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

No. 86-5089 and
Consolidated Cases

SECURITIES INDUSTRY ASSOCIATION,

Plaintiff-Appellee,

-v.-

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

Defendant-Appellant,

-and-

BANKERS TRUST COMPANY,

Defendant-Intervenor-Appellant.

CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES
OF THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for the Securities Industry Association, certifies that the following listed parties and *amici* appeared below:

A. *Plaintiffs*:

Securities Industry Association
A.G. Becker Incorporated (voluntarily dismissed without prejudice)

B. Defendants:

Board of Governors of the Federal Reserve System
Paul A. Volcker
Wayne Angell
Lyle E. Gramley
Manuel Johnson
Preston Martin
Emmet J. Rice
Martha Seger

Bankers Trust Company (Defendant-Intervenor)

C. Amici Curiae:

In support of Plaintiff:
Goldman, Sachs & Co.
Investment Company Institute
Securities & Exchange Commission

In support of Defendants and Defendant-Intervenor:
Bank of America, N.T. & S.A.
Citibank, N.A.
First National Bank of Boston
First National Bank of Minneapolis
NCNB National Bank of North Carolina
Security Pacific National Bank
Sovran Bank, N.A.
New York Clearing House Association

The Securities Industry Association is a national trade association representing more than 500 securities brokers, dealers and underwriters who are responsible for over 90 percent of the securities brokerage and investment banking business of the nation.

These representations are made in order that the Judges of the Court, inter alia, may evaluate possible disqualifications or recusal.

Dated: March 17, 1986

James B. Weidner

ROGERS & WELLS
200 Park Avenue
New York, NY 10166
(212) 878-8235

Attorneys for Securities Industry Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases Page

Miscellaneous

* Cases or authorities chiefly relied upon are marked by asterisks.

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

No. 86-5089 and
Consolidated Cases

SECURITIES INDUSTRY ASSOCIATION,

Plaintiff-Appellee,

-v.-

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

Defendant-Appellant,

-and-

BANKERS TRUST COMPANY,

Defendant-Intervenor-Appellant.

PRELIMINARY STATEMENT

The Supreme Court has admonished in this case that the provisions of the Glass-Steagall Act are "flat prohibitions" intended to "'separat[e] as completely as possible commercial from investment banking."* The Court has also confirmed that those prohibitions are to be enforced as written and not to be modified by *ad hoc* regulation.

---

* *Securities Industry Association* v. *Board of Governors*, 104 S. Ct. 2979, 2985 (1984) ("*SIA*").

Appellants and their amici urge this Court to limit the prohibitions by applying statutory exemptions from the securities laws, regulatory factors derived from the operation of the commercial paper market, and even ancient maxims of statutory construction. In short, they urge this Court to apply anything except what the Supreme Court has already instructed in this case.

Applying the Supreme Court's admonitions as instructed, however, the court below concluded the Federal Reserve Board had again acted contrary to law, avoiding the plain meaning of the statutory prohibitions and following instead just the sort of ad hoc regulatory approach the Supreme Court rejected.

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the district court correct in nullifying the Federal Reserve Board's ruling that authorized Bankers Trust, as agent, to promote specific issues of commericial paper securities to sophisticated investors, when the Glass-Steagall Act flatly prohibits banks from "underwriting, selling or distributing" securities of any sort to investors of any qualification?

2. Having found Bankers Trust's conduct directly contrary to law and thus "decidedly against the public interest," did the district court properly exercise its

discretion to enjoin the bank from continuing its marketing activities as the bank announced it otherwise intended to do?*

COUNTERSTATEMENT OF THE CASE

A. Bankers Trust's Entry into Commercial Paper Marketing

Over seven years ago the Securities Industry Association ("SIA") requested the Board of Governors of the Federal Reserve System ("Board") to declare newly initiated commercial paper sales activities of Bankers Trust Company ("Bankers Trust") violative of the Glass-Steagall Act, 12 U.S.C. §§ 24 (Seventh), 378. The Board denied that petition (JA 66-96),** ruling only that commercial paper is not a "security" subject to the Act's prohibitions and tabling the question of whether the bank's activities were illegal.***

---

* This case was previously before this Court, captioned A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136 (D.C. Cir. 1982), rev'd sub nom. Securities Industry Ass'n v. Board of Governors, 468 U.S. 137 (1984).

