Discount Brokerage Services, The Glass-Steagall Act, and Branch Banking in Texas.

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I. INTRODUCTION

Many bank holding companies have recently begun to offer discount brokerage services to customers of their subsidiary banks. The customers are thus able to purchase stocks, bonds, and other forms of securities through brokers employed by the bank,[1] usually at a price less than that

1. *See New National Bank Subsidiary Allowed to Offer Discount Brokerage Services,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,284, at 86,256 (Aug. 26, 1982), *rev'd,* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983). The office of the Comptroller of the Currency approved the application of Security Pacific National Bank "to offer discount brokerage services through a new subsidiary." *See id.* at 86,255; *FRB Approves Acquisition of Retail Discount Securities Brokerage Firm by Bank Holding Company,* [1982-1983 Transfer Binder] FED. BANKING L. REP.

which a full-service brokerage firm would charge.[2] In order to reduce expenditures for the computerized technology which is required to offer such a service, one of the holding company banks is usually designated as the "lead" bank through which all of the brokerage activity is coordinated.[3] Some members of the Texas banking community have privately questioned whether this practice constitutes branch banking in contravention of state law.[4]

This comment will be concerned specifically with: (1) a consideration of discount brokerage services as described in the context above and their relation to both federal and state branch banking laws; (2) whether such activity is expressly or impliedly permitted under the applicable federal and state statutes, with particular emphasis on the Glass-Steagall and McFadden Acts; and (3) whether discount brokerage services constitute branch banking in violation of Texas law.

II. BRANCH BANKING AND THE GOVERNING LAWS

A. *Federal Definition—The Determination of What is a Branch*

Branch banking is defined under federal law as a bank or banking facility which receives deposits, pays checks, or lends money.[5] Representative Louis McFadden explained to Congress, upon enactment of 12 U.S.C. § 36(f), that a branch bank is any place away from the banking office which engages in the traditional banking functions, or conducts business typically transacted at the principal office, provided the branch is established under the Act.[6]

(CCH) ¶ 99,475, at 86,631 (Jan. 7, 1983) (FRB announced approval of BankAmerica Corp. application to acquire Charles Schwab Corp., a retail discount securities broker).

2. *See FRB Approves Acquisition of Retail Discount Securities Brokerage Firm by Bank Holding Company,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,475, at 86,635 (Jan. 7, 1983) (discount brokers' lower commission rates are considered by full-line brokers in determining fees).

3. Telephone interview with Archie P. Clayton, III, General Counsel, State Banking Commission (Mar. 19, 1984).

4. *See* TEX. CONST. art. XVI, § 16(a). "[S]uch body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter." *Id.*; *see also* TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1984). "No state, national or private bank shall engage in business in more than one place, maintain any branch office, or cash checks or receive deposits except in its own banking house. . . ." *Id.*

5. *See* 12 U.S.C. § 36(f) (1982). "The term 'branch'. . . include[s] any branch bank, branch office, . . . or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent." *Id.*

6. *See* Dakota Nat'l Bank & Trust v. First Nat'l Bank, 554 F.2d 345, 352 (8th Cir.) (quoting Rep. McFadden's analysis of § 36(f) upon its enactment), *cert. denied,* 434 U.S. 877 (1977). "Any place outside of or away from the main office where the bank carries on its

Federal law authorizes national banking associations to branch,[7] and this provision may be viewed as a product of the dual system of regulation of national and state banks.[8] On its face, 12 U.S.C. § 36(f) provides a two-part test which determines whether or not a facility is a branch bank.[9] In applying such a test with regard to banking facilities, however, the United States Supreme Court has clearly expressed its intention to give a liberal construction to the term "branch."[10]

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business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch if it is legally established under the provisions of this act." *Id.* at 352; *see also* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 931 (D.C. Cir.) (quoting 68 CONG. REC. 5816 (1927)), *cert. denied,* 429 U.S. 862 (1976); Illinois *ex rel.* Lignoul v. Continental Ill. Nat'l Bank & Trust, 536 F.2d 176, 179 (7th Cir.) (quoting 68 CONG. REC. 5816 (1927)), *cert. denied,* 429 U.S. 871 (1976).

7. *See* 12 U.S.C. § 36(c) (1982). This section provides in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

Id.

8. *See, e.g.,* First Nat'l Bank v. Dickinson, 396 U.S. 122, 131 (1970) (citing First Nat'l Bank v. Walker Bank & Trust, 385 U.S. 252 (1967)) (*Dickinson* Court referred to "dual banking structure where state and national banks coexist"); County Nat'l Bancorporation v. Board of Governors of Fed. Reserve Sys., 654 F.2d 1253, 1262 (8th Cir. 1981) (U.S. banks chartered and governed by "federal and state agencies"); First Nat'l Bank v. Camp, 465 F.2d 586, 592 (D.C. Cir. 1972) (competitive equality doctrine results from unique "dual banking system" under which independent chartering authority of state and national banks matured), *cert. denied,* 409 U.S. 1124 (1973); *see also* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 932 (D.C. Cir.) (Congress established dual banking system), *cert. denied,* 429 U.S. 862 (1976).

9. *See* 12 U.S.C. § 36(f) (1982). In order to satisfy § 36(f) the facility must: (1) be a "branch bank, branch office, branch agency, additional office, or any branch place of business," and (2) receive deposits, pay checks, or lend money. *See id.; see also* First Nat'l Bank v. Dickinson, 396 U.S. 122, 135 (1970) (construing 12 U.S.C. § 36(f) (1945)). The Court stated in dicta that § 36(f) provides a definition of the minimum content of a "branch." *See id.* at 135. Essentially, by utilizing the word "include" in the definition contained in 12 U.S.C. § 36(f), a "calculated indefiniteness" is suggested regarding the term's outer limits. *See id.* at 135. By analogy, a "branch bank" minimally includes *any* place established to receive deposits, or pay checks, or lend money at a separate location from the main premises; the term, however, may encompass more within its scope. *See id.* at 135. Section 36(f) is written disjunctively; therefore, a banking facility, which operates apart from the chartered premises and offers only one of the three services enumerated in the definition, may be determined to be functioning as a branch bank. *See id.* at 135.

10. *See* First Nat'l Bank v. Dickinson, 396 U.S. 122, 134 (1970). The Court stated that

Before a national banking association may establish and operate a branch, it must obtain the approval of the United States Comptroller of the Currency.[11] A national bank's application to branch will not be considered unless branch banking of state chartered institutions is expressly permitted by the designated state's law.[12] If branch banking is permitted within a state, the question may then arise whether a banking operation is a branch within the meaning of 12 U.S.C. § 36(f); thus, a determination is made requiring application of federal law.[13] Conversely, state law is determinative of how, when, and where a nationally chartered bank may be permitted to branch if, indeed, branching is allowed at all.[14]

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a restrictive definition of "branch" would frustrate congressional intent. *See id.* at 134. Three years earlier, the Court expounded on their interpretation of Congress' intention regarding § 36, and concluded that in the realm of branch banking Congress intended to install state and national banks on a plane of "competitive equality." *See* First Nat'l Bank v. Walker Bank & Trust, 385 U.S. 252, 261 (1967). The Court further stated that Congress was unquestionably continuing its equalization policy by enacting 12 U.S.C. § 36, a policy which was adopted for the first time in the National Bank Act of 1864. *See id.* at 261; *see also* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 943 (D.C. Cir.) (restrictive interpretation of § 36(f) would thwart congressional intent), *cert. denied,* 429 U.S. 862 (1976).

11. *See, e.g.,* State *ex rel.* Edwards v. Heimann, 633 F.2d 886, 890 (9th Cir. 1980) (in determining national branch bank applications, Comptroller must consider requirements of state statutes); First Bank & Trust v. Smith, 545 F.2d 752, 753 (1st Cir. 1976) (Comptroller may authorize national bank to branch if state law permits), *cert. denied,* 430 U.S. 931 (1977); First Nat'l Bank v. Camp, 465 F.2d 586, 591 (D.C. Cir. 1972) (state law provisions govern Comptroller decision when considering national bank branch application), *cert. denied,* 409 U.S. 1124 (1973).

12. *See, e.g.,* First Nat'l Bank v. Walker Bank & Trust, 385 U.S. 252, 253 (1967) (national banking association authorized to branch if state in question expressly authorized state banks to branch); State *ex rel.* Edwards v. Heimann, 633 F.2d 886, 889 (9th Cir. 1980) (national banks may branch in state if state bank branching is also authorized by state law); State Bank v. Merchants Nat'l Bank & Trust, 593 F.2d 341, 343-44 (8th Cir. 1979) (national bank may not establish branch unless state bank in same state could also branch); *see also* St. Louis County Nat'l Bank v. Mercantile Trust Co. Nat'l Ass'n, 548 F.2d 716, 718 (8th Cir. 1976) (if state bank is unauthorized to operate branch, then national bank branch is illegal under 12 U.S.C. § 36(c)), *cert. denied,* 433 U.S. 909 (1977).

