THIS CASE IS SCHEDULED FOR ARGUMENT ON APRIL 4, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 86-5089

SECURITIES INDUSTRY ASSOCIATION,

Appellee,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, et al.,

Appellants,

and

BANKERS TRUST COMPANY,

Appellant.

- -

And Consolidated Cases Nos. 86-5090, 86-5091,
And 86-5139

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.

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TABLE OF AUTHORITIES

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*/ Cases or authorities chiefly relied on are marked by asterisks.

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INTRODUCTION

In its opening brief ("Bd. Opening Br."), the Board demonstrated that the commercial paper activities described in the Board's June 1985 Statement concerning the Commercial Paper Placement Activities of Bankers Trust Company (the "Statement") are authorized by the literal language of section 16 of the Glass-Steagall Act. 12 U.S.C. § 24 Seventh. We showed that

the bank places commercial paper solely as the agent of and on the order of customers and without recourse to the bank. In addition, we showed that the activities described in the Statement do not involve underwriting or distributing for purposes of sections 16 and 21 of the Act, because the bank does not purchase commercial paper and then resell it. Even if the terms underwriting and distributing include activities conducted solely as agent, we showed that the bank would not engage in such activities, because it does not offer commercial paper to the public. Finally, we demonstrated that the placement activities involved, if conducted within the limits prescribed by a literal reading of the statutory language, will not produce the risks to the bank and other subtle hazards that the Glass-Steagall Act was adopted to prevent.

In this reply brief, we will show the lack of merit in the contentions made by appellee the Securities Industry Association ("SIA Br.") and supporting amici in an effort to justify the district court's plain disregard for the statutory language and its unwarranted rejection of the Board's careful assessment of the supervisory risks involved.

The Board is joined in this reply brief by the Department of the Treasury and the Office of the Comptroller of the Currency.

SUMMARY OF ARGUMENT

Section 16 of the Glass-Steagall Act provides that a bank's business of dealing in securities shall be limited to buying and selling securities as the agent and on the order of customers. 12 U.S.C. § 24 Seventh. We demonstrated in our opening brief that the placement methods described in the Board's Statement fully comport with the literal language of this provision.

The SIA's contention that these methods are not authorized by the statute is premised on the view that the "business of dealilng" in securities referred to in section 16 applies only to trading in securities that have already been issued. The term "dealing" however, in its ordinary sense, simply means doing business or trading in a commodity. Similarly, the term "dealing" as used in the federal securities laws can refer to transactions in both the primary market, i.e., new issues of securities, and in the secondary market. Finally, if the provisions limiting a bank's business of dealing in securities apply, as the SIA contends, only to trading in the secondary market, then activities involving new issues cannot violate those limitations.

In addition, the SIA is wrong in claiming that a bank placing commercial paper under the Statement violates section 16 because the bank does not place the commercial paper on the unsolicited order of customers. First, nothing in the language of section 16 speaks in terms of unsolicited orders.

Second, under the Statement, the bank places commercial paper at the direction of the issuer/customer and engages in solicitation to no greater extent than a securities broker.

Section 21 of the Act prohibits a deposit-receiving institution from engaging in the business of "underwriting, selling, or distributing" securities. 12 U.S.C. § 378(a)(1). Because the commercial paper placement activities at issue are authorized by section 16, they are not prohibited by section 21, since sections 16 and 21 "seek to draw the same line." See Securities Industry Association v. Board of Governors, 104 S. Ct. 2979, 2986 (1984) ("Bankers Trust"). We also demonstrated in our opening brief that under the Statement the bank would not be underwriting or distributing commercial paper because the bank does not purchase commercial paper and attempt to resell it, the traditional meaning of these terms, and because the bank does not offer the paper to the public.

The SIA challenges these arguments by asserting that, based on the definition in the Securities Act of 1933, underwriting refers to any offering of securities. Based on a dictionary definition, the SIA claims that "distributing" means the same thing. However, as we have shown, under the Securities Act an underwriting requires a public offering, see H.R. Rep. No. 1838, 73d Cong. 2d Sess. 41 (1934), and, when used in connection with a securities offering, a distribution means a public offering. E.g., Black's Law Dictionary 426 (5th ed. 1979).

Given that commercial paper placement activities are authorized by the plain meaning of the statute, the activities may be invalidated only if there is clear evidence in the legislative history to support such a finding. The SIA has produced no legislative history even suggesting that Congress meant the Act to prohibit banks from privately placing commercial paper or any other securities.

