regulatory review of a bank acquisition before that acquisition is consummated. Accordingly, the Act must be interpreted to mean that any person who proposes to embark on a course of conduct which would go on without interruption and result in the acquisition of control, must go through the applicable notification and approval process before beginning that course of conduct.¹¹⁷

In the *Mid-Continent* case, despite the fact that defendants "never had the power to vote twenty-five percent of Mid-Continent's common stock, and there was some doubt as to whether they actually acquired the power to vote even ten percent of that stock," the court held that "because defendants were intent on acquiring control. . . they were therefore obligated to comply with the requirement of the CBCA before commencing their acquisition. Because they did not, they are in violation of that act."¹¹⁸

According to the Comptroller of the Currency, "[d]isapproval of proposed changes in control have been rare."¹¹⁹ The Comptroller has taken a position that tender-offers subject to the Exchange Act may proceed while a CBCA notice is being processed, provided steps are taken to assure that the tendering party does not acquire control of the bank prior to the Comptroller's disposition.¹²⁰ This requires drafting

115. See *Mid-Continent Bancshares, Inc. v. O'Brien*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,734, at 93,702 (E.D. Mo. Dec. 11, 1981).

116. *Id.* Courts are divided on the question of whether target banks and bank holding companies are intended beneficiaries of the CBCA and have standing to seek injunctive relief. Compare *Mid-Continent, supra*; and *First Alabama Bancshares, Inc. v. Lowder*, CU 81-M-D325 (N.D. Ala. May 1, 1981) with *Quaker City Nat'l Bank v. Hartley*, 533 F. Supp. 126 (S.D. Ohio 1981) and *Flagship Banks, Inc. v. Smithes*, No. 81-713-CIV-SPS (S.D. Fla. July 22, 1981). There is no express private right of action pursuant to the CBCA.

117. *Mid-Continent Bancshares, Inc. v. O'Brien*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,734, at 93,709 (E.D. Mo. Dec. 11, 1981).

118. *Id. Accord*, *FDIC v. D'Annunzio*, 524 F. Supp. 694, 698 (N.D. W.Va. 1981). The court stated that the CBCA

requires that under certain circumstances where 25 percent of the outstanding shares of an insured bank are acquired or *intended to be acquired* that [the appropriate bank regulatory agency] be given a sixty day notice and that [the appropriate regulatory agency] then can take some action to disapprove the transaction within sixty days with the option of extending consideration for an additional thirty days.

524 F. Supp. at 698 (emphasis added).

119. CBCA REPORT, *supra* note 106, at 18.

120. *Id.* at 2.

the tender-offer to condition its effectiveness on favorable disposition by the Comptroller. In such cases, it should be noted that the filing of a CBCA notice does not start the five-day period for a public announcement pursuant to the Comptroller's tender-offer rules¹²¹ because the CBCA notice is not publicly filed.¹²²

It is possible that two competing factions could file notices pursuant to the CBCA as part of an attempt to gain control of the same national bank. One would expect that if either party were to have their notice approved prior to the other, they would have a significant advantage in acquiring control of the bank. In this regard, the Comptroller has stated that the Office "would probably attempt to dispose of notices simultaneously."¹²³

In determining when a group has been formed for purposes of a CBCA, the Comptroller has stated that "while the aggregate security ownership of the putative group members may exceed the statutory or regulatory percentage threshold, the CBCA is not triggered at the time the group is formed unless there has been a disposition of voting rights to the group by its members."¹²⁴ Finally, the CBCA provides that any person who willfully violates any provision of the Act or any regulation issued pursuant to the Act may be fined a penalty of not more than \$10,000 per day for each day during which such violation continues.¹²⁵ At least one court has recognized the right of the appropriate federal banking agency to seek injunctive relief for violations or potential violations, regardless of their "willfulness."¹²⁶ That court stated: "The absence of willfulness. . . is not crucial nor even relevant to the resolution of this case. Instead, what is important is the power to control."¹²⁷ The court further stated that the federal agencies "must be very careful about how [they go] about enforcing [the Change in Bank Control Act] and must do it in the most economical manner

121. Compare 12 C.F.R. § 11.5(o) (1983) with 12 C.F.R. § 11.5(l)(4) (1983).

122. 12 C.F.R. § 5.50 (1983).

123. CBCA REPORT, *supra* note 106, at 8.

124. *Id.* at 12.

125. 12 U.S.C. § 1817(j)(15) (1982). The statute also provides:

The appropriate Federal banking agency shall have the authority to assess such a civil penalty, after giving notice and an opportunity to the person to submit data, views, and arguments, and after giving due consideration to the appropriateness of the penalty with respect to the size of financial resources and good faith of the person charged, the gravity of the violation, and any data, views, and arguments submitted. The agency may collect such civil penalty by agreement with the person or by bringing an action in the appropriate United States district court, except that in any such action, the person against whom the penalty has been assessed shall have a right to trial de novo.

126. FDIC v. D'Annunzio, 524 F. Supp. 694 (N.D. W. Va. 1981).

127. *Id.* at 699.

possible. . . .The injunctive process is the most efficacious way to accomplish compliance."¹²⁸

VI. *The Bank Merger Act*

The Bank Merger Act of 1966¹²⁹ prohibits "merger transactions" by FDIC-insured banks without the prior written approval of the responsible agency.¹³⁰ The responsible agency shall not approve any proposed merger transaction that would result in a monopoly or that would substantially lessen competition, unless it finds that the anticompetitive effects of the proposed transactions are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.¹³¹ Just as under the BHCA, the responsible agency is required in every case to "take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."¹³² The Bank Merger Act also provides that the responsible agency shall immediately notify the Attorney General "of any approval of a proposed merger transaction."¹³³ Generally, such transactions may not be consummated before the thirtieth day after the date of approval by the agency in order to allow the Department of Justice time to determine whether to attack the merger transaction on antitrust grounds. As with the BHCA, commencement of an antitrust challenge will stay the effectiveness of the agency's approval unless the court orders to the contrary.¹³⁴ In the event the responsible agency notifies the Attorney General and the other two banking agencies of the existence of "an emergency requiring expeditious action," a merger transaction may be consummated as soon as five days after the approval by the responsible agency.¹³⁵ Finally, if the responsible agency has determined that "it must act immediately to prevent the

128. *Id.* at 700-01.