13. *See, e.g.,* First Nat'l Bank v. Dickinson, 396 U.S. 122, 125 (1970) (threshold question of what constitutes "branch" is governed by federal law); State Bank v. Merchants Nat'l Bank & Trust, 593 F.2d 341, 344 (8th Cir. 1979) (whether national bank facility constitutes branch bank is federal law question); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 933 (D.C. Cir.) (what constitutes national bank branch is federal law threshold question regardless of state law), *cert. denied,* 429 U.S. 862 (1976).

14. *See, e.g.,* First Nat'l Bank v. Dickinson, 396 U.S. 122, 130 (1970) (branch established only "when, where, and how" state law authorizes state bank to branch); State *ex rel.* Edwards v. Heimann, 633 F.2d 886, 889 (9th Cir. 1980) (state law determines "when, where, and how" national bank may branch, if at all); Utah *ex rel.* Dep't of Fin. Inst. v. Zions First Nat'l Bank, 615 F.2d 903, 906 (10th Cir. 1980) (state law decides "when, where, and how" nationally chartered banks may branch, if at all); *see also* St. Louis County Nat'l Bank v. Mercantile Trust Co. Nat'l Ass'n, 548 F.2d 716, 717 (8th Cir. 1976) (branch established only

One of the items which is given strict consideration by the Comptroller in approving or disapproving a bank's application to operate a branch facility is whether the branching requirements in the state where branching is desired have been fully satisfied.[15] Compliance with state branch banking laws is one of the basic concepts embodied in the McFadden Act of 1927.[16]

B. *The McFadden Act's "Competitive Equality"*

The McFadden Act was a significant piece of legislation for national banking organizations since, prior to this act, the national banking community was prohibited from operating branch offices, and this was true even in states which permitted branch banking for state chartered banks.[17] This seemingly harsh rule was an indirect result of the National Bank Act of 1864.[18] The Act, by its terms, did not permit or prohibit branch banking by any nationally chartered banks, but was interpreted by the United States Supreme Court, in 1924, as forbidding branching by national banking associations.[19] Not until enactment of the McFadden Act, in 1927,

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"when, where, and how" state law authorizes state bank to branch), *cert. denied,* 433 U.S. 909 (1977).

15. *See, e.g.,* Marshall & Isley Corp. v. Heimann, 652 F.2d 685, 695 (7th Cir. 1981) (no Comptroller approval of national bank branch without state branching prerequisites satisfied), *cert. denied,* 455 U.S. 981 (1982); State *ex rel.* Edwards v. Heimann, 633 F.2d 886, 890 (9th Cir. 1980) (Comptroller considers relevant state law to comply with state statute requirements); First Bank & Trust v. Smith, 545 F.2d 752, 752-53 (1st Cir. 1976) (Comptroller required to consider applicable state standard in approving branch bank application), *cert. denied,* 430 U.S. 931 (1977); *see also* Hempstead Bank v. Smith, 540 F.2d 57, 59-60 (2d Cir. 1976) (in approving branching applications, Comptroller must consider state branching law and make required findings).

16. *See* McFadden Act, Pub. L. No. 639, 44 Stat. 1224, 1228-29 (1927) (codified as amended at 12 U.S.C. § 36(c) (1982)).

17. *See* National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C.). No section of this act expressly prohibited national banks from establishing branches. *See id.* at 99; *see also* First Nat'l Bank v. Missouri, 263 U.S. 640, 657-58 (1924) (Supreme Court interpreted National Bank Act as disapproving of national bank branches since not expressly provided). *See generally* LaFalce, *Banking in the Eighties,* 37 BUS. LAW. 839, 848-50 (1982) (article provides insight into history and development of the McFadden Act).

18. *See* National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C.).

19. *See* First Nat'l Bank v. Missouri, 263 U.S. 640, 657-58 (1924). The Supreme Court disapproved of nationally chartered branch banks by construing two pertinent sections of the Revised Statutes in conjunction with one another. *See id.* at 657-58 (Court construed Revised Statutes of the United States, Act of June 3, 1864, §§ 5134, 5190, at 992, 1003 (2d Ed. 1878)). For example, Rev. Stat. § 5134 provided for the organization certificate of the national bank to state specifically where its banking operations were to be conducted, by designating the particular state and county or city. *See* First Nat'l Bank v. Missouri, 263

were national banks authorized to open branch offices; this enabled state and national banks to compete with each other in a vastly expanding bank market.[20]

The McFadden Act was a result of the belief that state banks were given an advantage because some states allowed state banks to branch while branching of national banks was not permitted;[21] the Act sought to establish a "competitive equality" between state banks and national banks.[22] This competitive equality already existed, however, in states which prohibited the branching of their state chartered banks.[23]

U.S. 640, 657 (1924). Further, Rev. Stat. § 5190 required the business of the banking association to be "transacted at an office or bankinghouse" which was specified in the charter. *See id.* at 657. The Supreme Court strictly interpreted the article "an" as being singular, thereby confining the national bank to only one banking facility. *See id.* at 657. The Court concluded its interpretation by drawing upon three relevant analogies: first, the statutes provided for a bank with capital in proportion to the population of the bank's location, but omitted a provision adjusting the capital for any branch banks; second, another statute authorized state banks with existing branches to subsequently become national banking associations and keep their branches with the proportionate capital to be regulated according to the assigned capital; and third, Congress enacted special legislation on at least two separate occasions establishing branch banks, but for a limited duration of two years (the two instances being the Chicago Exposition of 1892 and the St. Louis Exposition of 1901). *See id.* at 657-58.

20. *See* 68 CONG. REC. H5815 (daily ed. Mar. 3, 1927) (statement of Rep. Louis McFadden, sponsor of the McFadden Act). "As a result of the passage of this act, the National Bank Act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal Reserve System." *Id.*

21. *See* State Bank v. Merchants Nat'l Bank & Trust, 593 F.2d 341, 343 (8th Cir. 1979) (national banks could not branch bank prior to the McFadden Act). *See generally,* Comment, *Customer-Bank Communication Terminals and Branch Banking,* 7 ST. MARY'S L.J. 389, 391 (1975) (prior to the McFadden Act, state banks alone could branch, resulting in a competitive disadvantage to national banks).

22. *See, e.g.,* First Nat'l Bank v. Walker Bank & Trust, 385 U.S. 252, 258 (1967) (citing statement by Rep. McFadden that "*competitive equality* has been established"); State *ex rel.* Edwards v. Heimann, 633 F.2d 886, 890 (9th Cir. 1980) (congressional intent is to establish competitive equality between national and state banks); Dakota Nat'l Bank & Trust v. First Nat'l Bank, 554 F.2d 345, 353 (8th Cir.) (doctrine of competitive equality is firmly embedded in the McFadden Act), *cert. denied,* 434 U.S. 877 (1977); *see also* Colorado *ex rel.* State Banking Bd. v. First Nat'l Bank, 540 F.2d 497, 499 (10th Cir. 1976) (congressional intent of "competitive equality" regarding branch banking for state and national banks), *cert. denied,* 429 U.S. 1091 (1977); Nebraskans for Indep. Banking, Inc. v. Omaha Nat'l Bank, 530 F.2d 755, 759 (8th Cir.) (competitive equality is underlying principle of the McFadden Act), *vacated and remanded for reconsideration in light of subsequent state legislation,* 426 U.S. 310 (1976); Driscoll v. Northwestern Nat'l Bank, 484 F.2d 173, 175 (8th Cir. 1973) (overriding policy of McFadden Act is "competitive equality" between state and national banks).

23. *See, e.g.,* MINN. STAT. ANN. § 48.34 (West 1970) (derivation of state branch bank prohibition dates to 1927); MO. ANN. STAT. §§ 362.105(1)(1), .107(5) (Vernon 1968) (branch

C. *Texas Constitutional and Statutory Laws—The History of Branch Banking Prohibition in Texas*

Today, a majority of states permit either state-wide branching[24] or some form of limited branching.[25] Only ten states, including Texas, do not allow any form of branch banking.[26] Both the Texas Constitution[27] and a corresponding statute[28] are very explicit in their prohibition of branch banking in this state.

The development of Texas commercial banking is a reflection of the populist's distrust of any organization with a primary focus on financial

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banking laws enacted in 1877); TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon 1973) (Texas banking system prohibiting branch banking established in 1905).

24. *See* ALASKA STAT. § 06.05.399 (1978); ARIZ. REV. STAT. ANN. § 6-190 (1974); CAL. FIN. CODE § 500 (Deering Supp. 1984); DEL. CODE ANN. tit. 5, § 770 (Supp. 1982); D.C. CODE ANN. § 26-103(b) (1981); HAWAII REV. STAT. § 403-53 (Supp. 1982); IDAHO CODE § 26-301 (Supp. 1983); ME. REV. STAT. ANN. tit. 9B, § 331(2) (1980); MD. FIN. INST. CODE ANN. § 5-501 (1980 & Supp. 1983); MISS. CODE ANN. § 81-7-1 (Supp. 1983); NEV. REV. STAT. § 660.015(1) (1979); N.J. REV. STAT. § 17:9A-19 (Supp. 1983-1984); N.Y. BANKING LAW § 105(1) (McKinney 1971 & Supp. 1983-1984); N.C. GEN. STAT. § 53-62(b) (1982); R.I. GEN. LAWS § 19-1-13 (1982); S.C. CODE ANN. § 34-1-70 (Law. Co-op. 1977); UTAH CODE ANN. § 7-3-5 (1982); VT. STAT. ANN. tit. 8, § 651(a) (1971); VA. CODE § 6.1-39 (Supp. 1982); WASH. REV. CODE ANN. § 30.40.020 (Supp. 1983-1984).