** References to the Joint Appendix filed with this Court on March 10, 1986 are cited herein as "JA __." The briefs for the Board and Bankers Trust will be cited respectively as "Board Br. __" and "BT Br. __."

*** See Federal Reserve System, Statement Regarding Petition to Initiate Enforcement Action (1980) (JA 66-96).

The SIA immediately challenged the Board's interpretation,* and the district court nullified it as contrary to law. 519 F. Supp. 602. This Court, by a divided panel, reversed. 693 F.2d 136. Ultimately, the Supreme Court upheld the district court decision, declaring that commercial paper is indeed a "security" under the Glass-Steagall Act. SIA, 104 S. Ct. 2979. But, because the lower courts had not addressed the issue, the Court remanded the case to decide whether Bankers Trust's activities were prohibited by the Act.

B. Bankers Trust's Activities Considered on Remand

The district court referred the issue to the Board after remand. The Board chose not to engage in any further fact-finding about the bank's activities, beyond obtaining a carefully written statement from bank counsel and soliciting comments from interested parties. (JA 109.)

The supplemental record then developed nevertheless demonstrated that the commercial paper market continues to be extremely competitive, requiring a seller to promote available

---

* Securities Industry Ass'n v. Board of Governors, No. 80-2730 (D.D.C. filed Oct. 24, 1980) (JA 97-105). A.G. Becker, Incorporated commenced an action parallel to that brought by the SIA, A.G. Becker, Inc. v. Board of Governors, No. 80-2614 (D.D.C. filed Oct. 14, 1980), and the two cases were originally consolidated. However, the suit brought by Becker has since been dismissed on consent, without prejudice, in light of its duplicative nature.

issues actively just as in any securities issuance.* The only change to the bank's program after the remand seems to have been a grudging concession (JA 113-14) to discontinue its prior practice of occasionally making overnight loans to commercial paper issuers for unsold portions of an offering the bank was selling.

The bank's submission confirmed that its activities are unmistakably the activities of investment banking. (JA 114-15, 119.) Like other commercial paper underwriters, Bankers Trust assists issuers in selling their commercial paper by providing advice with respect to rates and maturities on proposed issues, and actively soliciting potential purchasers. As the bank candidly admitted, <u>after</u> the Board's new Statement was released, to succeed as a commercial paper distributor the bank must be "a good trader, a good seller and a good market maker." "Bankers Trust Official Delighted By Fed Move," <u>New York Times</u>, June 6, 1985 at D2.**

---

* (JA 230.) Goldman, Sachs, one of the nation's largest commercial paper distributors, described the operation of the commercial paper market to the Board in some detail. (JA 157-92.)

** The bank's solicitation materials submitted when the case was initially before the Board had made clear its intention to be fully competitive with investment bankers. The bank touted to commercial paper issuers its objective "to expand sales distribution," and thus to be able to put an issuer

(Footnote Continued)

Although agreeing that the market is "highly competitive" (JA 230) and that some of the possible conflicts of interest in bank commercial paper marketing were "of substantial concern" (JA 233), the Board nevertheless concluded that Bankers Trust's activities, as described by the bank in its written submissions, were not prohibited "underwriting, selling, or distributing" within the meaning of the Glass-Steagall Act. (JA 193-246.)

C. The Supreme Court Decision

Appellants and their supporters largely relegate the Supreme Court's decision in this case to footnotes and afterthoughts. Its importance is clear. Although the specific issue before the Court was whether commercial paper constituted "notes, or other securities" under the Glass-Steagall Act, the Court took pains to set out in detail the proper approach

(Footnote Continued)

"in contact with more segments of the market . . . [and] to increase demand for your commercial paper." (JA 22, 26.) he bank described its fee as "competitive" (JA 21) and stated that "unlike the investment banker" the bank's "sales distribution effort is aimed principally at the shorter term investor." (JA 23.) The bank also described (JA 17) its widespread solicitation activities that included an extensive "calling program" based on