129. Pub. L. No. 89-356, 80 Stat. 7 (codified as amended at 12 U.S.C. § 1828 (1982)).

130. 12 U.S.C. § 1828(c) (1982). The Bank Merger Act further provides that "unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved," notice of the proposed merger shall be published prior to the agency's approval. The notice period is thirty days, or ten days if "an emergency exists requiring expeditious action." 12 U.S.C. 1828(c)(3), (4) (1982).

131. 12 U.S.C. § 1828(c)(5) (1982).

132. *Id.*

133. 12 U.S.C. § 1828(c)(4) (1982).

134. 12 U.S.C. § 1828(c)(7) (1982).

135. 12 U.S.C. § 1828(c)(6) (1982).

probable failure of one of the banks involved," the transaction may be commenced immediately upon approval.¹³⁶

VII. *The National Bank Act*

The statutory requirements for mergers and consolidations involving national banks are governed by 12 U.S.C. §§ 214a, 215, and 215a, depending on whether the transaction involves a merger or a consolidation and whether the surviving or resulting institution is a national or a state bank.¹³⁷ National banks may consolidate with one or more state or national banks pursuant to 12 U.S.C. § 215 upon approval from the Comptroller, and with majority approval from the board of directors of each bank and ratification by at least two-thirds of the shareholders of the outstanding stock of each institution.¹³⁸ However, if a state bank is involved and state law requires ratification by greater than two-thirds of the shareholders, then the higher state ratification standard will be required for the state institution.¹³⁹

A shareholders' meeting called to consider consolidation may be held after a notice has been published for at least four consecutive weeks in a newspaper of general circulation. However, publication by notice may be waived by unanimous shareholder approval if the Comptroller determines that "an emergency exists justifying such waiver."¹⁴⁰ The consolidated association shall be liable for all liabilities of the respective consolidating banks.¹⁴¹ The shareholders of any of the banks involved who have voted against such consolidation or who have provided written notice of dissent from the consolidation plan, "shall be entitled to receive the value of the shares so held by them when such consolidation is approved by the Comptroller. . . ."¹⁴² The value of the shares of any dissenting shareholders are appraised as of the effective date of the consolidation by a committee of three persons. The committee is composed of one person selected by the vote of the dissenting shareholders, one selected by the directors of the con-

136. *Id.*

137. Section 214a governs mergers and consolidations in which a state bank is the resulting or surviving institution. 12 U.S.C. § 214a (1982). Section 215 governs consolidations in which a national bank survives. 12 U.S.C. § 215 (1982). A "consolidation" refers to a transaction in which two or more preexisting institutions join together and create a new institution. A "merger" refers to a transaction in which one of the preexisting institutions survives with the other(s) disappearing into it.

138. 12 U.S.C. § 215(a) (1982).

139. *Id.*

140. *Id.*

141. 12 U.S.C. § 215(b) (1982).

142. *Id.*

solidated banking association, and one selected by the other two committee members. A shareholder who objects to the value so fixed by such appraisal may appeal within five days to the Comptroller, "who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant."¹⁴³ The expenses of such reappraisal shall be paid by the consolidated banking association.¹⁴⁴ Stock of a consolidated national banking association may be issued as provided by the terms of the consolidation agreement, free from any preemptive rights of the shareholders of the respective consolidating banks.¹⁴⁵

The statutory requirements governing mergers of national banks or state banks into national banks are set forth in 12 U.S.C. § 215a, which provides that "[o]ne or more national banking associations or one or more State banks, with the approval of the Comptroller, . . . may merge into a national banking association" pursuant to the statute.¹⁴⁶ Merger agreements are required to be approved in writing by a majority of the board of directors of each association and ratified by an affirmative vote of the shareholders owning at least two-thirds of the capital stock of each bank involved, unless state law requires a higher standard of ratification in the case of a state bank.¹⁴⁷ The shareholders' meeting is to take place after notice is published for at least four consecutive weeks in a newspaper of general circulation and after each shareholder is notified in writing. As with consolidations, publication notice may be waived in cases where the Comptroller determines that an emergency exists justifying such waiver, by unanimous action of the shareholders of each institution. Merger agreements are required to specify the total amount of capital stock in the receiving association, the amount of stock (if any) to be allocated for the transaction, and cash (if any) to be paid to shareholders of the merging associations.¹⁴⁸ Such agreements must also provide that the receiving association shall be liable for all liabilities of the merging institutions.¹⁴⁹

143. 12 U.S.C. § 215(c) (1982). The statute further provides that the shares of the consolidated banking association that would have been delivered to such dissenting shareholders, had they not requested payment, shall be sold by the consolidated banking association at an advertised public auction, unless some other method of sale is approved by the Comptroller. If the shares are sold at a price higher than the price paid to the dissenting shareholders, the excess is to be paid to those shareholders. 12 U.S.C. § 215(d) (1982). See *infra* note 216 and the accompanying text for an analysis of difficulties that arise in holding company acquisitions or reorganizations because of the operation of the securities laws and the "public auction" requirement.

144. 12 U.S.C. § 215(d) (1982).

145. 12 U.S.C. § 215(g) (1982).

146. 12 U.S.C. § 215a(a) (1982).