25. *See* ALA. CODE § 5-5A-20 (Supp. 1983); ARK. STAT. ANN. § 67-360 (Supp. 1983); CONN. GEN. STAT. § 36-59 (1981 & Supp. 1984); FLA. STAT. ANN. § 658.26(2)(a) (West Supp. 1983); GA. CODE ANN. § 13-203(c) (Supp. 1980); IND. CODE ANN. § 28-1-17-1 (Burns Supp. 1983); KY. REV. STAT. ANN. § 287.180(2) (Baldwin 1981); LA. REV. STAT. ANN. §§ 6:54, :328 (West Supp. 1984); MASS. ANN. LAWS ch. 172, § 11 (Michie/Law. Co-op. 1977 & Supp. 1983); MICH. STAT. ANN. § 23.710(171) (Callaghan 1983); MISS. CODE ANN. § 81-7-1 (Supp. 1983); NEB. REV. STAT. § 8-157(1) (Supp. 1983); N.H. REV. STAT. ANN. § 384-B:2 (1968); N.M. STAT. ANN. § 58-5-3 (Supp. 1983); OHIO REV. CODE ANN. § 1111.03 (Baldwin 1978); OKLA. STAT. ANN. tit. 6, § 501 (West Supp. 1983-1984); OR. REV. STAT. §§ 714.030-.130 (1983); PA. STAT. ANN. tit. 7, § 904 (Purdon 1967 & Supp. 1983-1984); S.D. CODIFIED LAWS ANN. § 51-20-1 (1980); TENN. CODE ANN. § 45-2-614 (Supp. 1983); W. VA. CODE § 31A-8-12 (Supp. 1983); WIS. STAT. ANN. § 221.04(j) (West 1982).

26. *See* COLO. REV. STAT. § 11-6-101 (Supp. 1983); ILL. REV. STAT. ch. 17, § 313 (Smith-Hurd 1981); IOWA CODE ANN. § 524.1201 (West Supp. 1983-1984); KAN. STAT. ANN. § 9-1111 (1982); MINN. STAT. ANN. § 48.34 (West Supp. 1984); MO. ANN. STAT. §§ 362.105(1)(1), .107(5) (Vernon 1984); MONT. CODE ANN. § 32-1-372(1) (1983); N.D. CENT. CODE § 6-03-14 (Supp. 1983); TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1984); WYO. STAT. § 13-2-201 (1977).

27. *See* TEX. CONST. art. XVI, § 16(a). Section 16(a) provides in pertinent part: "[S]uch body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter." *Id.*

28. *See* TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1984). This article provides: "No state, national or private bank shall engage in business in more than one place, maintain any branch office, or cash checks or receive deposits except in its own banking house. . . ." *Id.*

matters and fear that financial power would become too concentrated.[29] This fear and distrust was coupled with the realization that necessary adaptations were required to fulfill the expanding economy's banking needs.[30]

The present Texas Constitution and its predecessors evidence reluctance to establish a state banking system. As a result of that concern, state chartered banks were prohibited for over two decades.[31] The prohibition was removed briefly by the constitution of 1869 under the reconstruction government;[32] the present constitution adopted in 1876, however, once again inserted the ban on state incorporated banks.[33] The constitution was amended in 1904 to authorize the establishment of a banking system in Texas.[34] In 1905, the new banking system removed the ban on state chartered banks.[35] The 1905 act also included the first provision in Texas prohibiting any form of branch banking,[36] which was later incorporated into the current Texas Constitution.[37]

The first sentence of the Texas statute,[38] which is the general prohibition against any branch banking in Texas, was originally enacted as article 3 of the Texas Banking Code of 1943.[39] As currently written, the language in

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29. *See* TEX. CONST. art. XVI, § 16, interp. commentary (Vernon 1955) (summarizing history of Texas banking system).

30. *See id.* art. XVI, § 16.

31. *Compare* TEX. CONST. art. VII, § 30 (1845) ("No corporate body shall hereafter be created, renewed or extended, with banking or discounting privileges.") *with* TEX. CONST. art. VII, § 30 (1866) (no change in language from prior constitutions).

32. *See* TEX. CONST. art. XVI (1869) (traditional prohibition against state chartered banks absent from general provisions).

33. *See* TEX. CONST. art. XVI, § 16. The present constitution's language was identical to that of the 1866 constitution until it was amended in 1904. *See id.* (1876, amended 1904).

34. *See* TEX. CONST. art. XVI, § 16. This section provides: "The legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof." *Id.*

35. *See* Act of May 26, 1905, ch. 10, 1905 Tex. Gen. Laws 489, 489-520, *amended by* Texas Banking Code of 1943, ch. 97, subch. IX, 1943 Tex. Gen. Laws 127, 127-68 (current version at TEX. REV. CIV. STAT. ANN. art. 342 (Vernon 1973 & Supp. 1984)). The 1905 Act provides for regulation of banking corporations and banks. *See id.* at 489.

36. *See id.* at 490. Section 4 of the Act concluded: "Corporations created under the terms of this act shall not be authorized to engage in business at more than one place which shall be designated in their charters." *Id.* at 490.

37. *See* TEX. CONST. art. XVI, § 16(a). The branching prohibition in the Texas Constitution presently reads: "[S]uch body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter." *Id.*

38. *See* TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1984). "No State, national or private bank shall engage in business in more than one place, maintain any branch office, or cash checks or receive deposits except in its own banking house. . . ." *Id.*

39. *See* Texas Banking Code of 1943, ch. 97, subch. IX, art. 3, 1943 Tex. Gen. Laws

the statute is identical to that in the Code except for the new provision stating that unmanned teller machines are not included in the branch banking prohibition.[40]

Texas law regarding the constitutional and statutory prohibitions of branch banking are generally confined to Opinions of the Texas Attorney General.[41] One of the more comprehensive opinions written by the Attorney General held that article XVI, section 16, of the Texas Constitution was not just a general barrier for a bank engaging in business at more than one location; rather, that provision reflected a state policy demanding a bank corporation to function as a viable unit apart from any other.[42] Two

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127, 165, *amended by* Act of May 7, 1951, ch. 139, § 14, 1951 Tex. Gen. Laws 233, 233-39, *amended by* Act of May 13, 1957, ch. 220, § 1, 1957 Tex. Gen. Laws 448, 448, *amended by* Act of Apr. 29, 1959, ch. 123, § 1, 1959 Tex. Gen. Laws 213, 213-14, *amended by* Act of Apr. 30, 1963, ch. 81, § 6, 1963 Tex. Gen. Laws 134, 138, *amended by* Act of May 25, 1971, ch. 358, § 1, 1971 Tex. Gen. Laws 1352, 1352.

40. *See* TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1984) ("No . . . bank shall engage in business in more than one place . . . except . . . through unmanned teller machines as authorized in Article 3A."); *see also* Oak Forest Bank v. Harlingen State Bank, 656 S.W.2d 589, 592 (Tex. App.—Corpus Christi 1983, no writ) (Texas bank may conduct business in chartered location "or through unmanned teller machines"). *See generally* Comment, *Operating Unmanned Teller Machines in Texas,* 13 TEX. TECH L. REV. 61, 81 (1982) (unmanned teller machines are one type of branch banking but are excepted from the prohibition of art. 342-903). The author details the applicable state constitutional and statutory laws and then discusses the provisions as they relate to branch banking and "competitive equality" under the McFadden Act. *See id.* at 72-82; *see also* Comment, *Customer-Bank Communication Terminals and Branch Banking,* 7 ST. MARY'S L.J. 389, 396-401 (1975) (discussion of CBCTs and application of the federal definition of branch). There is a line of cases determining that CBCTs are branch banking. *See, e.g.,* State Bank v. Merchants Nat'l Bank & Trust, 593 F.2d 341, 344 (8th Cir. 1979) ("settled beyond question" that use of CBCT is "branch banking"); Missouri *ex rel.* Kostman v. First Nat'l Bank, 538 F.2d 219, 219-220 (8th Cir.) (ability of properly operated CBCT machine is branch banking), *cert. denied,* 429 U.S. 941 (1976); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 941 (D.C. Cir.) (held off-premises CBCTs are within federal definition of branch), *cert. denied,* 429 U.S. 862 (1976).

41. *See* Bank of N. Am. v. State Banking Bd., 468 S.W.2d 529, 531 (Tex. Civ. App.—Austin 1971, no writ) (constitutional branching prohibition is not judicially construed but Attorney General has written opinions concerning its application).