> . . . contacts made by commercial lending officers of the bank, information gleaned from published statements of publicly held concerns, unsolicited telephone calls by bank officers to investment officers of financial and non-financial institutions, and other conventional new business development techniques.

generally to construction of the Act. Obviously, the Court intended its guidance to be followed upon remand. The district court thus was in the unusual position of already having the Supreme Court's teaching on the issues to be addressed:

The bank's role. The Court pointed out the SIA's contention that "the role played by Bankers Trust in placing the commercial paper of third parties is precisely what the Glass-Steagall Act sought to prohibit" (id. at 2986) and later criticized the Board for "ignoring the role of the bank", thereby "misapprehend[ing] Congress' concerns with commercial bank involvement in marketing securities." Id. at 2989. Those "concerns," the Court made clear, derived from Congress' perception that "the role of a bank as a promoter of securities was fundamentally incompatible with its role as a disinterested lender and advisor." Id. at 2989. The Court put it succinctly: "By giving banks a pecuniary incentive in the marketing of a particular security, commercial-bank dealing in commercial paper . . . seems to produce precisely the conflict of interest that Congress feared. . . ." Id. at 2990.

Flat prohibitions. The Court emphasized "[t]he Act's design" as reflecting "the congressional perception that certain investment-banking activities are fundamentally incompatible with commercial banking." 104 S. Ct. at 2985. Understanding the extreme subtlety of conflicts of interest "present when a single institution is involved in both investment and commercial banking" (id. at 2984), Congress did not try to regulate them. Instead, Congress chose "a broad structural approach" that operated "through flat prohibitions . . . to 'separat[e] as completely as possible commercial from investment banking.'" Id. at 2985. Regardless of its "costs in terms of efficiency and competition," the Act is "a strong prophylaxis." Id. at 2986.

Securities Act exemptions. The Court rejected any attempt to narrow the broad scope of the Glass-Steagall prohibitions by incorporating Securities Act exemptions. The Court thus did not accept the Board's reasoning that Congress' exemption of commercial paper from registration requirements under the Securities Act of 1933 indicated a similar exemption of commercial paper under the Glass-Steagall Act. Rather, the Court found the Securities Act exemption relevant by contrast: It demonstrated Congress' awareness that without an explicit exception the term "securities" would be understood to include commercial paper, and it confirmed that, by omitting an exemption from the Glass-Steagall Act, one obviously was not intended. Id. at 2987.

Regulatory approach. The Court rejected out of hand the Board's attempt merely to minimize admitted conflicts of interest through guidelines or other regulatory standards. The

Court agreed with the SIA that the Board had "effectively convert[ed] a portion of the Act's broad prohibition into a system of administrative regulation." Id. at 2988. Rejecting that approach in no uncertain terms, the Court stated (id.):

> Although the guidelines may be a sufficient regulatory response to the potential problems, Congress rejected a regulatory approach when it drafted the statute, and it has adhered to that rejection ever since.

The Court equally rejected the Board's "nebulous inquiry" into factors such as the riskiness of the securities sold or the sophistication of their purchasers. Id. at 2988. "Ad hoc analysis" (id. at 2989) is simply inappropriate under the Act.

Addressing the merits on remand, the district court applied this Supreme Court teaching, as admonished.*

SUMMARY OF ARGUMENT

1. The Glass-Steagall Act is a statute of "flat prohibitions." Section 21 of the Act, without qualification, bars banks from "underwriting, selling or distributing"

---

* All apart from disagreeing with the legal position of the Board and the bank, the district court held that their cross-motions for summary judgment would have to be denied in any event because the record raised several material issues of fact relating to their motions. (JA 317-20.) Given this ruling, nowhere mentioned in appellants' briefs, their present request (BT Br. 59; Board Br. 55) that this Court direct entry of summary judgment in their favor is particularly inappropriate.

securities. On their face, each of these terms applies to the activities of Bankers Trust. The Board did not dispute this, but rather narrowed the scope of the terms, either through reference to other sections in the Glass-Steagall Act or by analogy to exemptions in the Securities Act. Following the Supreme Court's admonition that the Glass-Steagall Act should be applied as a statute of "flat prohibitions," the district court properly nullified the Board's conclusion.