147. *Id.*

148. *Id.*

149. *Id.*

The appraisal rights of dissenting shareholders in such merger transactions are similar to those contained in the consolidation statute.¹⁵⁰ And as with the consolidation statute, the merger statute provides that stock of the receiving association may be issued as provided by the terms of the merger agreement, free from any preemptive rights of the shareholders of the respective merging banks.¹⁵¹

National banks also may convert into, merge with, or consolidate with a state bank in the same state, so long as the plan has been approved by a majority of its board of directors and after compliance with certain notice provisions.¹⁵² The statute does not require any particular percentage of shareholder ratification.¹⁵³ Dissenting shareholders are entitled to receive in cash the value of the shares held by them if the transaction is consummated.¹⁵⁴ The value will be determined as of the date of the shareholders' meeting by an appraisal committee of three members who are chosen in a manner similar to the one in which a committee is chosen when the resulting institution is a national bank.¹⁵⁵ The statute provides for reappraisal by the Comptroller. However, when the resulting institution is a state bank, the manner of dispersal of the dissenters' shares must merely be provided for in the plan of conversion, merger, or consolidation. There is no statutory requirement for a public auction.¹⁵⁶ The National Bank Act further provides that national banks may merge or consolidate with state banks only if the state law is no more restrictive than the federal law with regard to state banks merging, converting, or consolidating into national banks.¹⁵⁷

VIII. *Federal Securities Law*

The applicability of the federal securities laws to financial institution mergers, consolidations, or tender-offers depends on whether the institutions are Securities Exchange Act¹⁵⁸ registrants¹⁵⁹ and on the type

150. Compare 12 U.S.C. § 215(b), (c), (d) (1982) with 12 U.S.C. 215a(b), (c), (d) (1982). The appraisal rights of shareholders of state banks that consolidate or merge into national banks are determined by state law. 12 U.S.C. §§ 215(d), 215a(d) (1982).

151. 12 U.S.C. § 215a(g) (1982).

152. 12 U.S.C. § 214a(a) (1982).

153. *Id.*

154. 12 U.S.C. § 214a(b) (1982).

155. *Id.*

156. Compare 12 U.S.C. § 214a(b) (1982) with 12 U.S.C. §§ 215(d), 215a(d) (1982).

157. See 12 U.S.C. § 214c (1982). Merger transactions resulting in national banks may not be in contravention of the state law. See 12 U.S.C. §§ 215(d), 215a(d) (1982).

158. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C. §§ 77, 78 (1982)).

159. Exchange Act § 12(g), 15 U.S.C. § 78I(g) (1982). The Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77bbbb (1982) can also apply, but only in

of vehicle utilized to effect the transaction. Section 12(i) of the Exchange Act¹⁶⁰ contains general provisions pertaining to financial institutions and primary banking regulators named in that section.¹⁶¹

Under section 12(i), banking regulators are given the powers, functions, and duties otherwise vested in the Securities and Exchange Commission (Commission) to administer and enforce Exchange Act sections 12,¹⁶² 13,¹⁶³ 14(a),¹⁶⁴ 14(c),¹⁶⁵ 14(d),¹⁶⁶ 14(f),¹⁶⁷ and 16¹⁶⁸ for securities issued by their regulated entities.¹⁶⁹ They are authorized to investigate past and potential violations of the enumerated sections and to bring actions to enjoin such violations.¹⁷⁰ In addition, the banking regulators have authority to make such rules and regulations as may be necessary to implement the Exchange Act provisions for which they are responsible. However, they are required to issue within sixty days of adoption by the Commission substantially similar rules and regulations, "unless they find that implementation of substantially similar regulations . . . are not necessary or appropriate in the public

holding company acquisitions. In addition, there are certain instances, at least as to national banks, in which institutions not covered by the Exchange Act can be subjected to requirements similar to those of the Exchange Act. For example, the Comptroller reviews proxy solicitation materials of national banks not covered by the Exchange Act when those materials are used in connection with shareholders' meetings called to consider the merger or consolidation of the institution. The Comptroller considers the quality of disclosure to shareholders as one item in his determination of whether to approve the proposed transaction. 12 C.F.R. § 5.33(b)(2)(vi) (1983). The Comptroller's regulations promulgated and adopted under the Exchange Act, 12 C.F.R. §§ 11.1 to 11.103 (1983) are enforced by the staff in that determination.

160. 15 U.S.C. § 781(i) (1982).

161. The provisions of Exchange Act § 12(i) apply to: (1) national banks and their primary regulator, the Comptroller of the Currency; (2) savings and loan institutions and the Federal Home Loan Bank Board (FHLBB); (3) state chartered member banks of the Federal Reserve System and the Board of Governors; and, (4) state chartered FDIC-insured nonmember banks, and the Federal Deposit Insurance Corporation.

162. 15 U.S.C. § 781 (1982).

163. *Id.* § 78m (1982).

164. *Id.* § 78n(a) (1982).

165. *Id.* § 78n(c) (1982).

166. *Id.* § 78n(d) (1982).

167. *Id.* § 78n(f) (1982).

168. *Id.* § 78p (1982).

169. Absent from the enumerated sections are sections 10(b), *id.* § 78j(b) (1982), and 14(e), *id.* § 78n(e) (1982), the "antifraud" provisions. Argument can be made that the latter sections are not jurisdictional and that they may be invoked to enforce the substantive requirements contained in the enumerated sections. See *infra* text accompanying notes 202-213.