The SIA also errs in attempting to treat the Supreme Court's decision in Bankers Trust as dispositive here. In Bankers Trust, the Supreme Court expressed no opinion on whether a bank placing commercial paper would be involved in selling activities proscribed by the Act. 104 S. Ct. at 2992 n.12. Moreover, unlike the ruling in Bankers Trust, where it was conceded that the literal terms of the statute applied (104 S. Ct. at 2987-88), the Board's Statement here is based on the finding that the activities in question do not fall within the literal language of the Act.

Finally, the SIA's contention concerning the possibility of subtle hazards arising from the commercial paper placement activities is tantamount to an assertion that the Act is violated whenever a bank has a promotional interest in particular securities. However, Congress has used clear and precise language to identify the investment banking functions it intended to prohibit to banks. There is no justification, therefore, for expanding the Act's prohibitions based on nebulous considerations of promotional interest that are inherent in many lawful banking functions.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE COMMERCIAL PAPER PLACEMENT METHODS DESCRIBED IN THE BOARD'S STATEMENT ARE AUTHORIZED BY SECTION 16 AND DO NOT CONSTITUTE UNDERWRITING OR DISTRIBUTING SECURITIES IN THE ORDINARY MEANING OF THOSE TERMS.

A. The Board's Finding That The Placement Of Commercial Paper On An Agency Basis Is Authorized By The Terms Of Section 16 Is Consistent With The Terms Of The Statute.

Section 16 of the Glass-Steagall Act, 12 U.S.C. § 24 Seventh, provides in relevant part that a bank's business of dealing in securities shall be limited to purchasing and selling securities "without recourse, solely upon the order, and for the account of, customers, and in no case for [the bank's] own account." We have demonstrated (Bd. Opening Br. 19-24), that the placement activities described in the Statement are authorized by the literal terms of section 16 since, in conducting these activities, the bank does not purchase commercial paper for its own account or make loans to the issuer of the paper that are the equivalent of purchasing the paper; since the bank places the paper only at the direction of its customer, the issuer of the paper; and since the bank assumes no liability that gives the holder recourse to the bank.

The SIA's contentions concerning the applicability of the permissive phrase of section 16 to the activities described in the Board's Statement are premised on reading into the terms of the section limitations not contained in the statutory

language. Indeed, the court below did not dispute the Board's finding that the activities outlined in the Statement are consistent with the common meaning of the Act's literal language.

1. The SIA errs in claiming that the "business of dealing . . . in securities" referred to in section 16 covers only the trading of securities in the secondary market, not to selling new securities, and thus that the authorization for agency sales of securities in section 16 is inapplicable to the placement of commercial paper as described in the Statement. Nothing in the statutory language, the structure of the Act, or in the contemporaneous understanding of the relevant terminology as reflected in the federal securities laws supports such a proposed alteration of the statutory language.

First, nothing in the ordinary meaning of the phrase the "business of dealing" in securities suggests a distinction between primary and secondary market activities. The ordinary meaning of "dealing," moreover, simply refers to doing business or trading in a commodity.[1/]

1/ E.g., Webster's New International Dictionary 675 (2d ed. 1959). Nothing in Securities Industry Ass'n v. Board of Governors, 104 S. Ct. 3003 (1984) ("Schwab") supports the SIA's efforts to rewrite the statute. In Schwab, the Supreme Court indicated that secondary market brokerage falls within the permissive phrase of section 16. Id. at 3011 n.20. Nothing in the Court's opinion or analysis suggests, however, that contrary to the plain meaning of the language only secondary market activities are permitted by section 16.

Second, the SIA's reliance on the federal securities laws to support such a limitation to secondary market transactions is misplaced, since the Securities Act of 1933 recognizes no such limitation. The Securities Act defines a "dealer" as:

> any person who engages . . . as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

15 U.S.C. § 77b(12). This definition literally covers a person who engages, as an agent, in the business of selling new securities issued by another person. Indeed, firms that engage in no business other than underwriting or distributing new issues of securities are uniformly understood to be broker/dealers for purposes of federal securities laws.[2/]

2/ SEC, Report of Special Study of the Securities Markets, H.R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. 17, 32 (1963) (according to SEC survey of broker-dealers registered with the Commission, over 50 broker-dealers engaged only in activities involving new issues). Other provisions of the Securities Act demonstrate that "dealing" in securities can encompass selling new issues. For example, the Act's registration requirements, generally applicable to new issues of securities, do not apply to "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1). Similarly, the Act also exempts transactions by a dealer, but excludes from the exemption securities constituting an unsold allotment to or subscription by a dealer who participates in the distribution of the securities. 15 U.S.C. § 77d(3)(C). Both these provisions explicitly recognize that a dealer may be involved with new issues of securities.