2. The Board based its analysis initially upon an exception in Section 16 of the Act which allows limited "dealing in" securities to the extent of purchasing and selling them solely "upon the order" and for the account of customers. The plain language of this exception shows it does not apply. "Dealing" commonly refers to activities in the trading, or secondary, market; whereas the commercial paper activities of Bankers Trust involve the constant floatation of new commercial paper issues. Further, the Board itself has recognized that the "upon the order" language means that transactions are to be "unsolicited," and the Supreme Court has also confirmed that banks may merely "accommodat[e]" customers. Bankers Trust, however, solicits aggressively both purchasers and sellers of commercial paper.

3. The legislative history of the Section 16 exception also confirms its inapplicability. The Supreme Court has made clear that Congress intended the exception merely to allow continuation of the accommodation "securities brokerage" banks were offering to customers when the Act was passed. The Court has made equally clear the exception had nothing to do with the sort of aggressive commercial paper promotion now at issue. In the fifty years since the statute was enacted, no bank had attempted to market commercial paper as does Bankers Trust, thus confirming its universally understood prohibition.

4. The Board's decision was not in any event based on a literal application of the terms of Section 16. Instead, the Board's analysis of the terms "underwriting" and "distributing," as used in Section 21 of the Act was integral to its definition of activities permitted under Section 16. The Section 21 terms, according to the Board, "circumscribe" those contained in Section 16. To analyze the prohibitions of Section 21, however, the Board did not look to their unqualified language. Rather, relying upon a study done by its staff in 1977, the Board narrowed the Section 21 terms by reference to an exemption for non-public offerings found in the Securities Act of 1933. The Board thus again ignored the Supreme Court's admonitions in this case. The Court has instructed that exemptions included in the Securities Act, but omitted from the Glass-Steagall Act, are not

to be used to modify the prohibitions in the latter. Moreover, the rationale underlying the so-called "private placement" exemption in the Securities Act, that large investors can "fend for themselves," has no application at all to the flat prohibitions of the Glass-Steagall Act. Even if the Securities Act exemption did apply, the activities authorized by the Board do not fit within it because they do not constitute a "private placement" under that Act as defined by the Securities and Exchange Commission.

5. The Supreme Court has stressed repeatedly, in this case and elsewhere, that Congress intended the Glass-Steagall Act to eliminate the "subtle hazards" that arise whenever a bank acts as a promoter of particular securities. Those hazards and conflicts of interest occur, as the Board previously acknowledged, whether the bank acts as an agent or a principal in marketing securities, and whether it deals with sophisticated purchasers or the general public. The promotional or salesman's stake in a particular investment still remains. The bank here concededly was promoting particular securities, thus inevitably causing just the "pernicious promotional pressures that Congress sought to eliminate from the commercial banking industry." (JA 335.)

6. The Board again improperly attempted to transform the flat prohibitions of the Glass-Steagall Act into a system of

ad hoc regulation. The Supreme Court has made clear that Congress rejected a regulatory approach when it passed the Act and adhered to that decision ever since. Conceding that the bank's activities could cause conflicts of interest that were of "particular concern," the Board nevertheless established a regulatory "framework" of lending and recordkeeping procedures within which banks could sell securities. The Board also conceded that a bank's marketing activities could change from "non-public" to "public," at which point the Act would become applicable. To make that determination, however, the Board was forced to refer to a number of regulatory criteria (such as riskiness of the securities, breadth of distribution, sophistication of investors, etc.) nowhere found in the statute -- exactly the same sort of "nebulous inquiry" the Supreme Court rejected. The Board also dismissed other admitted conflicts of interest as "unlikely," despite Congress' intent that such conflicts, "unlikely" or not, were to be eliminated and not merely minimized.

7. Having concluded that Bankers Trust's conduct was unlawful and "decidedly against the public interest," the district court properly enjoined the bank from continuing its illegal securities marketing activity, as it had announced it intended to do. The court had the inherent power to enter such orders as necessary to effectuate its judgment.