170. Exchange Act § 21(a), 15 U.S.C. § 78o(a) (1982) and the legislative history of section 12(i), 15 U.S.C. § 781(i) (1982), contained in S. REP. No. 379, 88th Cong., 1st Sess. 63-64 (1963). See also 12 U.S.C. §§ 1818(n), 1820(c) (1982), for the Comptroller's general powers with regard to investigations.

interest or for protection of investors and publish such findings, and the detailed reasons therefor, in the Federal Register."¹⁷¹

In order to come within Exchange Act registration requirements, national banks must have \$1 million in assets and five hundred shareholders,¹⁷² or have a class of securities listed on a national exchange.¹⁷³ Such banks would not, however, be subject to the reporting requirement imposed by Exchange Act section 15(d)¹⁷⁴ for companies having a registration statement in effect under the Securities Act.¹⁷⁵

The national banks subject to Exchange Act registration and to the Comptroller's regulations adopted under the Act¹⁷⁶ must make periodic filings similar to those made by other publicly held companies.¹⁷⁷ The filings required are made with the Comptroller rather than with the Commission. In the event the bank converts to a holding company structure, it would then deregister with the Comptroller and, assuming the holding company remained above the asset and shareholder threshold of section 12 (or rules 12g-1 and 12g), it would register with the Commission and make the periodic filings with that

171. 15 U.S.C. § 78I(i) (1982). As originally enacted in the 1964 Securities Acts amendments, section 12(i) did not require the adoption of substantially similar regulations. Pub. L. No. 88-467, 78 Stat. 565. That requirement was added as part of the Depository Institutions Amendments of 1974, Pub. L. No. 93-495, § 105(b), 88 Stat. 1503.

172. Effective Apr. 15, 1982, the Commission, pursuant to its general rule-making powers, adopted rule 12g-1 revising the criteria for companies subject to Exchange Act registration. The asset value now required is \$3 million, up from \$1 million. That change was based on Commission findings that the rate of inflation between 1964, when originally adopted by Congress, and 1982 justified the higher figure as consistent with congressional intent relating to the size of affected companies. The Commission also adopted a companion rule, rule 12g-4, which provides for deregistration if the number of shareholders drops below five hundred. Previously, deregistration could occur only if the number of shareholders dropped below three hundred. Release No. 34-1864, 6 FED. SEC. L. REP. (CCH) ¶ 83,204 (Apr. 15, 1982). The Comptroller, notwithstanding the requirements of section 12(i), has not adopted substantially similar regulations.

173. Exchange Act § 12(b), 15 U.S.C. § 78J(b) (1982).

174. 15 U.S.C. § 78o(d) (1982).

175. A distinction should be drawn between the bank as a registrant and its holding company parent. Although bank-issued securities are exempt from Securities Act registration, bank holding company-issued securities are not. Hence, the holding company, even a "one bank holding company," having as its sole asset a single bank, could be subject to Securities Act as well as Exchange Act registration requirements. Securities issued by national banks, while exempt from Securities Act registration, are subject to the Comptroller's Securities Offering Disclosure Rules, 12 C.F.R. §§ 16.1-16.8 (1983). Those regulations, adopted pursuant to the National Bank Act, provide a format for disclosure and require that material information be disclosed regarding the issuer.

176. There are at present approximately 270 national banks covered by the Exchange Act.

177. The Comptroller's regulations under section 12 were originally adopted in 1964 and, although amended from time to time, continue in their original format. See 12 C.F.R. §§ 11.1-11.103 (1983). The last amendments were adopted Jan. 22, 1981 (46 Fed. Reg. 6865).

agency. The timing and triggering mechanisms of those filings are substantially the same.

Within 120 days of the close of the fiscal year in which the filing requirement was triggered, national banks covered by the Exchange Act must file with the Comptroller a registration statement on Form F-1.¹⁷⁸ Thereafter, pursuant to the various enumerated sections, the bank, its officers, directors, or significant shareholders must make periodic filings dependent either on time or certain events.

Exchange Act section 13 requires all companies covered by its provisions to file an annual report.¹⁷⁹ National banks subject to that requirement must file their annual reports with the Comptroller on Form F-2¹⁸⁰ within ninety days of the close of the fiscal year or within thirty days of the mailing of the bank's annual report to shareholders, whichever comes first.¹⁸¹ Quarterly reports on Form F-4¹⁸² must be filed no later than forty-five days after the end of the quarterly period for each fiscal quarter ending after the close of the latest fiscal year for which a registration statement, Form F-1, was in effect.¹⁸³ A current report on Form F-3¹⁸⁴ must be filed within fifteen days of the happening of certain events, including: (1) changes in control of the bank; (2) acquisition or disposition of assets; (3) bankruptcy or receivership; (4) changes in the bank's certifying accountant; (5) resignation of the bank's directors; or (6) other materially important events.¹⁸⁵ The requirements of Comptroller's forms F-1, F-2, F-3, and F-4 correspond with Commission forms 8-A, 10-K, 8-K, and 10-Q, respectively. In addition, any person who acquires beneficial ownership of 5% or more of the outstanding shares of any class of securities issued by a national bank registered under the Exchange Act must file with the bank and the Comptroller an Acquisition Statement on Form F-11 within ten days of that acquisition.¹⁸⁶

Section 14(a) of the Exchange Act¹⁸⁷ prohibits the solicitation of proxies without compliance with applicable regulations. The form of the proxy statement or statement where management does not solicit proxies is described in 12 C.F.R. § 11.51 and Form F-5.¹⁸⁸

178. 12 C.F.R. §§ 11.4(a), 11.41 (1983).

179. 15 U.S.C. § 78m (1982).

180. 12 C.F.R. § 11.42 (1983).

181. 12 C.F.R. § 11.4(e) (1983).

182. 12 C.F.R. § 11.44 (1983).

183. 12 C.F.R. § 11.4(h) (1983).

184. 12 C.F.R. §§ 11.43, 11.4(g) (1983).

185. *Id.*

186. 12 C.F.R. §§ 11.47, 11.4(g)(2) (1983). *See also* 12 C.F.R. § 11.4(g)(4) (1983), regarding the definition of "beneficial owner."