42. *See id.* at 531. The court cited a 1952 dissertation written to the State Banking Board by Attorney General Price Daniel. *See id.* at 531. The dissertation interpreted § 16 as denying an individual bank from establishing separate units and controlling them so as to circuitously be engaging in the business of banking through colorably independent banks. *See id.* at 531. Further, the Attorney General stated that the constitution in no way forbade stockholders of a certain bank from possessing stock in another bank if this stock ownership was the only affiliation that person had with the two banks. *See id.* at 531. If, on the other hand, a stockholder of one bank purchased a controlling share of another bank simply to operate the second bank as an agent of the first bank, this would, according to the Attorney General, be illegal under § 16 of art. XVI of the constitution. *See id.* at 531; *see also* Op. Tex. Att'y Gen. No. H-606 (1975) (one bank holding company-controlled bank may "domi-

Texas cases, *Texas Bankers Association v. Government Employees Credit Union*[43] and *State Banking Board v. Airline National Bank,*[44] considered the intended scope of section 16 of the constitution, and also noted the purposes and applicability of that provision.[45] A reasonable explanation for the absence of Texas case law interpreting the branching prohibition may be the precise language of the relevant constitutional and statutory provisions.

III. Discount Brokerage and the Glass-Steagall Act

American banks have historically dealt in a limited capacity with the buying and selling of stocks on behalf of their customers, although, even before the Banking Act of 1933, the general feeling of the lawmakers was that such dealings in the brokerage business were not proper.[46] Investment dealings by banks were considered to be at least one of the causes of bank failures in the late 1920s and early 1930s; the banks were too actively involved in dealing with securities and, in particular, the stock market.[47] During the early days of recovery from the Great Depression, a concerted effort was made to separate the fundamentals of banking from the business of investments.[48] One of the tools used in accomplishing such a purpose was the enactment of the Banking Act of 1933, more commonly known as the Glass-Steagall Act.[49]

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nate and control" another bank's operation as to violate Texas Constitution and statutory law).

43. 625 S.W.2d 338 (Tex. Civ. App.—San Antonio 1981, no writ).

44. 398 S.W.2d 805 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

45. *See* Texas Bankers Ass'n v. Government Employees Credit Union, 625 S.W.2d 338, 342 (Tex. Civ. App.—San Antonio 1981, no writ) (branch banking limitations apply only to corporate bodies created by first sentence of § 16); State Banking Bd. v. Airline Nat'l Bank, 398 S.W.2d 805, 817 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (banking laws' primary purpose is "protection and security" of bank depositors).

46. *See* Investment Co. Inst. v. Camp, 401 U.S. 617, 629 (1971) (prior to passage of Glass-Steagall Act, it was believed improper for commercial bank to directly participate in investment banking).

47. *See id.* at 629-30. The Bank of the United States' failure in 1930 was attributed to activities with multiple securities affiliates. *See id.* at 629-30.

48. *See* A.G. Becker, Inc. v. Board of Governors of Fed. Reserve Sys., 519 F. Supp. 602, 614 (D.D.C. 1981) (citing Baker, Watts & Co. v. Saxon, 261 F. Supp. 247, 252 (D.D.C. 1966), *aff'd sub nom.* Port of N.Y. Auth. v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968)), *rev'd,* 693 F.2d 136 (D.C. Cir.), *aff'd,* 694 F.2d 280 (D.C. Cir. 1982). The statutory language reflects the "unalterable and emphatic intention of Congress to divorce commercial banks from the business of underwriting and dealing in securities." *See id.* at 614. *See generally* Pitt & Williams, *The Glass-Steagall Act: Key Issues for the Financial Services Industry,* 11 Sec. Reg. L.J. 234, 234 (1983) (Glass-Steagall Act intended to separate banking from securities).

49. *See* Banking (Glass-Steagall) Act of 1933, Pub. L. No. 66, 48 Stat. 162 (codified as

Four sections of the Banking Act of 1933[50] are specifically concerned with the disassociation of "commercial and investment banking" and are referred to when considering securities dealings within the scope of banking activities.[51] Not only did Congress intend to separate national banks from their prior involvement in securities, the Act was also designed to protect those who deposited their money in financial institutions from a recurrence of the widespread bank closings which occurred during the Great Depression.[52] A proper construction of the Glass-Steagall Act requires that the four relevant sections be read together to avoid confusion as to Congress' intent in passing the Act.

A. *Express Approval of Limited Brokerage Activities—Section 24(Seventh)*

Section 24(Seventh) of title 12 of the United States Code expressly approves of the marginally limited brokerage activities offered by some national banking associations.[53] Historically, however, the position of the Comptroller of the Currency has been that such services can be provided by national banks only to established customers of the bank, and then only

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amended in scattered sections of 12 U.S.C.). One commentator has noted the ambiguity and confusion of the popular title "Glass-Steagall Act" because of its application to the Feb. 27, 1932, statute and the June 16, 1933, statute as well. *See* Dunne, *Glass-Steagall Act—A History of its Legislative Origins and Regulatory Construction,* 92 BANKING L.J. 38, 38 (1975).

50. Banking (Glass-Steagall) Act of 1933, Pub. L. No. 66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.). Sections 16, 20, 21, and 32 are now found at 12 U.S.C. §§ 24(Seventh), 377, 378, and 78, respectively. *See* 12 U.S.C. §§ 24(Seventh), 377, 378, 78 (1982).

51. *See* 12 U.S.C. §§ 24(Seventh), 78, 377, 378 (1982). *See generally* Note, *A Banker's Adventure in Brokerland: Looking Through Glass-Steagall at Discount Brokerage Services,* 81 MICH. L. REV. 1498, 1501-11 (1983) (analysis and interpretation of theory of Glass-Steagall Act). The author explains in a footnote that the codified sections of the Banking Act of 1933, §§ 24 (Seventh), 377, 378, and 78, consider "the separation of commercial and investment banking and are usually the intended reference when the name Glass-Steagall is used." *See id.* at 1501 n.12; *see also* Comment, *Savings and Loan Associations, Securities Activities and the Glass-Steagall Act,* 20 HOUS. L. REV. 1383, 1412-1414 (1983) (discussion of Glass-Steagall Act and analogy to savings and loan associations).

52. *See* Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 61 (1981) (Glass-Steagall Act enacted to protect depositors from bank closings which occurred in the Great Depression); *see also* 77 CONG. REC. 3837 (1933) (statement of Rep. Henry Steagall, co-sponsor debating purpose of the Act).

53. *See* 12 U.S.C. § 24(Seventh) (1982). Section 24(Seventh) reads in part:

> The business of dealing in securities and stock by the association shall be limited 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. . . .

Id.

if the customer prepays for any securities purchased.[54] Otherwise, if the customer did not prepay his order and subsequently defaulted or refused to pay, the broker would still be required to complete the purchase with bank funds.[55] This purchase by the broker would in turn violate section 24(Seventh), which restricts securities purchases to those only for the customer's account.[56] In fact, the statute twice specifies that a national bank may not purchase securities or stocks for its own account,[57] except in limited situations as provided.[58]

The comptroller has recently abolished the requirements that the customer have a prior banking relationship and that the order be prepaid by the customer;[59] both of these requirements have reflected "the great caution of banking regulations in the years immediately following the 1931-32

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54. *See New National Bank Subsidiary Allowed to Offer Discount Brokerage Services,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,284, at 86,256-57 (Aug. 26, 1982) (as early as 1936, Comptroller determined that buying and selling securities by national banks for bank customers only required prepayment of sufficient collateral with bank), *rev'd,* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983).

55. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 256 (D.D.C. 1983) (contingent bank brokerage liability if securities customer did not pay or did not deliver promised securities). SIA made an argument such as this in an attempt to urge its position that such contingent liability is a violation of the "without recourse" limitation imposed by 12 U.S.C. § 24(Seventh). *See id.* at 256. The district court rejected the argument and distinguished the case relied on by SIA. *See id.* at 256.

56. *See* 12 U.S.C. § 24(Seventh) (1982) (securities purchased only for customer account, not for bank's account).

57. *See id.* The first limiting provision reads in part: "solely upon the order, and for the account of, customers, and in no case for its own account." *Id.* Section 24(Seventh) also reads: "Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation." *Id.*

58. *See id.* A national bank may acquire investment securities for the bank's personal account under regulations prescribed by the Comptroller of the Currency. *See id.* Some of the more notable exceptions include: "obligations of the United States, or general obligations of any State or of any political subdivision thereof . . . , or obligations issued under authority of the Federal Farm Loan Act . . . , or the Federal Home Loan Banks, or obligations which are insured by the Secretary of Housing and Urban Development." *Id.*

59. *See New National Bank Subsidiary Allowed to Offer Discount Brokerage Services,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,284, at 86,255-61 (Aug. 26, 1982) (Comptroller of the Currency approved application submitted by Security Pacific National Bank to provide discount brokerage services through new subsidiary, Security Pacific Discount Brokerage Services, Inc.), *rev'd,* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983). Analysis of the Comptroller's decision reveals an absence of the previous existing rules of "banking relationship" and "prepayment," which have been requirements since 1936. *See id.* at 86,256-61; *see also Comptroller of the Currency—Bank Automatic Investment Services,* [1973-1978 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 96,272, at 81,353-58 (June 10, 1974) (Comptroller's prior opinions which develop into 1974 opinion discussed).

debacle."[60] Another restriction eliminated was the requirement that the services be performed at or near cost.[61] This change resulted from the realization that a bank is in business to make profits.