ARGUMENT

I.

BANKERS TRUST'S MARKETING ACTIVITY IS PROHIBITED BY THE PLAIN LANGUAGE OF THE ACT

The Supreme Court already has instructed in this case that a reviewing court "'must reject administrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.'" SIA, 104 S. Ct. at 2983 (quoting FEC v. Democratic Senatorial Campaign Comm'n, 454 U.S. 27, 32 (1981)). The Board's recent determination, like its original statutory interpretation at issue in this litigation, is both inconsistent with the statute and contrary to the policy set by Congress.

This Court, however, need look no further than the ordinary meaning of the language of the statute to affirm the district court. Section 21 of the Glass-Steagall Act, 12 U.S.C. § 378(a)(1), broadly prohibits all depository institutions from "issuing, underwriting, selling, or distributing" securities, and that is so whether the activity is "at wholesale or retail, or through syndicate participation." (JA 486.) Section 16 of the Act, 12 U.S.C. § 24 (Seventh), separately prohibits banks from both underwriting and "dealing in" securities, with only a narrow exception for certain types of "dealing." (JA 483.) Bankers Trust's actions are unlawful "if prohibited by either section." SIA, 104 S. Ct. at 2986.

As a statute of "flat prohibitions," the Act should be construed broadly to fulfill the congressional objective of "separat[ing] as completely as possible commercial from investment banking." SIA, 104 S. Ct. at 2985. The Supreme Court has admonished repeatedly that its prohibitions are not to be accorded a narrow meaning.* Plainly, the district court was correct that the activities authorized by the Board are prohibited by the Act.

A. The Plain Language of Section 21 Prohibits Bankers Trust's Activity

Section 21 prohibits in the broadest terms, a bank's "underwriting, selling or distributing" securities. As ordinarily understood, these terms prohibit both principal and agency activity and admit of no exception for securities not offered to the general public. Each applies here.

"Underwriting." Although not defined in the Glass-Steagall Act, the ordinary meaning of the term "underwriting" since the Act was passed has encompassed both principal activities ("firm commitment" underwriting) and agency activities ("best efforts" underwriting) connected with the flotation of new issues of securities. The contemporaneous

* SIA, 104 S. Ct. at 2987-88; Board of Governors v. Investment Co. Institute, 450 U.S. 46, 65 (1981); Investment Co. Institute v. Camp, 401 U.S. 617, 635 (1971); Board of Governors v. Agnew, 329 U.S. 441, 446-47 (1947); Awotin v. Atlas Exchange National Bank, 295 U.S. 209, 212 (1935).

Securities Act of 1933, 12 U.S.C. §§ 77a, et seq., passed less than three weeks after the Glass-Steagall Act (SIA, 104 S. Ct. at 2987), confirms the congressional understanding. It defines an "underwriter" to include agents of an issuer, specifically encompassing a person who simply "offers" or "sells" for an issuer, or who has a "direct or indirect participation" in the distribution of a security.* The Board in its Statement readily conceded that "best efforts" activities are recognized as "underwriting" under the securities laws and all but conceded the same under the Glass-Steagall Act. (JA 217 n.23.) Bankers Trust, in turn, admitted that it acts as agent, selling commercial paper on behalf of corporate issuers (JA 70, 114-15), and that it receives a commission for its promotional efforts directly related to its success in selling the paper. (Id.) The bank's activities, in short, are just the sort of best efforts underwriting prohibited by Section 21, as the Board previously held. See First Arabian Corp., 63 Fed. Res. Bull. 66 (1977), discussed infra, at 41. The Board did not dispute any of this but, reversing its prior position (id.),

---

* 15 U.S.C § 77b(11). See SEC v. Chinese Consolidated Benevolent Ass'n, 120 F.2d 738 (2d Cir.), cert. denied, 314 U.S. 618 (1941). See also H.R. Rep. No. 85, 73d Cong., 1st Sess. 13-14 (1933); Dale v. Rosenfeld, 229 F.2d 855, 857 (2d Cir. 1956); accord, e.g., United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969); Securities Act Rule 144, 17 C.F.R. § 230.144 (preliminary note).

concluded that "non-public" underwriting is not barred. Section 21 on its face, however, makes no such exception.