187. 15 U.S.C. § 78n(a) (1982).

The form for statements in election contests is described in 12 C.F.R. § 11.52.¹⁸⁹ Section 14(c) of the Exchange Act provides that if management does not solicit proxies, it still must “transmit to all [shareholders of record] information substantially equivalent to the information which would be required to be transmitted if a solicitation were made.”¹⁹⁰ This section covers situations in which management controls sufficient votes to accomplish the purpose of the shareholders’ meeting without soliciting proxies. All shareholders, however, are entitled to receive the information they would have received had their proxy been solicited. Exchange Act section 14(d)¹⁹¹ would prohibit tender-offers for shares of covered national banks except in compliance with that section and the Comptroller’s regulations.¹⁹² The bidder must file a tender-offer statement with the Comptroller¹⁹³ and observe certain substantive requirements, including:

(1) pro rata acceptance of shares tendered within ten days of the offer if the offer is for less than all outstanding shares;

(2) nonvariance of the offer during the term of the offer without giving all offerees the benefit of the most favorable offer;

(3) withdrawal rights of tendering shareholders for fifteen days after the commencement of the offer; and

(4) certain minimum disclosures that must be made to target company shareholders.¹⁹⁴

Also, the target bank must file, no later than ten business days from the date the tender-offer is commenced, a Solicitation/Recommendation Statement pursuant to Exchange Act section 14(d)(4)¹⁹⁵ which ex-

188. See *infra* note 190 and the discussion of Exchange Act §§ 14(c) for the importance of the information statement required to be furnished even if management is not soliciting proxies.

189. See also Form F-6.

190. 15 U.S.C. § 78n(c) (1982).

191. 15 U.S.C. § 78n(d) (1982).

192. 12 C.F.R. §§ 11.5(1) (1983). See also 12 C.F.R. § 11.5(o) (1983), which contains regulations relating to tender-offers for shares in national banks not covered by the Exchange Act. The requirements contained in that section include prohibitions against: (1) holding the tender-offer open less than twenty days; (2) increasing the offered consideration without extending the offering period at least ten days; (3) failing to pay the consideration offered; and (4) extending the length of the tender-offer without issuing a press release containing that information.

193. Form F-13, 12 C.F.R. § 11.54 (1983).

194. Effective Dec. 15, 1982, the Commission by rule expanded the provisions of Exchange Act § 14(d)(6) to provide for pro rata acceptance of shares tendered at any time during the offer. Exchange Act Release No. 34-19336. 47 Fed. Reg. 57,679 (Dec. 15, 1982), now contained in rule 14d-8, 17 C.F.R. § 240.14d-8 (1983). The Commission had previously expanded the withdrawal rights of tendering shareholders from seven to fifteen days beyond the commencement of the offer. See rule 14d-7, 17 C.F.R. § 240.14d-7 (1983). The latter rule was also adopted by the Comptroller. 12 C.F.R. § 11.5(n) (1983).

195. 15 U.S.C. § 78n(d)(4) (1982).

presses the views of management toward the tender-offer.¹⁹⁶ Section 14(f) of the Exchange Act¹⁹⁷ provides that if a majority of the board of directors of a target company (tender-offer target) has been pre-chosen by the offeror, then the information required in proxy solicitations for election to the board of directors must be furnished to the shareholders.

Section 16 of the Exchange Act¹⁹⁸ requires persons who acquire 10% or more of the outstanding equity securities of any class registered under the Exchange Act, and every officer and director, to file an Initial Statement of Beneficial Ownership.¹⁹⁹ Any changes in that person's ownership must be disclosed on a Statement for Changes of Beneficial Ownership.²⁰⁰ In addition, short swing profits and short selling by 10% security holders and officers and directors is prohibited.²⁰¹

Conspicuously absent from the list of enumerated sections over which the banking regulators, including the Comptroller, have authority to administer and enforce are Exchange Act sections 10(b)²⁰² and 14(e)²⁰³ (the antifraud provisions). The text of section 12(i)²⁰⁴ does not indicate what "powers, functions, and duties" are vested in the banking regulators, although a literal reading of the language would seem to exclude authority to enforce the antifraud provisions. That result may seem anomalous, however, because if the bank, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of the bank, were involved in a 10(b) or 14(e) violation, the banking regulators would appear to have authority to enforce those sections indirectly against the bank and certain individuals or entities through their administrative powers derived from the National Bank Act.²⁰⁵ This section provides authority for the federal bank regulatory agency to issue a notice of charges, which may

196. Form F-12, 12 C.F.R. § 11.53 (1983). See also 12 C.F.R. §§ 11.5(o)(5), 11.5(n)(11), 11.5(n)(6) (1983).

197. 15 U.S.C. § 78n(f) (1982).

198. *Id.* § 78p (1982).

199. Form F-7, 12 C.F.R. § 11.61 (1983). The 10% ownership threshold can also trigger CBCA filings. See text *supra* accompanying notes 123-171.

200. Form F-8, 12 C.F.R. § 11.62 (1983).

201. "Short swing profits" result from the purchase and sale, or sale and purchase, of securities within any period of less than six months. The profits may be recovered by the issuer. See Exchange Act § 16(b), 15 U.S.C. § 78p(b) (1982). "Short selling" is selling securities that are not presently owned. Such transactions are profitable only if the market value of the securities decreases. See Exchange Act § 16(c), 15 U.S.C. § 78p(c) (1982).

202. 15 U.S.C. § 78j(b) (1982).

203. *Id.* § 78n(c) (1982).

204. *Id.* § 78l(i) (1982).