Interpreting the authorization in section 16 to engage in "the business of dealing" in securities to include the selling of new issues of securities does not, as the SIA contends, make redundant the separate prohibition in section 16 against "underwrit[ing] any issue of securities or stock." As is evident from the terms of the statute, the provisions in section 16 relating to the "business of dealing" in securities concern the bank's business--its ongoing, day-to-day operations. The prohibition against underwriting any issue of securities governs the bank's conduct regarding any particular issue of securities, and applies regardless of the nature of the bank's day-to-day business. Indeed, the Securities Act of 1933, which is relied on by the SIA to support its claims, makes precisely this same distinction between "underwriting" and "dealing":

> The term "underwriter" is defined not with reference to the particular person's general business but on the basis of his relationship to the particular offering.
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> * * *
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> In contrast to the definition of "underwriter," the definition of "dealer" in § 2(12) does depend on the person's general activities rather than his conduct in the particular offering.

1 L. Loss, Securities Regulation 547, 557 (2d ed. 1961).

Third, a finding that the "business of dealing" in section 16 refers only to transactions with securities already issued does not compel a conclusion that the activities

described in the Statement violate section 16; such a finding would compel precisely the opposite conclusion. Since, under the terms of section 16, the limitation to sales solely as agent and not for the bank's own account applies only if the activities are part of the "business of dealing" in securities, a conclusion that particular securities activities are not part of that business means the activities cannot violate section 16 (provided they are not underwriting). Moreover, because the activities would be permissible under section 16, they would also be consistent with section 21 (see pp. 12-13 infra).3/

2. The SIA's contention that, in following the placement procedures described in the Board's Statement, the bank would not be placing securities "on the order of customers" is without merit. As we have shown, the requirement in section 16 that purchases and sales of securities by a bank be on the order of customers is plainly intended to prohibit transactions for the order of the bank -- those initiated and directed by

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3/ This analysis would leave open the question whether the bank's placement activities are within its authorized powers. Since the Board regulates only state chartered banks that are members of the Federal Reserve System, this question would be one of state law. However, since banks in New York and other states have privately placed securities for years without the intervention of any state authorities, presumably these placement functions fall within the lawful activities of banks in general. In any event, these questions are beyond the issues in this case -- whether the bank's placement role is inconsistent with the federal prohibition in the Glass-Steagall Act.

the bank for its own account. See Securities Industry Association v. Comptroller of the Currency, 577 F. Supp. 252, 255 (D.D.C. 1983), aff'd per curiam, 758 F.2d 739 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 790 (1986). Since, under the Statement, only the issuer, not the bank, decides whether to sell commercial paper, the bank complies with the requirement that the sales be on the order of customers. New York Stock Exchange v. Smith, 404 F. Sup. 1091, 1097 (D.D.C. 1975), vacated on ripeness grounds, 562 F.2d 736 (D.C. Cir. 1977), cert. denied, 435 U.S. 942 (1978).

Contrary to the SIA's contention, there is nothing in the statute that requires that bank agency sales must be on the "unsolicited" order of customers. Even if there were such a requirement, however, the "solicitation" activities of a bank placing commercial paper under the Statement are basically the same as those of a securities broker, whose activities clearly comport with the "on the order of customers" requirement. Although a bank placing commercial paper under the Statement solicits a limited number of institutions to purchase the issuer's commercial paper, a securities broker performs exactly the same function if no parties are readily available to complete the customer's trade (see Bd. Opening Br. 29-30). Nor is the bank's publicizing of its willingness and ability to sell the customer's commercial paper a prohibited investment banking function; a broker does the same thing when it advertises that it will sell an investor's stock.

3. Since the commercial paper placement activities authorized in the Statement are permitted by the permissive phrase in section 16, the SIA errs in asserting they are prohibited under section 21 of the Act, which makes it unlawful for a deposit-receiving institution to engage in the business of "selling" securities. 12 U.S.C. § 378(a)(1). The Board found (J.A. 203-04), and the district court agreed (J.A. 315-16), that section 21 should not be read as prohibiting the kinds of selling activities authorized by section 16.