Another consideration in determining whether discount brokerage services are authorized under the Glass-Steagall Act is whether the service is an incidental power necessary to the exercise of the banking business.[62] The standard used by the majority of federal courts today in determining whether an activity is an incidental power necessary to exercise the business of banking, is whether the service is "convenient or useful" in conjunction with the presently authorized activities.[63] The United States Supreme Court has construed the incidental powers clause of section 24(Seventh) since the passage of the National Bank Act[64] and has concluded that unless an activity is expressly provided for in the statutes or is impliedly present as an incidental power, such activity is not allowed.[65]

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60. *See New National Bank Subsidiary Allowed to Offer Discount Brokerage Services,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,284, at 86,257 (Aug. 26, 1982) (citing *Comptroller of the Currency—Bank Automatic Investment Services,* [1973-1978 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 96,272, at 81,360 (June 10, 1974)), *rev'd,* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983).

61. *See Comptroller of the Currency—Bank Automatic Investment Services,* [1973-1978 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 96,272, at 81,357 (June 24, 1974) (Comptroller dropped "no-profit" condition in 1957). The opinion further stated that a national banking association is legally authorized, as is any business enterprise, to profit from its permissible business operations. *See id.* at 81,361.

62. *See* 12 U.S.C. § 24(Seventh) (1982) (board of directors may exercise all incidental powers necessary to conduct banking business).

63. *See* Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972). *Arnold Tours* summarizes the present test as follows: the activity of a national bank is permissible through its incidental powers which are "necessary to carry on the business of banking," should that activity be "convenient or useful" in association with the discharge of a bank's innate enterprises in accord with its affirmative powers emanating from the National Bank Act. *See id.* at 432. The court concluded that if the association between the attendant activity and the express power is non-existent, the particular service or activity is therefore not approved as being an incidental activity. *See id.* at 432. For a line of cases following this "convenient or useful" incidental activity test, see National Retailers Corp. v. Valley Nat'l Bank, 604 F.2d 32, 33 (9th Cir. 1979) (statute expressly required service offered to be "convenient or useful" to banking); Association of Data Processing Serv. Orgs. v. Federal Home Loan Bank Bd., 568 F.2d 478, 486 (6th Cir. 1977) (quoting verbatim *Arnold Tours* "convenient or useful" test); M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377, 1382 (9th Cir. 1977) (prerequisite that incidental activity be "convenient or useful"), *cert. denied,* 436 U.S. 956 (1978).

64. National Bank Act of 1864, ch. 106, § 8, 13 Stat. 99, 101-02 (codified as amended in scattered sections of 12 U.S.C.).

65. *See, e.g.,* Franklin Nat'l Bank v. New York, 347 U.S. 373, 377 (1954) (incidental powers of national bank do not preclude advertising in authorized national bank branches); Miller v. King, 223 U.S. 505, 506 (1912) (contracts at issue are not within incidental powers required to proceed with banking business); Wyman v. Wallace, 201 U.S. 230, 236 (1906)

As previously stated, this comment addresses the issue of whether the applicable sections of the Glass-Steagall Act permit a national banking association to engage in offering a discount brokerage service to its customers. If section 24(Seventh), title 12, of the United States Code was the only applicable section, the practice would invariably be approved based on statutory language alone.[66] There are, however, three other relevant statutes which must be read in connection with section 24(Seventh).[67]

B. *Restrictions on Securities Firms in Banking—Section 378*

The United States Supreme Court, in construing the Glass-Steagall Act, has recently determined that sections 24(Seventh) and 378 approach the congressional intent of severing the business of dealing in securities "from the banking business from different directions."[68] Section 24(Seventh) restricts a national bank's power to transact securities dealings.[69] Conversely, section 378 denies a securities firm the right to engage simultaneously in the business of banking.[70]

In its full form, section 378, title 12, of the United States Code specifies in detail the wide range of securities dealers who are expressly prohibited from engaging in the diverse spectrum of banking.[71] The statute further

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(power to enter banking transaction by national bank must be incidental power if not expressly conferred); *see also* First Nat'l Bank v. National Exch. Bank, 92 U.S. 122, 127 (1875) (authority given to transact banking business as enumerated, plus any incidental powers required to effectuate the purpose).

66. *See* 12 U.S.C. § 24(Seventh) (1982) (purchases and sales of securities and other stocks shall be for the customer's account).

67. *See id.* §§ 78, 377, 378.

68. *See* Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 62 (1981) (Glass-Steagall §§ 16 and 21 approach Congress' goal of separating securities and banking business from reverse directions).

69. *See* 12 U.S.C. § 24(Seventh) (1982). No less than three restrictions are placed upon a national bank's power to engage in securities dealings in the authorizing sentence of this provision: (1) "The business of dealing in securities and stock by the association shall be limited to . . ."; (2) A national bank may not purchase or sell securities "for its own account"; and (3) "[T]he association shall not underwrite any issue of securities or stock. . . ." *See id.*

70. *See id.* § 378 ("it shall be unlawful—(1) [f]or any person . . . engaged in the business of . . . securities, to engage at the same time . . . in the business of . . . receiving deposits").

71. *See id.* § 378. The section reads in pertinent part:

> (a) After the expiration of one year after June 16, 1933, it shall be unlawful— (1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor. . . .

provides penalties which shall be levied upon any violators of the statute.[72] The saving provision for the associations authorized to deal in securities under section 24(Seventh) is also found in section 378, which provides that nothing in section 378 shall prevent certain banking associations from buying and liquidating investment securities as previously authorized in section 24(Seventh).[73]

The purpose of section 378, as construed by the United States Supreme Court, is to command firms which deal primarily with securities, "such as underwriters or brokerage houses," to break all ties to banking institutions.[74] The Court made it clear that section 378 was not a requirement that banks should dispose of their accepted banking practices concerning the acquisitions and sales of stocks and securities for their customers' accounts as regulated in section 24(Seventh).[75]

C. *Restrictions on Federal Reserve Banks and Securities Organizations or Individuals—Sections 377 and 78*

Both national and state banks which are members of the Federal Reserve System are prohibited, under the language of 12 U.S.C. § 377, from affiliating with any organization which is primarily engaged in dealings with securities.[76] The fourth relevant section of the Glass-Steagall Act is section 78 of title 12 of the United States Code, which specifically disallows any individuals or organizations which are engaged in the dealing of securities, as outlined in section 378, from simultaneously engaging in the business of banking.[77] These two provisions read in conjunction with each

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Id. § 378.

72. *See id.* § 378(b). Willful violators of the statute shall be fined up to $5,000 or imprisoned up to 5 years, or both. *See id.* § 378(b).

73. *See id.* § 378(a)(1). Section 378(a)(1) also provides:

> [T]he provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities, or issuing securities, to the extent permitted to national banking associations by the provisions of section 24 of this title. . . .

Id. § 378(a)(1).

74. *See* Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 63 (1981) (section 21 intended to require "underwriters or brokerage houses" to cut off banking connections).

75. *See id.* at 63. Section 21 is "not intended to require banks to abandon an accepted banking practice that was subjected to regulation under section 16." *See id.* at 63.

76. *See* 12 U.S.C. § 377 (1982). This section provides: "[N]o member bank shall be affiliated in any manner . . . with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities. . . ." *Id.*

77. *See id.* § 78. Section 78 provides:

other prevent an interlocking of directors and forbidden activities and require separation between the entities of banking and securities with due regard to the individual directors of each.[78]

In summary, one of the four provisions of the Glass-Steagall Act seems to permit national banks to engage in discount brokerage activities, although limited 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."[79] The other three provisions attempt to restrict any ties between banks and any individuals (officers and employees) or organizations who engage in the business of dealing with securities.[80] When these four statutes are read together and considered in light of their legislative intent, a natural rather than literal interpretation of the Glass-Steagall Act results in finding that discount brokerage services are not prohibited by the Act if the operation is kept within the prescribed limits.[81]

D. *Bank Holding Company Act as Applied to the Glass-Steagall Act*

The Glass-Steagall Act was seemingly successful in its intended purpose; the forming of holding companies, however, enabled circumvention of the Act.[82] Because bank holding companies are not "banks" in the literal meaning of the word,[83] a holding company may be permitted to engage in

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> No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases. . . .

Id. § 78.

78. *See* Board of Governors of Fed. Reserve Sys. v. Agnew, 329 U.S. 441, 445-49 (1947) (employees "primarily engaged" in securities business are disqualified from bank directorship).

79. *See* 12 U.S.C. § 24(Seventh) (1982).

80. *See id.* §§ 78, 377, 378.