205. 12 U.S.C. § 1818(b) (1982).

lead to the issuance of a cease and desist order after appropriate notice and hearing, if, for example, in the opinion of the agency

any insured bank . . . or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank . . . is violating or has violated, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation²⁰⁶

Hence, a plain reading of section 1818(b) would appear to grant the banking regulators the power to redress violations of the antifraud provisions at least through administrative proceedings.²⁰⁷

Notwithstanding probable jurisdiction under 12 U.S.C. § 1818, the ability to bring actions under section 12(i) in district court to enjoin violations of the antifraud provisions appears questionable. In describing the authority delegated to the banking regulators, the legislative history of section 12(i) is replete with specific statements that the section would delegate to the federal banking regulators powers to administer and enforce “registration and reporting requirements,” “proxy rules,” and “insider trading rules” with respect to securities issued by banks.²⁰⁸

Consistent with the 1964 legislative history of section 12(i) is the legislative history amending that section in 1968 with the passage of the Williams Act.²⁰⁹ The reports of the House of Representatives summarized the 1968 amendments to section 12(i) as follows:

206. *Id.*

207. *Hearings on H.R. 6789, H.R. 6793, S. 1642, Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st & 2d Sess. (1963-64) (“House Hearings”), reprinted in HOUSE INTERSTATE & FOREIGN COMMERCE COMM., INVESTOR PROTECTION (1963), at 6, 15 (Statement of William L. Cary, Chairman, Securities and Exchange Comm’n), at 31; (Letter from William L. Cary to Hon. Oren Harris), at 72, 79; (Statement of William L. Cary), at 56; (Recommendations of the Special Study of the Securities Markets that would be implemented by the bill), at 161, 162, 165; (Statement of the Securities and Exchange Comm’n), at 614; (Statement of Hudson B. Lemkau, vice-chairman, Board of Governors, NASD), at 1361, 1362-65; (Memorandum of the Securities and Exchange Comm’n), at 1375; (Letter from the American Bankers Association).*

208. *See, e.g., Hearings on H.R. 7693 Before the Committee of the Whole House, 88th Cong., 2d Sess. (1964), 110 CONG. REC. 17,914 (1964) (Statement of William L. Cary, Chairman, SEC, id. at 17,919-20); id. at 31 (Letter of Chairman Harris from Chairman Perry); id. at 72 (Statement of Chairman Cary); id. at 79; id. at 156 (Recommendations of the Special Study of the Securities Markets—implemented by the bill); id. at 161 (Statement of the Securities and Exchange Commission); id. at 162; id. 165; id. at 614 (Statement of Hudson B. Lemkau, vice-chairman, Board of Governors, NASD); id. at 1361 (Memorandum of the Securities and Exchange Commission); id. at 1362-65; id. at 1375 (Letter from the American Bankers Association.).*

209. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 781-78n (1982)).

Section 12(i) of the Securities Exchange Act of 1934 would be amended to make clear that the authority and responsibility to administer and enforce the new disclosure provisions added to the Securities Exchange Act of 1934 by this bill [the Williams Act], insofar as they apply to the securities of banks, will be vested in the various federal banking agencies rather than in the Securities and Exchange Commission.

This amendment is consistent with the provisions of the Securities Acts Amendments of 1964, which vested in the Federal banking agencies the authority and responsibility to administer the disclosure provisions of the Exchange Act as they apply to bank securities. Under this section the Federal bank regulatory agencies are authorized to adopt rules and forms differing from those of the Securities and Exchange Commission whenever the bank regulatory agencies deem it appropriate.²¹⁰

However, an argument can be made that the antifraud provisions constitute a "power" or "function" necessary for the enforcement of the enumerated sections, i.e., sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Act. In fact, Chairman Cary of the Securities and Exchange Commission, in his testimony during the 1963 congressional hearings concerning what came to be the 1964 Securities Acts amendments, testified that the absence of adequate disclosure "deprived investors of important bulwarks against fraud."²¹¹

Hence, there would appear to be a relationship between the system of disclosure created by the sections enumerated in section 12(i) and the antifraud provisions of section 10(b) and 14(e). It may be argued that the absence of effective authority to enforce prohibitions against false and misleading statements significantly derogates from the effectiveness of any system of disclosure. Indeed, this principle is reflected in the SEC's criticism of the disclosure requirements the Comptroller had at that time already adopted under its general authority. In his prepared testimony before the House subcommittee, Chairman Cary stated:

210. H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968) reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2817 (emphasis added). See also S. REP. No. 75, 94th Cong., 1st Sess. (1975) reprinted in 1975 U.S. CODE CONG. & AD. NEWS 179, 229, which accompanied Pub. L. No. 94-29, 89 Stat. 117 (1975) (the 1975 Securities Act Amendments) wherein Congress considered the "contrasting regulatory philosophies and orientations of the banking and securities statutes, and the public policies which underlie each" before reaffirming the Commission's "plenary power" in the area of fraud even over bank municipal dealer activities.

211. Memorandum of Securities and Exchange Commission with respect to changes in H.R. 6789 between its submission to the industry liaison committee and its introduction in Congress. *House Hearings, supra* note 207, at 75. See also *Hearings on S. 1642 Before the Senate Comm. on Banking and Currency*, 88th Cong., 1st Sess. 288 (1963).