"Selling." The Board conceded that Bankers Trust "is 'selling' commercial paper within the literal definition of that term." (JA 204; emphasis supplied.) Indeed, the term "selling," as distinct from "underwriting," was commonly used in 1933 to refer specifically to the promotion of securities by agents who received a commission for the securities they actually sold, but who otherwise had no obligation to sell a specific amount nor to purchase unsold securities.* Again the Board did not dispute this, but concluded that agency selling activities were permitted as a result of an exception in Section 16 of the Act, so long as the sales were further limited to "private placements." Again, however, Section 21 on its face makes no such distinctions.

"Distributing." The term "distributing" is not defined in either the Glass-Steagall Act or the Securities Act, but the ordinary meaning of "distribute" is simply "to deal out" or "to dispense." 3 Oxford English Dictionary 533

---

* See, e.g., V. Carosso, Investment Banking in America 65 (1970) ("selling groups" during 1920s "assumed no risk"); F. Burtchett & C. Hicks, Corporation Finance 374 (1948) (a "selling group" historically took no risk of final distribution); American Council on Education, A Study of Investment Banking 12-13 (unpublished manuscript, 1932) (a "selling group" has no liability for an issue but is authorized "to enter orders" on which "they receive a selling commission").

(1933). According to Webster's New International Dictionary (2d ed. 1959), the authority relied upon by the Board (Board Br. 22), the term "distribute" means "to divide among several" or "to dispense." This literal meaning unquestionably applies to the activities described by Bankers Trust, which "places" an issuer's commercial paper with a number of investors. (JA 198.) Once again, the Board did not disagree but, referring to an exemption in the securities laws, concluded that only "public" distributions were covered. Again, Section 21 on its face simply does not make that distinction.

In sum, the statutory language itself shows Congress intended to be as all-encompassing as possible. The terms used by Congress in Section 21 -- "issuing, underwriting, selling, or distributing" -- cover the spectrum of activities a bank might pursue in order to market securities. The terms expressly prohibit all distributional activities, whether as principal or agent, whether public or private. The "expansive language" used by Congress "offers no indication whatever that Congress intended the limiting construction" urged by the Board. Harrison v. PPG Industries, Inc., 446 U.S. 578, 589 (1980). The district court properly applied the Act, as written.

B. The Plain Language of Section 16's Narrow Exception Does Not Apply to Bankers Trust's Activity

Attempting to avoid Section 21, the Board tried to fit the bank's activity into a narrow exception in Section 16 of the Act for "purchasing and selling . . . without recourse solely upon the order, and for the account of customers." (JA 483.) Addressing this "shoehorn" effort (JA 335), the district court determined that "Bankers Trust's activities do not fall within section 16's permissive phrase, and are therefore barred by section 21's ban on the 'selling' of securities."* Plainly, the district court was correct. Not only was the Board's effort contrary to Section 16's legislative history and policy, as the district court held (see infra, at 25-27), but the effort was also inconsistent with its plain language.

"Dealing." The Board's analysis all but overlooked that the Section 16 exception applies only to "the business of dealing in securities and stock."* The term "dealing" itself is commonly understood to encompass the purchasing and selling

---

* (JA 336 n.8.) Appellants (e.g., Board Br. 19; BT Br. 16) simply mischaracterize the district court in repeatedly suggesting that the decision below agreed that Bankers Trust's activity "fit neatly" within the brokerage exception of Section 16.

* In full, the relevant language of Section 16, 12 U.S.C. § 24 (Seventh), is:

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

(Footnote Continued)

of securities in the secondary trading market, as principal for the dealer's own account and as agent for others.* Indeed, the Supreme Court has confirmed that the "purchasing and selling" language in Section 16 describes "securities brokerage" -- obviously a secondary (trading) market activity, not a distribution activity in the new issue market.**

Congress' understanding of the distinction between secondary market "dealing" and primary market "underwriting" is apparent even from the structure of Section 16; it juxtaposes in the same sentence (a) a "limited" permission for banks to engage in "the business of dealing in securities and stock" with (b) an unqualified prohibition that banks "shall not underwrite

(Footnote Continued)

> 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. . . .