81. *See New National Bank Subsidiary Allowed to Offer Discount Brokerage Services,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,284, at 86,256 (Aug. 26, 1982) (Glass-Steagall Act authorizes discount brokerage services for customers if bank acts as agent), *rev'd,* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983); *see also* Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., __ U.S. __, __, 104 S. Ct. 3003, 3012, __ L. Ed. 2d __, __ (1984) (approving acquisition of discount brokerage firm by national banking association).

82. *See* Note, *Glass-Steagall: A Proposal for Regulation Rather Than Prohibition,* 47 ALB. L. REV. 1378, 1383 (1983) (prohibitions of Glass-Steagall Act easily avoided by forming holding companies).

83. *See* 12 U.S.C. § 1841(c) (1982). Section 1841(c) provides in part: " 'Bank' means any institution organized under the laws of the United States, any State of the United States,

certain activities which are prohibited for banks.[84] Until 1966, when Congress amended 12 U.S.C. § 371c, holding companies were not included in the definition of "affiliate" as contained in the Federal Reserve Act.[85]

This particular "loophole" of circumventing the Glass-Steagall Act was tightened, although not closed, when Congress enacted the Bank Holding Company Act of 1956.[86] This act prohibited "multi-bank" holding companies from engaging in the activities proscribed in the Glass-Steagall Act as not related to banking.[87] The more persevering companies continued to elude the effects of the Glass-Steagall Act by forming one-bank holding companies, which were surprisingly not included in the 1956 act.[88] Fi-

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. . . 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." *Id.* Section 1841(c) further provides that "the term 'bank' also includes a State chartered bank or a national banking association which is owned exclusively . . . by a bank holding company." *Id.* The prior statement makes clear that a "bank" and a "bank holding company" are not synonymous with one another. *See id.; see also id.* § 36(h) (entities included in use of "bank" or "state bank" discussed). This section concerns branch banking, but in its definition of "bank," § 36(h) does not refer to a bank holding company: "The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws." *Id.* § 36(h).

84. *See* Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 64 (1981) (Congress implied in Glass-Steagall Act and Bank Holding Company Act that "bank affiliate may engage in activities . . . impermissible for the bank itself.").

85. *See* Federal Reserve Act, Pub. L. No. 89-485, § 12(a), 80 Stat. 236, 241 (1966) (current version at 12 U.S.C. § 371c (1982)). The 1966 amendment added bank holding companies to the definition of "affiliate" as follows: "[T]he term 'affiliate' shall include, with respect to any member bank, any bank holding company of which such member bank is a subsidiary within the meaning of the Bank Holding Company Act of 1956, as amended, and any other subsidiary of such company." *See id.* at 241.

86. *See* Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841-1850 (1982)).

87. *See id.* at 135. Section 4(a) of the Bank Holding Company Act of 1956 provides:

> (a) Except as otherwise provided . . . , no bank holding company shall—
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> (1) . . . acquire . . . ownership or control of any voting shares of any company which is not a bank, or
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> (2) . . . retain . . . ownership or control of any voting shares of any company which is not a bank or a bank holding company or engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank. . . .

Id. at 135.

88. *See id.* at 133. The definition of "Bank holding company" in § 2(a) impliedly excludes single-bank holding companies:

> (a) "Bank holding company" means any company (1) which . . . owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of *two* or more banks . . . , or (2) which controls in any manner the election of a majority of the directors of each of *two* or more banks, or (3) for the benefit of whose shareholders . . . 25 per centum or more of the voting shares of each of *two* or more banks. . . .

nally, Congress amended the Act in 1970,[89] adding single-bank holding companies to the list of banks and organizations which were prohibited from participation in an unlimited range of securities activities.[90]

The 1970 amendment also included statutory language which limits non-bank activities of a bank holding company to companies whose interests are "so closely related to banking or managing or controlling banks as to be a proper incident thereto."[91] The amended statute further provided a guide as to what elements might indicate that an activity was a "proper incident" to banking.[92]

In determining which activities are "closely related to banking," neither section 4(c)(8), of 12 U.S.C. § 1843, nor its legislative history provides any factors to be used as a guide.[93] In *National Courier Association v. Board of*

Id. at 133 (emphasis added).

89. *See* Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101, 84 Stat. 1760 (codified as amended at 12 U.S.C. § 1841 (1982)).

90. *See id.* at 1760-61. The 1970 amendments changed § 2 of the Act to include all bank holding companies, single and multiple. *See id.* at 1760-61. Section 2(a)(1), as amended in 1970, read in relevant part: " '[B]ank holding company' means any company which has control over any bank or over any company that is or becomes a bank holding company . . . ." *Id.* at 1760-61; *see also* Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 68-69 (1981) (1970 amendment extended coverage to one-bank controlled holding companies).

91. *See* Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101, 84 Stat. 1760, 1764-65 (codified as amended at 12 U.S.C. § 1841 (1982)). Section 1843(c)(8) was amended to read: "[The] prohibitions [of section 1843] shall not, with respect to any other bank holding company, apply to . . . (8) shares of any company the activities of which the Board . . . has determined . . . to be so closely related to banking . . . as to be a proper incident thereto." *Id.* at 1764-65.

92. *See id.* at 1765. The test developed in the 1970 amendment to § 1843(c)(8) provides:

> In determining whether a particular activity is a proper incident to banking . . . 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 interest, or unsound banking practices.

See id. at 1764. For a line of cases applying the statutory test, see Independent Ins. Agents of Am. v. Board of Governors of Fed. Reserve Sys., 658 F.2d 571, 573 (8th Cir. 1981) (determine whether public benefits outweigh adverse effects); Citicorp v. Board of Governors of Fed. Reserve Sys., 589 F.2d 1182, 1190 (2d Cir.) (public benefits must be greater than detrimental effects), *cert. denied,* 442 U.S. 929 (1979); Association of Bank Travel Bureaus v. Board of Governors of Fed. Reserve Sys., 568 F.2d 549, 551 (7th Cir. 1978) (weigh benefits against possibility of adverse effects); *see also* National Courier Ass'n v. Board of Governors of Fed. Reserve Sys., 516 F.2d 1229, 1233 (D.C. Cir. 1975) (determine whether performance of non-banking activity will accomplish favorable balance of benefits and detrimental effects delineated in statute).

93. *See* Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., ___ U.S. ___,

Governors of the Federal Reserve System,[94] however, a test was employed which is generally accepted by several circuit courts.[95] The court in *National Courier* held that at least three criteria are included in the statutory intent of section 4(c)(8) and should be used in determining whether a proposed activity and usual banking function are closely connected.[96] The three tests of connection are:

> 1. Banks generally have in fact provided the proposed services. 2. Banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed service. 3. Banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form.[97]

Only since the approval of a few applications to operate a discount brokerage firm has discount brokering been considered as conforming to the above-outlined guide.[98] It should be noted, however, that this test might not be exhaustive of all possibilities.[99]

__, 104 S. Ct. 3003, 3008, __ L. Ed. 2d __, __ (1984) (statute and legislative history do not identify factors made in determination of closely related banking activities).

94. 516 F.2d 1229 (D.C. Cir. 1975).

95. *See, e.g.,* Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., __ U.S. __, __ n.5, 104 S. Ct. 3003, 3006 n.5, __ L. Ed. 2d __, __ n.5 (1984) (citing three factor *National Courier* test); NCNB Corp. v. Board of Governors of Fed. Reserve Sys., 599 F.2d 609, 613 (4th Cir. 1979) (three criteria in considering "closely related" question); Association of Bank Travel Bureaus v. Board of Governors of Fed. Reserve Sys., 568 F.2d 549, 551 (7th Cir. 1978) (three considerations used in deciding if activity "closely related"); *see also* Alabama Ass'n of Ins. Agents v. Board of Governors of Fed. Reserve Sys., 533 F.2d 224, 241 (5th Cir. 1976) (applying test created by *National Courier* court), *cert. denied,* 435 U.S. 904 (1978).

96. *See* National Courier Ass'n v. Board of Governors of Fed. Reserve Sys., 516 F.2d 1229, 1237 (D.C. Cir. 1975) (Board must articulate methods in which proposed activities and banking functions are closely connected).

97. *Id.* at 1237.

98. *See* Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., 716 F.2d 92, 101 (2d Cir. 1983), *aff'd,* __ U.S. __, 104 S. Ct. 3003, __ L. Ed. 2d __ (1984). The Board, in concluding that banks widely purchase and convert securities for their customers' accounts and have thus become knowledgeable in the tradings of securities, held that "retail brokerage is an activity closely related to banking." *See id.* at 101. The court subsequently ruled that no opposing arguments were made which would justify a reversal of the Board's decision. *See id.* at 102; *see also FRB Approves Acquisition of Retail Discount Securities Brokerage Firm by Bank Holding Company,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,475, at 86,633 (Jan. 7, 1983) (brokerage activities are "closely related to banking").

99. *See* Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., __ U.S. __, __, 104 S. Ct. 3003, 3006, __ L. Ed. 2d __, __ (1984) (*National Courier* factors are not exclusive).