In Securities Industry Association v. Board of Governors, 104 S. Ct. 2979 (1984) ("Bankers Trust"), the Supreme Court expressly recognized that "§ 16 and § 21 seek to draw the same line" and noted that the parties agree that the "underwriting prohibitions described in the two sections are coextensive." 104 S. Ct. at 2986.[4/] Indeed, section 16 expressly authorizes banks to "sell[]" securities as agent. If the SIA's contention were correct, the very selling activities that are authorized by section 16 would be made unlawful by section 21. The authorization provisions of section 16 would, therefore, be of no effect. However, in construing a statute, effect must be given, if possible, to every word Congress

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4/ This conclusion is supported by the fact that in 1935 section 21 was amended to make clear that it does not prohibit any bank from engaging in any securities activity to the extent permitted under section 16. See H.R. Rep. No. 742, 74th Cong., 1st Sess. 16 (1935).

used. E.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). In addition, since a securities broker unquestionably "sells" securities on behalf of customers, the SIA's theory would make unlawful activities that clearly are permissible under the Act.

B. The Board Reasonably Found That The Commercial Paper Placement Methods Described In Its Statement Do Not Constitute Underwriting Or Distributing Securities As Those Terms Are Commonly Understood.

Section 16 states that a bank may not "underwrite any issue of securities." 12 U.S.C. § 24 Seventh. Section 21 prohibits deposit-receiving institutions from engaging in the business of "underwriting" or "distributing" securities. 12 U.S.C. § 378(a)(1).

The Board's opening brief demonstrates that the placement methods described in the Board's Statement do not involve underwriting or distributing securities in the ordinary meaning of the term since the bank does not purchase commercial paper and then resell it. (Bd. Opening Br. 35-37). We also demonstrate that even if it is assumed that the Act prohibits underwriting and distributing securities on an agency basis, the bank would not engage in such conduct because it does not offer commercial paper to the public. (Bd. Opening Br. 37-43). Finally, we demonstrated that the Board's reliance on the meaning of these terms as used in the contemporaneous Securities Act provides no basis for invalidating the Board's determinations, since the Board's analysis is based primarily

on the ordinary meaning of the terms underwriting and distributing, not on the Securities Act definition, and because the Supreme Court's analysis of whether commercial paper is a security for purpose of the Act expressly considered analogous provisions in the Securities Act. (Bd. Opening Br. 40-43).

1. The SIA argues that "underwriting" includes an offering of securities for an issuer, citing the Securities Act of 1933 as its sole support for this proposition. However, as we have shown, this assertion is clearly wrong. Under the Securities Act "there can be no underwriter . . . in the absence of a public offer." H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934). Indeed, the authorities cited by the SIA (Br. 16) clearly involved the public offering of securities.[5/]

2. The SIA's contention that the literal meaning of "distributing" covers the placement activities described in the Statement is equally in error. As the Supreme Court has recently made clear, words used in financial regulatory statutes must be understood in the sense "used in the financial

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5/ E.g., SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738, 739 (2d. Cir.), cert. denied, 314 U.S. 618 (1941)(funds solicited and received from "the general public"); Dale v. Rosenfeld, 229 F.2d 855, 857 (2d Cir. 1956)(shares offered to the public); Securities Act Rule 144, 17 C.F.R. § 230.144 (preliminary note)(underwriter includes investment banker that arranges with an issuer for the public sale of its securities as well as a nonprofessional acting as a link in a chain of transactions through which securities move from an issuer to the public).

community." Board of Governors v. Dimension Financial Corp., 106 S. Ct. 681, 686 (1986). As used in connection with securities offerings, a distribution is commonly understood to mean a "public offering of securities of an issuer, whether by an underwriter, . . . or by the issuer itself." Black's Law Dictionary 426 (5th ed. 1979) (emphasis added). Indeed, the interpretation advanced by the SIA is so broad that under its view "distributing" could encompass concededly lawful securities activities, since a securities broker can be viewed as engaged in "dispensing" or "dealing out" securities. Finally, as we have shown, under the Securities Act, which the SIA relies on to show the "plain meaning" of "underwriting," a distribution has traditionally been understood as equivalent to a public offering. (Bd. Opening Br. 38-39).[6/]

6/ Further evidence that Congress intended the terms "underwriting" and "distributing" to refer to public offerings of securities is the fact that these terms are used in section 20 of the Act in conjunction with the term "public sale." Section 20 prohibits a member bank of the Federal Reserve System from being affiliated with a firm engaged principally in, among other things, the "underwriting," "public sale," or "distribution" of securities. 12 U.S.C. § 377. In Schwab, the Supreme Court made clear that the term "public sale" should be viewed as referring to the activity described by the terms surrounding it. 104 S. Ct. at 3010. By the same analysis, "underwriting" and "distributing" should be read as referring to the public marketing functions denoted by the term "public sale."