There have been recent efforts on the part of the Comptroller of the Currency to provide by annual reporting and proxy rules, some protections for bank investors The regulations do fall below those contemplated by the Exchange Act. For example, they do not provide for their distribution, contain no general prohibition of the use of false or misleading information, and specifically deny the right of shareholders to secure relief against false or misleading solicitations. Thus, useful administrative practices, along the lines developed by the Commission for assisting companies to transmit properly prepared proxy materials, are not available—nor are effective private sanctions.²¹²

If the absence of adequate antifraud provisions is a critical inadequacy in a system of disclosure, as the above quotation would imply, then a strong argument can be made that the authority to enforce and administer the enumerated provisions also includes the authority to enforce sections 10(b) and 14(e) as “necessary for the administration and enforcement of sections 12, 13, 14a, 14c, 14d, 14f, and 16.”²¹³

Because of the interplay of statutes and regulations applicable to national bank mergers, to consolidations, and to tender-offers, e.g., the National Bank Act, the Exchange Act, the Securities Act, the Bank Holding Act, the Bank Merger Act, and the Change in Bank Control Act, certain inconsistencies have developed that often make it difficult or impossible to comply with all applicable regulations. For example, the National Bank Act, in both its merger²¹⁴ and consolidation sections,²¹⁵ provides extensive requirements to protect shareholders who dissent from the proposed reorganization. It provides that the receiving association shares that would have gone to the dissenting shareholder had he not dissented shall be sold at an advertised public auction. The dissenting shareholder is entitled to receive the amount by which the auction price exceeds the appraised value of his shares.²¹⁶

212. *House Hearings, supra* note 207, at 118.

213. Section 12(i) of the Exchange Act, 15 U.S.C. § 78I(i) (1982). There is, however, a district court decision, in a suit brought by a state chartered bank seeking to quash an SEC subpoena in an investigation involving alleged § 10(b) violations, in which the following is stated, *en dictum*: “The sole governmental agency charged with enforcing the antifraud sections [of the Exchange Act] against the banks is the SEC. Although federal banking officials hold concurrent jurisdiction to enforce some of the securities laws, they can not enforce these antifraud sections.” *Peoples Bank v. William*, 449 F. Supp. 254, 260 (W.D. W. Va. 1978).

214. 12 U.S.C. § 215a (1982).

215. *Id.* § 215 (1982).

216. For purposes of the discussion relating to dissenter’s rights, there is no practical distinction between a merger governed by 12 U.S.C. § 215a (1982) and a consolidation governed by 12 U.S.C. § 215 (1982). *Ellis v. State Nat’l Bank*, 434 F.2d 1182 (5th Cir. 1978). (12 U.S.C. §§ 215 and 215a (1982) will hereafter be referred to as “merger statutes”). The merger statutes

Because of the detailed and somewhat cumbersome procedures that must be followed to value the dissenting shareholders' shares, a significant time can elapse between the shareholders' meeting called to consider the merger or consolidation and the advertised public auction of the shares, which is the last step in the valuation process. The shareholders have a right to have three appraisers appointed, to have an appraisal done of the value of the shares and, if the appraisal is unacceptable, to appeal it to the Comptroller, who will then conduct a reappraisal. After that reappraisal, the shares are sold at a public auction with the dissenting shareholders receiving any amount over and above the Comptroller's appraised value.²¹⁷ That delay can be used by dissenting shareholders to extract a premium price from the surviving institution.

When enacted in 1959,²¹⁸ the merger statutes envisioned bank-to-bank mergers and consolidations. Little or no consideration was given to the possibility of significant bank holding company acquisitions. A bank holding company, in order to effect a merger or consolidation in all but cash purchase agreements, must have filed a registration statement with the Commission pursuant to the Securities Act.²¹⁹ That registration statement is usually filed on forms S-14 or S-15, (short-form registration statements), which are wraparound proxy statements submitted to the national bank shareholders. The S-14 or S-15 then serves as the proxy statement²²⁰ and registration statement for effecting the merger between the national bank and the holding company.

The Comptroller has, as an unwritten policy, interpreted the statute to mean that it is the holding company shares that must be auctioned pursuant to the merger statutes.²²¹ Because of the delay in the appraisal rights, many times the registration statement of the holding company is no longer effective when the appraisal process reaches the auction stage. The holding company is then faced with having to file a new registration statement (or to amend its previously filed statement with current information) prior to the public auction, at additional ex-

contemplate that the surviving institution will be a national bank. If the survivor is a state bank, 12 U.S.C. § 214a (1982) applies.

217. See 12 U.S.C. §§ 215(c), (d); 215a(c), (d) (1982).

218. Pub. L. No. 86-230, 73 Stat. 460 (1959). See 1959 U.S. CODE CONG. & AD. NEWS 2232.

219. Bank acquisitions by holding companies effected under the merger statutes, 12 U.S.C. §§ 215, 215a (1982), except those involving a purchase and assumption (i.e., the purchase of assets for cash with the attendant assumption of liabilities), usually involve the distribution of holding company securities to the acquired bank's shareholders. Bank holding companies do not qualify for the exemption from registration found in section 3(a)(2) of the Securities Act, 15 U.S.C. § 77c(a)(2) (1982).

220. See 12 C.F.R. §§ 11.5, 11.51 (1983).

221. Golden, *Corporate Law for Financial Institutions*, 99 BANKING L.J., 745, 749 (1982).

pense, pay the dissenting shareholders a premium to waive their right to an auction under the merger statute, or seek to qualify for an exemption from the registration requirements.

The most common such exemption sought to be utilized by holding company counsel is the intrastate-offering exemption under section 3(a)(11) of the Securities Act.²²² The question then arises whether an auction limited to bidders of one state is a "public auction" within the meaning of the merger statutes. The Comptroller has taken the position that such intrastate auctions *may* qualify as "public auctions" in certain situations. The factors considered include the size of the bank, its location within the state, and the size of potential bidders. In addition, the Comptroller considers the number of shares to be auctioned and the nature of the market for those shares.²²³

There is yet another way by which holding company counsel have recently sought to avoid the difficulties imposed by the interplay between the Securities Act and the merger statutes. A reading of the merger statutes clearly indicates that it is only the dissenting shareholders in the disappearing institution who have the protections previously outlined. This reading is consistent with the legislative history contained in the House and Senate Banking and Currency Committee Report analyzing the then proposed legislation:

Your committee . . . believes that it is desirable that there be made available a method whereby national banks may combine with other national banks, and State banks may combine with national banks under Federal charter, without a right in dissenting shareholders of the absorbing bank to demand cash payment for shares. This would achieve that desirable end by authorizing a new method of merger, one feature of which would be that only the dissenting shareholders of the absorbed bank would be entitled to demand cash for their shares.²²⁴

This congressional committee, however, did not anticipate the corporate reorganization method now known as a "reverse triangular merger" utilizing a phantom or interim bank. A "triangular merger" is a statutory merger under applicable state or federal law in which the consideration for the merger is stock, securities, or other property of the controlling parent of one of the merging corporations. If the cor-

222. 15 U.S.C. § 77c(a)(11) (1982).