E. *Summary*

One of the primary objectives of the Glass-Steagall Act was to divorce the business of banking from the heavy dealings in securities.[100] These securities transactions were extensive and one of many reasons for the widespread insolvency of banks during the Great Depression.[101] The Glass-Steagall Act's legislative history exhaustively relates the unfavorable results which were a consequence of the interplay of commercial and investment banking; no mention is made, however, of curtailing the activity of bank brokering.[102] Rather, the only reference made in the legislative history is that national banks are permitted to buy and sell securities for their customers' account just as they had before.[103] Pertinent case law illustrates that previous to the Glass-Steagall Act brokerage services were offered by banks not just to their customers alone but also to the public-at-large.[104]

The Glass-Steagall Act, then, is not a bar to a national banking association offering brokerage services to its customers, provided the service is not

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100. *See* Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 62 (1981) (Congress attempted separation of national banks from affiliates dealing in securities); Comment, *Expansion of National Bank Powers: Regulatory and Judicial Precedent Under the National Bank Act, Glass-Steagall Act, and Bank Holding Company Act,* 36 SW. L.J. 765, 779 (1982) (purpose of Glass-Steagall Act is to maintain commercial bank soundness and preclude securities dealings).

101. *See* Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 61 (1981) (Congress believed multitude of failing banks during "Great Depression" was attributable, in part, to speculative investment activities); Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., 716 F.2d 92, 97 (2d Cir. 1983) (securities speculation by commercial banks contributed to numerous bank closings during 1930s depression), *aff'd,* __ U.S. __, 104 S. Ct. 3003, __ L. Ed. 2d __ (1984).

102. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 255 (D.D.C. 1983). The Glass-Steagall Act's legislative history does not mention limitation of bank brokerage despite the exhaustive cataloguing of ills regarding prior "investment and commercial banking" intermingling. *See id.* at 255; *FRB Approves Acquisition of Retail Discount Securities Brokerage Firm by Bank Holding Company,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,475, at 86,642-43 (Jan. 7, 1983). The Board stated that since the harmful securities activities which were considered to be against public policy were completely catalogued in the Glass-Steagall Act's legislative history and no attention was given to brokerage activities, Congress probably did not determine these activities as an object of prohibition in the Act. *See id.* at 86,642-43.

103. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 255 (D.D.C. 1983) (Glass-Steagall Act's legislative history states national banks are permitted to buy and sell securities for customers to degree allowed previously).

104. *See* Blakely v. Brinson, 286 U.S. 254, 259 (1932) (bank promised to purchase United States bonds from third party for customer); McNair v. Davis, 68 F.2d 935, 936 (5th Cir.) (bank's purchase of bonds from third party upon customer's order), *cert. denied,* 292 U.S. 647 (1934).

for the bank's personal account.[105] Nor is the Act a bar to the bank making a profit on the transaction, such profit being derived solely as commission for the services performed as agent for the customer.[106] Rather, the standard or test necessitated by the Glass-Steagall Act is applied to the activity itself. In a brokerage situation, is a discount brokerage service provided by the bank a "convenient or useful" activity of the bank's function?[107] This standard is decided on a case-by-case method, and if the answer is positive, then the activity is permitted.[108] A separate criterion is applied under the Bank Holding Company Act.

The test used in determining if a holding company may offer such a service under the Bank Holding Company Act is similar in that the activity in question must be "so closely related to banking . . . as to be a proper incident thereto."[109] The standard required by the applicable statute is two-fold. First, a determination must be made that the activity is at least, generally, an activity "closely related to banking."[110] Second, the board is required to find that the activity's performance by the bank holding company may be reasonably anticipated to result in benefits which outweigh any adverse effects.[111] In many instances, a favorable decision will likely

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105. *See Comptroller of the Currency—Bank Automatic Investment Services,* [1973-1978 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 96,272, at 81,356 (June 10, 1974). The Comptroller stated that Congress, in enacting the Glass-Steagall Act, provided banks with "definite authority" to remain involved in the business of securities so long as certain guidelines are followed; for example, the service must not be for the bank's personal account. *See id.* at 81,356.

106. *See id.* at 81,356. Any profits made by a bank in its securities dealings with customers are derived solely from charges for services rendered. *See id.* at 81,356.

107. *See, e.g.,* National Retailers Corp. v. Valley Nat'l Bank, 604 F.2d 32, 33 (9th Cir. 1979) (requirement that service offered be "convenient or useful" to banking); Association of Data Processing Serv. Orgs. v. Federal Home Loan Bank Bd., 568 F.2d 478, 486 (6th Cir. 1977) (quoting verbatim *Arnold Tours* "convenient or useful" test); M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377, 1382 (9th Cir. 1977) (prerequisite that incidental activity be "convenient or useful"), *cert. denied,* 436 U.S. 956 (1978).

108. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 257 (D.D.C. 1983) (national bank "ownership and operation" of subsidiaries conducting brokerage activities is not prohibited by Glass-Steagall Act).

109. *See* Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 103(4), 84 Stat. 1760, 1765 (codified as amended at 12 U.S.C. § 1843(c)(8)).

110. *See, e.g.,* Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., __ U.S. __, __ n.5, 104 S. Ct. 3003, 3006 n.5, __ L. Ed. 2d __, __ n.5 (1984) (citing *National Courier* "closely related to banking" test); NCNB Corp. v. Board of Governors of Fed. Reserve Sys., 599 F.2d 609, 613 (4th Cir. 1979) (three criteria to consider in deciding "closely related" question); Association of Bank Travel Bureaus v. Board of Governors of Fed. Reserve Sys., 568 F.2d 549, 551 (7th Cir. 1978) (three considerations used in deciding if activity is "closely related").

111. *See, e.g.,* Independent Ins. Agents of Am. v. Board of Governors of Fed. Reserve Sys., 658 F.2d 571, 573 (8th Cir. 1981) (determine whether public benefits outweigh adverse

be made.[112]

IV. Discount Brokerage and Branch Banking in Texas

The laws seem to be clear that no bank in the State of Texas, nationally or state chartered, may engage in the business of banking in more than one location.[113] Arguably, if a subsidiary places its customer's order through the so-called "lead" bank, the "lead" bank is engaging in the business of banking in more than one location and, therefore, is branch banking.[114]

An additional consideration is whether discount brokerage services offered through the main bank office is branch banking and, therefore, in violation of the McFadden Act.[115] The argument has been made that offering these services under such circumstances is not branching since the bank is not engaged in any "statutory branching functions."[116] The

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effects); Citicorp v. Board of Governors of Fed. Reserve Sys., 589 F.2d 1182, 1190 (2d Cir.) (public benefits must be greater than detrimental effects), *cert. denied,* 442 U.S. 929 (1979); Association of Bank Travel Bureaus v. Board of Governors of Fed. Reserve Sys., 568 F.2d 549, 551 (7th Cir. 1978) (weigh benefits against possibility of adverse effects).

112. *See* Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., 716 F.2d 92, 103 (2d Cir. 1983) (brokerage service "closely related to banking" and public benefit will outweigh adverse effects), *aff'd,* __ U.S. __, 104 S. Ct. 3003, __ L. Ed. 2d __ (1984); *FRB Approves Acquisition of Retail Discount Securities Brokerage Firm by Bank Holding Company,* [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,475, at 86,634-35 (Jan. 7, 1983) (Board concluded brokerage activities "closely related to banking" and securities firm purchase will result in benefits outweighing adverse effects).

113. *See* Tex. Const. art. XVI, § 16(a). The branching prohibition in the Texas Constitution presently reads: "[S]uch body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter." *Id.; see also* Tex. Rev. Civ. Stat. Ann. art. 342-903 (Vernon Supp. 1984). The statute provides: "No State, national or private bank shall engage in business in more than one place, maintain any branch office, or cash checks or receive deposits except in its own banking house . . . ." *Id.*

114. *Cf.* St. Louis County Nat'l Bank v. Mercantile Trust Co. Nat'l Ass'n, 548 F.2d 716, 719-20 (8th Cir. 1976) (held trust activities established apart from chartered premises is branch under § 36(f)), *cert. denied,* 433 U.S. 909 (1977).

115. *See New National Bank Subsidiary Allowed to Offer Discount Brokerage Services,* [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284, at 86,259 (Aug. 26, 1982), *rev'd,* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983). The application of Security Pacific National Bank implied that its intention was to offer discount brokerage services through non-branch offices or locations other than the bank's principal office. *See id.* at 86,259. The Comptroller acknowledged that one factor to be given weight in approving the applications pertained to the geographic limitations imposed by the branching regulations in the McFadden Act. *See id.* at 86,259.

116. *See id.* at 86,259. Security Pacific argued, in its application, that the "non-chartered offices" where the services will be offered should not be considered a branch, as the McFadden Act defines it, since the branching functions, as provided by statute, will not be part of the operation. *See id.* at 86,259. *But see* Colorado *ex rel.* State Banking Bd. v. First Nat'l Bank, 540 F.2d 497, 499 (10th Cir. 1976) (deposits, checks, or loans are not the sole elements of branch banking), *cert. denied,* 429 U.S. 1091 (1977).