3. Equally without merit is the SIA's contention that the Board's construction of the ordinary understanding of the statutory terminology reads into the Glass-Steagall Act the Securities Act's exemption for nonpublic offers of securities, an exemption not contained in Glass-Steagall (Br. 30-33). First, as explained above, the Board's conclusions are grounded squarely on the ordinary meaning of the terms "underwriting" and "distributing" and should be affirmed apart from any reference to the provisions of the Securities Act. Second, the SIA's assertions on this point are an attempt to extend the Supreme Court's analysis of the Securities Act in Bankers Trust. See 104 S. Ct. at 2987. But even a superficial analysis of the Court's Bankers Trust decision demonstrates that the critical statutory language here is fundamentally different from the determinative provisions in that case. In Bankers Trust, it was conceded that commercial paper fell within the literal terms of the relevant language in section 21 of the Glass-Steagall Act ("notes, or other securities"), as well as within the definition of security in the federal securities laws. 104 S. Ct. at 2986, 2987. In that case, the Supreme Court found that because the Securities Act explicitly excluded commercial paper from certain of that Act's substantive requirements, and because no such exclusion was found in the Glass-Steagall Act, Congress understood the literal language, unless modified, to cover commercial paper. 104 S. Ct. at 2987.

Here, precisely the opposite is the case. Neither the ordinary meaning of the Glass-Steagall Act terminology nor the meaning of the terms "underwriting" and "distribution" in the Securities Act refers to the private placement of securities. This fact completely justifies the Board's determination that private placements are not proscribed by section 21. Whether there is a separate exemption from the registration requirement of the Securities Act for nonpublic offerings is simply irrelevant.7/

4. Contrary to the contentions of amicus the Investment Company Institute (ICI Br. at 11-15), the Supreme Court's decision in Investment Company Institute v. Camp, 401 U.S. 617 (1971) ("ICI I"), has no controlling effect in this case. In ICI I, the Supreme Court held that a bank's creation of a fund to hold various securities and its sale of interests in the fund to the public violates the literal language of sections 16 and 21 of the Glass-Steagall Act. 401 U.S. at 622-25. The bank there was involved in activities that a bank

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7/ The SIA's arguments about whether the bank complies with the SEC's Regulation D (17 C.F.R. § 230.501-.506), which implements the Securities Act's nonpublic offer exemption, are irrelevant. First, the Board's finding that the bank would not make a public offer of commercial paper is not dependent on compliance with Regulation D. (J.A. 222-24). Indeed, the Board addressed that Regulation only because it was cited by some commenters as evidence that the bank would be involved in a public offer (J.A. 224-26). In any event, even under the Securities Act, conduct that does not comply with Regulation D can nevertheless constitute a private offering. E.g., 17 C.F.R. § 230.501 (Preliminary Notes ¶ 3); L. Loss, Fundamentals of Securities Regulation 375 (1983).

following the placement methods outlined in the Statement does not engage in. First, the bank in ICI I offered and sold to the public interests in the fund, which was sponsored, controlled and promoted by the bank.[8/] A bank placing commercial paper under the Statement does not make a public offer of the paper. Second, in ICI I, the bank arguably acted as a principal, since the securities held by the fund could be viewed as held by the bank for its own account.[9/] Under the Statement, a bank does not act for its own account.

II. THE BOARD CORRECTLY FOUND THAT THE PLACEMENT METHODS PERMITTED UNDER THE PLAIN MEANING OF THE STATUTE ARE CONSISTENT WITH THE LEGISLATIVE HISTORY AND PURPOSES OF THE ACT.

The Board's opening brief demonstrated that the plain meaning of sections 16 and 21 may be ignored only if there is compelling evidence that it is wrong (Bd. Opening Br. 24-25). We further demonstrated that nothing in the Act's legislative history evinces any legislative intent to prohibit a bank's private placement of securities, nor has Congress disapproved the existing rulings of the regulatory agencies that permit banks to engage as agent in private placements (Bd. Opening Br. 25-28). The Board's brief also showed that a reading of the Act according to its plain terms would not produce an irrational

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8/ Investment Company Institute v. Camp, 274 F. Supp. 624, 628 (D.D.C. 1967), rev'd, 420 F. 2d 82 (D.C. Cir. 1969), rev'd, 401 U.S. 617 (1971).

9/ Board of Governors v. Investment Company Institute, 450 U.S. 46, 66 n. 37 (1981) ("ICI II").

result or defeat the objectives of the Act. (Bd. Opening Br. 28-29). Finally, we showed the error in the district court's finding that the Act was designed to prevent a bank from having any salesman's stake in particular securities. Not only is the bank's interest in placement transactions analogous to that of a bank providing securities brokerage services and not to the interest of an underwriter, but the Act itself, in terms as clear as the language permitting agency activities in section 16, permits banks and banking organizations to engage, to a limited extent, in other types of securities activities that undisputedly give the bank a pecuniary interest in particular securities. (Bd. Opening Br. 29-34).