223. See Letter from Frederick R. Medero, Director, Securities Disclosure Division, Office of the Comptroller of the Currency (Sept. 21, 1978), and Letter from Peter C. Liebesman, Senior Attorney, Legal Advisory Services Division, Office of the Comptroller of the Currency (Sept. 18, 1978).

224. H.R. REP. No. 2421, 82d Cong., 2d Sess. 2 (1952), reprinted in 1952 U.S. CODE CONG. & AD. NEWS 2133, 2134. See also S. REP. No. 763, 82d Cong., 1st Sess. 2 (1951).

poration to be acquired merges into the controlled subsidiary, the transaction is known as a "triangular merger." If, on the other hand, the controlled subsidiary merges into the target corporation, the transaction is known as a "reverse triangular merger." In any event, the surviving corporation remains or becomes a subsidiary of the parent corporation that supplied the consideration for the merger. In the context of a bank holding company acquisition, the controlled subsidiary of the bank holding company, which is a party to the merger, may be an operating bank subsidiary of the holding company or a nonoperating "interim bank," chartered for the purpose of the merger.²²⁵

Historically, the primary business advantage of casting a bank acquisition in the form of a triangular merger was that (subject to dissenters' rights) the holding company would obtain all of the outstanding shares of the target bank.²²⁶ By virtue of the National Bank Act and the Comptroller's interpretation of the merger statutes requiring a public auction of holding company shares pursuant to the dissenters' rights provisions, the reverse triangular merger has received increased attention.

A reverse triangular merger is one in which the interim bank, set up by the holding company, is merged into the existing (target) bank. That latter bank becomes the surviving institution. The shareholders would be paid cash or a mixture of cash and stock to give up their equity interests. Each share of the phantom bank (which would be wholly owned by the bank holding company) would then be converted into the target bank shares so that the bank holding company would become the sole shareholder of the target bank.²²⁷ Thus, while the target bank would be the resulting or surviving association, its shareholders' interests would be replaced by ownership interests in the bank holding company that set up the phantom. The target bank then survives in the merger transaction and, as noted in the legislative history to the merger statutes, Congress did not intend for shareholders in surviving institutions to have dissenters' rights.²²⁸

The Comptroller, because of the lack of dissenters' rights in a

225. On March 13, 1981, the Comptroller adopted new rules applicable to the formation of interim national banks (see 46 Fed. Reg. 16,661 (1981)). An "interim national bank" is generally defined in the rules as a new national bank organized solely to facilitate the creation of a bank holding company and the acquisition of 100% of the voting shares of an existing bank, which prior to commencing business will be a party to a merger with an existing bank. 46 Fed. Reg. 16,662 (1981), codified in 12 C.F.R. § 5.21(a) (1983). The rules were intended to eliminate unnecessary duplication and delay in charter applications filed solely to facilitate such transactions.

226. J. CHAMBERS & L. SADLER, JR., *BANK HOLDING COMPANIES: A PRACTICAL GUIDE TO BANK ACQUISITIONS AND MERGERS* ch. 3 (1982).

227. See 12 U.S.C. § 72 (1982).

228. See Golden, *supra* note 221.

reverse triangular merger, has historically denied applications for such reorganizations.²²⁹ Therefore, their current viability, at least as to national bank acquisitions and reorganizations, is minimal.

Conclusion

The comparatively comfortable environment that existed as recently as ten years ago, with clear lines between investment and commercial banking, and safe interstate havens for the latter, is no longer with us. Commercial banks compete with money market funds through the Money Market Deposit Accounts and SuperNow Accounts, authorized effective November 15, 1982 and January 5, 1983, respectively. Banks and bank holding companies have expanded their products and services as discount brokers and as futures commission merchants. Securities firms are attempting to buy banks and "nonbanks" and offer bank-like services interstate. As the assaults on the Glass-Steagall Act and interstate banking prohibitions continue, it would appear wise to consider the events that led originally to their imposition. Can we now say that the financial markets are sophisticated and "mature" enough to avoid another crash? As banks become less regulated and are allowed to pay more for their source funds, they may be forced to take more risks in order to generate a competitive return.

The high degree of regulation in the banking industry has provided obstacles to geographic- and product-extending activities within the banking industry. That same regulation has also protected the industry from competition and hindered a concentration of capital. With the advent of deregulation the banking industry faces competition both from within and beyond its historical confines. While such competition may ultimately strengthen the industry, it will no doubt exact a price. Whether the price, which includes risks of failure, is justified remains to be seen.

229. The Comptroller's authority to "approve" mergers carries with it a great degree of discretion. As stated by the court in *Apfel v. Mellon*, 33 F.2d 805, 807 (D.C. Cir.), *cert. denied*, 280 U.S. 585 (1929), "An examination of congressional legislation with regard to banking since 1864 shows that Congress has consistently used various forms of the word 'approved' in the sense of conferring discretion upon the Comptroller of the Currency, the Secretary of the Treasury, or the Federal Reserve Board."