* See Loss, Securities Regulation, at 1215. Section 2(12) of the Securities Act defines the term "dealer" to include "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). See also JA 215 n.22.

** Securities Industry Association v. Board of Governors, 104 S. Ct. 3003, 3011 n.20 (1984) ("Schwab"). The Board, too, earlier in this proceeding took the position that Sections 16 and 21 of the Act bar banks from all "involvement" with securities "except for permissible brokerage." (JA 75.) This view was consistent with its long-standing contemporaneous construction of other sections of the Glass-Steagall Act as allowing only "the purchase and sale of securities on behalf of others in the open market." 22 Fed. Res. Bull. 51 n.1 (1936) (emphasis added; quoted in Schwab, 104 S. Ct. at 3010).

any issue of securities or stock." If Congress had intended the "purchasing and selling" exception to permit banks to assist in floating securities in the new issue market, the "limited" permission would extend to the ban on "underwriting" as well. It does not, and obviously Congress did not intend it to do so.*

---

* Congress made the same kind of distinction in setting requirements applicable to "dealing" and "underwriting" transactions, respectively, in the contemporaneous Securities Act of 1933. That statute generally imposed certain requirements on the issuance of new securities, but not on subsequent trading in them. Accordingly, "transactions by a dealer" were exempted from restrictions that otherwise apply to "underwriters." 15 U.S.C. § 77d(3). See also SEC v. Chinese Consolidated Benevolent Association, 120 F.2d 738, 741 (2d Cir.), cert. denied, 314 U.S. 618 (1941) (the Act "intended to exempt only trading transactions between individual investors with relation to securities already issued"). Congress' understanding of the common distinction between underwriting and dealing could hardly have been made clearer in the House Committee's explanation of the "dealer's exemption" to the Securities Act:

> [The dealer's exemption] broadly draws the line between distribution of securities and trading in securities, indicating that the act is, in the main, concerned with the problem of distribution as distinguished from trading. . . . Transactions by an underwriter are not exempted. It is true, however, that there is a point of time when a person who has become an underwriter ceases to exercise any underwriting function and, therefore, ceases to be an underwriter. When that point is reached such a person would be subject only to whatever restrictions would be imposed upon him as a dealer.

H.R. Rep. No. 85, 73d Cong., 1st Sess. 15-16 (1933). The committee that expressed this understanding is the same committee of the same Congress that simultaneously drafted and debated the Glass-Steagall Act, which also made the distinction between "dealing" and "underwriting."

There is no dispute that commercial paper activities here involve the constant promotion of new issues, not trading in the secondary market. Accordingly, Section 16's narrow "brokerage" exception, on its face, simply does not apply to Bankers Trust's activities.

On the order of customers. Even if the brokerage exception did apply, however, the activities here would contravene the flat requirement in Section 16 that purchases and sales may only be "upon the order of . . . customers." As the Supreme Court has confirmed, Congress intended this provision to allow the purchase and sale of securities "as an accommodation" to bank customers. Schwab, 104 S. Ct. at 3008 (emphasis added). The Board itself expressly recognized in that case that Congress intended a non-promotional role for banks under Section 16. In granting the application by BankAmerica Corporation to acquire Schwab, a discount broker, the Board stated its view that the broker's business fell within the language of Section 16 (69 Fed. Res. Bull. at 107) and, significantly, described it as "the business of purchasing or selling securities upon the unsolicited order of, and as agent for, a particular customer." Id. at 114 (emphasis added). Leaving no doubt as to the import of the Board's description, including its "unsolicited" component, the Supreme

Court quoted it as part of its holding in Schwab, 104 S. Ct. at 3012.*

Even so, in the Board's current view (JA 198-99, 209-11), a bank may actively solicit both issuers and purchasers of commercial paper, advise both sides of the transaction, participate in the negotiations and earn a fee based on its success in completing a deal. Such a bank is still acting only "upon the order of . . . customers," according to the Board, because the commercial paper issuer is the only relevant "customer" of the bank and the issuer retains the ultimate decision to issue commercial paper at the rates and terms negotiated by the bank. (JA 209-10.) That, however, is just the type of "narrow" reading of the ordinary terms of the Act that should be rejected.