In its brief, the SIA has elected to ignore these arguments, relying instead on broad statements in the legislative history and in court decisions in other cases. But these generalizations afford no evidence at all, much less a clear indication of congressional intent, that the Board's literal construction of the Act was wrong.

1. The SIA's contention that the Act's legislative history shows that Congress intended to bar banks from engaging in transactions involving new issues of securities is devoid of support. The legislative history cited by the SIA (Br. 25-27) does not indicate that the secondary market brokerage referred to was understood to be the only permissible function under section 16. The SIA's contention regarding legislative history

amounts basically to an assertion that unless an activity that is permitted by the ordinary meaning of the statutory language is expressly referred to somewhere in the legislative history, the plain meaning of the statute may not be followed. Such a theory, of course, is manifestly in error and contrary to the entire weight of the teaching of the Supreme Court and this Court on the interpretation of statutes. See Bd. Opening Br. 24-25; Eagle-Picher Industries v. EPA, 759 F.2d 922, 929 (D.C. Cir. 1985) (departure from clear language and structure of the statute is justified only where there is "very clear legislative history" indicating a contrary congressional intent and application of the language would lead to an irrational result).

2. The SIA's reliance on the fact that until recently banks have not placed commercial paper on behalf of issuer/customers as evidence of the meaning of the statute is misplaced. As the Supreme Court has noted, reliance on this kind of inaction is hardly a conclusive method of interpretation. Bankers Trust, 104 S. Ct. at 2992. More importantly, industry perception of the limits of the Glass-Steagall Act prohibitions affirmatively supports the Board's decision here. The Board's Statement confines bank's role in placing commercial paper to the methods followed by banks in assisting the private placement of other types of securities. And banks have privately placed debt and equity securities for a number of years.

3. Contrary to the SIA's repeated suggestions (Br. 16, 33-34, 41-43), the Board's conclusion that the placement methods described in the Statement comport with the sections 16 and 21 is in full accord with accepted and heretofore unchallenged administrative rulings.

a. The SIA's reliance on the Board's 1976 decision in First Arabian Corp., 63 Fed. Res. Bull. 66, 68, is misplaced, since that decision was repudiated shortly after it was issued and since on its face the decision did not purport to interpret the relevant statutory language in sections 16 and 21. In that decision, the Board approved the acquisition of a financially troubled bank by First Arabian, a foreign company that also held an interest in a domestic company engaged in private placement activities. The Board disapproved First Arabian's retention of the domestic company under a regulation that prohibited First Arabian from controlling a company engaged in the business of underwriting, selling, or distributing securities in the United States. The Board's decision was premised basically on policy reasons, and the Board's order did not even purport to address the meaning and scope of the terms underwriting, selling, and distributing as used in the Glass-Steagall Act and did not consider the express authorization in section 16 for selling securities as the agent of customers.

In a letter dated two days before the First Arabian decision, the Chairman of the Committee on Banking, Currency, and Housing of the House of Representatives, specifically

noting that banks have been providing private placement services, requested the Board to undertake a study of these services.[10/] The Board's staff subsequently conducted a thorough study of the supervisory, competitive, and legal questions related to these services. With respect to the legal questions, the report of the study, which was issued in June 1977, examined the literal terms of the sections 16 and 21, the legislative history and purposes of the statute, as well as contemporaneous congressional understanding of the relevant statutory language and concluded that private placement services are not prohibited to banks by those statutory terms. Private Placement Study, supra, at 81-99. The Study specifically rejected the First Arabian ruling, which was basically a policy decision, as well as several similar earlier opinions of a Deputy Comptroller of the Currency. Id. at 91. "[An agency] faced with new developments, or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation." American Trucking Associations v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967). Moreover, in contrast to the First Arabian decision, the legal conclusions of the Private Placement Study have been brought

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10/ Federal Reserve Board Staff, Commercial Bank Private Placement Activities, Appendix A (1977) ("Private Placement Study").

to the attention of Congress[11/] and have been left untouched in subsequent amendments to the Act. (Bd. Opening Br. 27-28).[12/]

b. The SIA's contention that the Supreme Court's decision in Bankers Trust "repudiated" the rationale of the Private Placement Study (Br. at 34-35) is wholly without merit. It is evident that the Study deals with the scope of the terms "selling," "underwriting," and "distributing" as used in sections 16 and 21 of the Glass-Steagall Act.[13/] In Bankers Trust, the Court made plain that it "express[ed] no opinion on these matters, leaving them to be decided on remand." 104 S. Ct. at 2992 n.12.