United States Comptroller of the Currency determined that discount brokerage services are not within the scope of the McFadden Act's purpose and, therefore, are not branch banking and not amenable to applicable state laws.[117] This decision was reversed, however, by the United States District Court for the District of Columbia in *Securities Industry Association v. Comptroller of the Currency,*[118] which held that a national bank office engaging in "discount brokerage activities" fits the McFadden Act definition of "branch" and is therefore "subject to state law restrictions."[119] A problem arises in Texas, however, in that no Texas cases have been decided which have addressed whether offering discount brokerage services is branch banking.

Several courts in various jurisdictions have determined that bank offices away from the main premises which engage in any one or more of the three routine banking functions[120] are "branches" as defined in the McFadden Act and, therefore, subject to state laws regarding branching.[121] One court has stated that it was Congress' intent to include "typical brick-and-mortar branch bank[s]," as well as other banking agencies which offer services that are engaged in at the bank's main office, within the "branch"

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117. *See New National Bank Subsidiary Allowed to Offer Discount Brokerage Services,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,284, at 86,261 (Aug. 26, 1982) (discount brokering activities are not branch banking within McFadden Act), *rev'd,* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983).

118. 577 F. Supp. 252 (D.D.C. 1983).

119. *See id.* at 260 (national bank office conducting "discount brokerage activities" is branching and state restrictions apply).

120. *See* 12 U.S.C. § 36(f) (1982) (three routine functions: receiving deposits, paying checks, lending money).

121. *See* First Nat'l Bank v. Dickinson, 396 U.S. 122, 137 (1969) (armored car service and "off-premises receptacle" which receives deposits constitute branch bank). The United States Supreme Court was called upon to consider whether an "armored car messenger service and . . . an off-premises receptacle for the receipt of packages containing cash or checks for deposit" was branch banking in violation of Florida law. *See id.* at 125-26, 131. The Comptroller of the Currency had previously approved of both activities, and First National, relying on such approval, had commenced operation of the armored car service and the off-premises receptacle. *See id.* at 126. The Court decided that since deposits were in fact "received" at these facilities, which were not located at the bank's "chartered place of business," the delivery point for these deposits was an "additional office, or . . . branch place of business . . . at which deposits are received," as expressed in 12 U.S.C. § 36(f). *See id.* at 137; *see also* Colorado *ex rel.* State Banking Bd. v. First Nat'l Bank, 540 F.2d 497, 500 (10th Cir.) (deposits received by off-premises, customer-bank communications terminal violates 12 U.S.C. § 36), *cert. denied,* 429 U.S. 1091 (1976); Missouri *ex rel.* Kostman v. First Nat'l Bank, 538 F.2d 219, 220 (8th Cir.) (ability of CBCT machine to receive deposits is branch banking), *cert. denied,* 429 U.S. 941 (1976); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 951 (D.C. Cir.) (any facility performing traditional functions of "receiving or disbursing funds" is branch within 12 U.S.C. § 36), *cert. denied,* 429 U.S. 862 (1976).

definition found at 12 U.S.C. § 36(f).[122]

A few courts have held, however, that branching exists where activities conducted by the bank do not involve the three traditional banking functions.[123] The leading case on this question is *St. Louis County National Bank v. Mercantile Trust Company National Association.*[124] In that case, the Comptroller had permitted a national banking association to open a trust office in a St. Louis suburb if the trust office would not accept deposits, make loans, or pay checks.[125] The Comptroller determined that if any of these three banking functions were conducted then the trust office would be within the McFadden Act's definition of branch.[126] The court rejected the argument that since none of the three activities were engaged in the office was not a branch and held that "the three routine banking functions delineated in section 36(f) are not the only indicia of branch banking."[127] Circuit Judge Henley, in a well-reasoned dissent, urged that a facility is not a branch simply because it performs functions or furnishes services (other than the three traditional services) which banks usually offer.[128]

By analogy, then, the offering of discount brokerage services at a subsidiary, of the same type of services performed at the main office or "lead" bank of a holding company, is within the McFadden Act definition of

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122. *See* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 932 (D.C. Cir.) (Congress intended "brick-and-mortar branch bank" and "lesser bank agencies" to be included in "branch" definition), *cert. denied,* 429 U.S. 862 (1976).

123. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 259-60 (D.D.C. 1983) (bank offices conducting business excluding three traditional functions are branches subject to state restrictions); *see also* St. Louis County Nat'l Bank v. Mercantile Trust Co. Nat'l Ass'n, 548 F.2d 716, 719-20 (8th Cir. 1976) (trust activities established apart from chartered premises at permanent location constitute branch under § 36(f)), *cert. denied,* 433 U.S. 909 (1977); Illinois *ex rel.* Lignoul v. Continental Ill. Nat'l Bank & Trust, 536 F.2d 176, 179 (7th Cir.) ("cash withdrawal and payments on installment loans" ability of CBCT are also transactions conducted at main office and, therefore, constitute branch banking), *cert. denied,* 429 U.S. 871 (1976).

124. 548 F.2d 716 (8th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977).

125. *See id.* at 717.

126. *See id.* at 717. The court noted that for a period of approximately three years none of the three traditional banking functions were engaged in at the suburban office, but an estimated 500 trusts were handled by an administrator at that office. *See id.* at 717.

127. *See id.* at 719.

128. *See id.* at 720-22 (Henley, J., dissenting). Circuit Judge Henley continued his persuasive dissent as follows:

> When the McFadden Act was passed in 1927, it was well known to Congress that the operation of trust departments and the furnishing of trust services was not an insignificant part of the business of banks, and I feel that if Congress had intended to include in its definition of a "branch" a trust office such as the one involved in this case, it would have said so just as it specifically mentioned the accepting of deposits, the cashing of checks, and the lending of money.

Id. at 721 (Henley, J., dissenting).

branch and subject to state banking restrictions. Because Texas has an absolute prohibition of branch banking,[129] the discount brokerage services offered at a subsidiary bank and coordinated by a "lead" bank are branch banking; thus, they are in contravention of state law.

One further complication arises. If such an activity is branch banking which is prohibited in Texas, why are so many banks permitted to continue these transactions? There is apparently a relaxing of the standard of branch banking in Texas. Since the bank brokerage industry has not been proven to produce any of the ills sought to be avoided by the passage of the Glass-Steagall Act,[130] the enforcers of branch banking laws have not made an asserted effort to pursue the letter of the law in this industry.

V. CONCLUSION

The recent influx into the banking industry of securities-related discount brokerage services has prompted an insightful questioning into its validity, especially in a state such as Texas which prohibits branch banking. The Glass-Steagall Act was enacted to avoid another Great Depression by separating the commercial and investment banking industries. Neither the Glass-Steagall Act nor the Bank Holding Company Act, however, denies a national banking association the opportunity to perform such a service under limited conditions. It may confidently be said, then, that discount brokerage services are permissible.

The next question is whether such an activity is within the intended scope of the McFadden Act's definition of branching and, therefore, subject to individual state law restrictions. The trend seems to be that an affirmative answer is proper, even if the traditional branching functions are not inherent in the activity.

Offering discount brokerage services in Texas creates a problem though.

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129. *See* TEX. CONST. art. XVI, § 16(a). "[S]uch body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter." *Id.; see also* TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1984). "No State, national or private bank shall engage in business in more than one place, maintain any branch office, or cash checks or receive deposits except in its own banking house . . . ." *Id.*

130. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 255 (D.D.C. 1983). The Glass-Steagall Act's legislative history does not mention limitation of bank brokerages despite exhaustive cataloging of ills regarding prior "investment and commercial banking" intermingling. *See id.* at 255; *see also FRB Approves Acquisition of Retail Discount Securities Brokerage Firm by Bank Holding Company,* [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,475, at 86,642-43 (Jan. 7, 1983). The Board stated that since the harmful securities activities, which were considered to be against public policy, were completely catalogued in the Glass-Steagall Act's legislative history, and no attention was given to brokerage activities, Congress probably did not determine these activities as an object of prohibition in the Act. *See id.* at 86,642-43.

Unquestionably, such an activity is allowed under the Glass-Steagall Act; even the Bank Holding Company Act has determined this operation to be authorized for member banks. These services are, however, branch banking under the Texas law when considered in the context of one bank coordinating all of the brokerage activities of its other subsidiaries.

The discount brokerage industry in Texas, therefore, regardless of its convenience to the public and profitability to the banks, is operating in unchartered waters—at least until the issue is judicially construed. Possibly the time is ripe to argue for a constitutional amendment which would repeal the branch banking prohibition in Texas and join the ranks of two other states which have recently allowed branching.[131] The arguments in favor of prohibition of branch banking are seemingly outweighed by the arguments of an expanding economy and the desire of the public to have certain services made more convenient and at a lesser cost to them at their option.

131. *See* NEB. REV. STAT. § 8-157(1) (Supp. 1983); OKLA. STAT. ANN. tit. 6, § 501 (West Supp. 1983-1984). In 1983, Nebraska and Oklahoma discarded their respective branch banking prohibition laws, and now each state allows at least a limited form of branch banking. *See* NEB. REV. STAT. § 8-157(1) (Supp. 1983); OKLA. STAT. ANN. tit. 6, § 501 (West Supp. 1983-1984).