11/ E.g., Bank Holding Company Legislation and Related Issues: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 96th Cong., 1st Sess. 902, 909 (1979) (statement of John F. Donahue, Jr. on behalf of the SIA).

12/ The SIA's suggestion (Br. 34) that it somehow was precluded from challenging the conclusions of the Private Placement Study is without merit. Those conclusions were adopted before the Bankers Trust commercial paper controversy arose and, of course, represent a separate administrative action involving issues of much wider applicability. Indeed, there is persuasive authority that the SIA is barred by the doctrine of laches from attacking the legal conclusions of the Private Placement Study, at least as they relate to the placement of stocks and bonds generally. Unlike this case, these conclusions have never been challenged by the SIA or others. The SIA is a national trade association familiar with trends in the banking industry, and in the interim period banks have made financial commitments in order to conduct private placement activities that would be lost if the activities are unlawful. See Independent Bankers Ass'n v. Heimann, 627 F.2d 486, 488 (D.C. Cir.1980).

13/ Private Placement Study, supra, at 81-99.

III. THE BOARD PROPERLY FOUND THAT BANKERS TRUST'S PRIVATE PLACEMENT OF COMMERCIAL PAPER WILL NOT PRODUCE THE SUBTLE HAZARDS THE ACT WAS DESIGNED TO ELIMINATE.

As shown in the Board's opening brief, a bank that places commercial paper in accordance with the limitations inherent in the terms of the statute will not be subject to the risks and more subtle hazards that the Act was adopted to eliminate. (Bd. Opening Br. 44-52). Because the bank does not place commercial paper for its own account or with recourse to the bank, it does not risk its own funds or compromise the impartiality of its own credit facilities; because the bank does not offer commercial paper to the public, the bank will not jeopardize its reputation in the eyes of the public or depositors generally; and because the bank sells only on the order of customers, the customer, not the bank, makes the decision whether to utilize the bank's placement services. In any event, although possible abuses are not present here, it was shown that where an activity is lawful under a literal reading of the Act's terms, the mere allegation of potential conflicts of interest or other abuses affords no basis for invalidating the activity. (Bd. Opening Br. 45-46). The SIA has advanced no contention that in any way undermines the force of these arguments.

1. The SIA's attempt to analogize the Board's decision here with the ruling invalidated in Bankers Trust, which the Court found converted the Act's prohibitions into "a system of

administrative regulation" (104 S. Ct. at 2988), completely distorts the nature of the conclusions reached in the Statement. In Bankers Trust, it was conceded that commercial paper falls within the general meaning of "notes" as used in section 21. The Supreme Court noted that the Board could not "depart[] from the literal meaning of the Act" and rely on factors suggested by other terms used in conjunction with "notes" in section 21 to narrow the ordinary meaning of the statutory language. 104 S. Ct. at 2987-88.

Here, precisely the opposite is true. The court below did not dispute that the permissive phrase of section 16 expressly authorizes the bank's placement services. In addition, the literal meaning of "underwriting" and "distributing" in the Glass-Steagall Act, as explained by the Supreme Court in Schwab, refer to public offerings of securities and not to the kind of private placements of securities at issue here, even if it is assumed that transactions as agent are covered at all. Thus, the literal meaning of the Act, rather than covering the activity at issue, as in Bankers Trust, expressly does not reach it. While the Supreme Court in Bankers Trust disapproved of agency attempts to regulate an activity unlawful under the literal terms of the Act, the Board's Statement here does not regulate any activity, but merely applies the literal meaning of the statute. Nothing in the Act or the Bankers Trust opinion precludes the Board from delineating the facts covered by the literal meaning of

the statute. ICI II, 450 U.S. at 62. ("[I]f the restrictions imposed by the Board's interpretive ruling are followed, investment advisory services . . . would not violate the requirements of section 16").

The SIA offers no response to the Board's showing that Congress has authorized banks to sell certain types of government securities, such as the general obligations of local government authorities, as principal and in the primary market. Therefore, it must be conclusively presumed that these activities do not give rise to the subtle hazards that prompted enactment of the Glass-Steagall Act. Since, in terms equally as umambiguous, Congress has authorized banks to place securities privately, Congress could not have understood private placements to give rise to the "subtle hazards" at which the Act was directed.

Indeed, placing commercial paper under the methods described in the Statement clearly involves no greater potential for risk to the bank or for conflicts of interest than the public underwriting of municipal government securities. Since the financial condition of companies that use commercial paper to raise short-term funds is monitored by independent services (J.A. 237-38), the risk of loss associated with commercial paper is certainly no greater than the risk related to municipal securities in general. Thus, a bank placing commercial paper solely as agent is no more likely to jeopardize its own assets or to misuse its credit facilities to

prop up a financially ailing issuer than would a bank engaged in underwriting municipal securities. Similarly, while a bank underwriting municipal securities actively markets these securities to the public, a bank placing commercial paper under the Statement deals only with a limited number of financially sophisticated institutions. Thus, the possibility that the bank's commercial paper role will undermine public confidence in the bank is no greater than that inherent in the bank's clearly permissible government securities operations. Finally, since both the issuers and purchasers of commercial paper are at least as expert in financial matters as those participating in the municipal securities market, there is no greater likelihood that commercial paper issuers and purchasers are dependent on the bank for advice than are the issuers or purchasers of municipal securities, and there is clearly no greater risk that the bank's obligation to provide impartial advice will be tainted.

2. At bottom, the SIA's contentions concerning subtle hazards advance the same theory adopted by the district court -- regardless of the statutory language a bank activity involving securities violates the Act if it places the bank in the "role of promoter," if the bank must operate in a "highly competitive market," or might be led into "subtle or imperceptible . . . temptations" (see J.A. 327, 332, 335). Congress clearly did not intend such nebulous characteristics to form the line that separates banking from impermissible

investment banking, since these characteristics are inherent in virtually every banking function. Banks are subject to promotional and competitive pressures in virtually every banking function they perform -- in underwriting government securities, in raising funds by placing their own commercial paper and other securities and obligations, and in soliciting fiduciary and investment advisory services.[14/] Nevertheless, Congress has authorized banks to perform these functions, just as it has authorized banks to place commercial paper as agent; and no general expressions of intent regarding prohibited activities may be used to defeat the literal authorization by Congress.

On the contrary, the SIA's line of argumentation can sweep many otherwise clearly lawful banking functions within the prohibitions of the Act, and would ignore the precise language Congress enacted -- the best evidence of legislative

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14/ Amicus Goldman, Sachs & Co. asserts that in conducting the placement functions described in the Board's Statement, a bank would have no commercial interest (as opposed to legal obligation) in protecting the purchasers of the paper the bank places, especially if the bank became aware through its commercial lending operations that a particular issuer's financial condition has worsened. (Goldman, Sachs Br. 24-26). This purported conflict of interest is hardly one that is indicative of an investment banking function. Indeed, a bank that operates a trust department could be subject to exactly the same commercial pressure. If the bank discovered that one of its borrowers in whose stock the trust department has heavily invested begins facing financial difficulties, the bank would stand to gain (or avoid losses) if it causes the trust department to sell the borrower's stock to unsuspecting investors. See, e.g., E. Herman, Conflicts of Interest: Commercial Bank Trust Departments 123-27 (1975).

intent. The SIA's argument would necessitate pursuing an unstructured, unauthorized search for subtle, imperceptible hazards and promotional incentives. Congress clearly established in the literal terms of the Glass-Steagall Act the boundaries of permissible bank activities. These terms should not be distorted into an anticompetitive tool by reading into them, as the SIA proposes, through the prism of generalized excerpts from the legislative history, prohibitions on new bank activities that are authorized by the clear language Congress itself used.[15/]

15/ The district court found that there are disputed material issues of fact that preclude granting summary judgment in favor of defendants. The district court stated that it is unclear whether Bankers Trust is in fact following all aspects of the placement methods described in the Board's Statement (J.A. 319-20). However, these questions are clearly not material to the only issue raised by the SIA's lawsuit -- whether the Board's construction of the Glass-Steagall Act as it applies to a bank's role in placing commercial paper is consistent with the Act as a matter of law (see SIA Mem. in Support of Plaintiff's Motion for Further Summ. J. at 3, 44). Whether Bankers Trust in fact is following the limits on its activities is a separate supervisory question that is committed in the first instance to the appropriate enforcement agency. Because the placement functions described in the Statement comply with the Act, there is no need for further factual inquiry, prior to resolving the exclusively legal issues raised by the SIA.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Board's Opening Brief, the judgment of the district court court should be reversed, the injunction entered by the district court should be vacated, and the cause should be remanded with instructions to grant defendants' cross-motions for summary judgment.

Respectfully submitted,

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