First, there is no reason the term "customers" should not apply to investors who buy commercial paper through the bank, just as it does to those who sell through it. Section 16 applies to both "purchasing and selling," and this Court has

---

* The distinction between "solicited" and "unsolicited" brokerage transactions has indeed long been recognized in the Securities laws. See 15 U.S.C. § 77d(4). As the SEC has explained, "[i]n the case of solicited transactions . . . . the broker's position and interest in, and his responsibility for, the transaction cannot in substance be distinguished from the case of a dealer who is selling for his own account." In re Brooklyn Manhattan Transit Corp., 1 SEC 147, 171 (1935).

already held that the term "customers" includes persons who have no relationship with the bank other than an actual purchase or sale of securities.* Second, under any common sense interpretation, sales of commercial paper by issuers the bank represents are not unsolicited; the bank aggressively recruits issuers to sell _their_ commercial paper through it and then counsels them on timing and terms of the sale. "Tombstone" ads published by the bank admit, indeed tout, that the bank "'_initiated_ _this_ _program_, provides letter of credit support and acts as financial advisor, trustee and exclusive sales agent'." (JA 318 n.3, 397; emphasis added.) Third, the result of the Board's Section 16 interpretation would be that, merely by finding issuers who agree to let the bank sell their securities, any bank could -- with Glass-Steagall impunity -- open up a high-pressure, boiler-room securities operation, regardless of the type of securities being sold or the obvious hazards involved. Congress could not have intended that result.

In sum, the plain language of the Act shows Section 16's brokerage exception to be as _in_applicable to the bank's activities as the Section 21 prohibitions are applicable.

---

* _Securities Industry Ass'n_ v. _Comptroller_, 577 F. Supp. 252, 255 (D.D.C. 1983), _aff'd mem._, 758 F.2d 739 (D.C. Cir. 1985), _cert. denied_, 106 S. Ct. 790 (1986).

C. The Legislative History Confirms the Limited Scope of the Section 16 Exception

There is no need now to delve into the legislative history of the Section 16 exception to understand its import. The Supreme Court has already done so. The relevant committee reports explained that Section 16 was intended to permit banks "to purchase and sell investment securities for their customers to the same extent as heretofore." S. Rep. No. 77, 73d Cong., 1st Sess. 16 (1933); see also H.R. Rep. No. 150, 73d Cong., 1st Sess. 3 (1933). Citing just that "heretofore" language, the Court in Schwab explained that Congress had intended in 1933 merely to endorse the "traditional banking service" of "arrang[ing] the purchase and sale of securities as an accommodation to their customers," thereby authorizing banks "to continue the practice."* In stark contrast, banks'

---

* Schwab, 104 S. Ct. at 3008 n.13 and accompanying text. The legislative history shows that the only reason for the "purchasing and selling" exception in Section 16 was to allow banks to continue accommodating their customers by arranging for the purchase or sale of their securities in the secondary market, a service of particular import in rural areas where, in 1933, a bank could well be the only financial institution for miles. See Hearings on H.R. 5357 before the House Comm. on Banking and Currency, 74th Cong., 1st Sess. 663 (1935); Hearings on H.R. 7617 before the Senate Comm. on Banking and Currency, 74th Cong., 1st Sess. 154-55 (1935) (explaining basis for initial amendments to Section 16 in 1935). As the Comptroller originally explained Section 16: "[I]t was not the intention of Congress to penalize the public located in communities removed from the money centers in disposing of or purchasing securities in the form of corporate stocks for investment purposes." Annual Report of the Comptroller of the Currency at 11 (Jan. 3, 1934).

involvement with commercial paper before the Act was passed in 1933 "overwhelmingly" had been "in the role of discounter rather than dealer." SIA, 104 S. Ct. at 2992. And, as the Supreme Court also pointed out (id. at 2991 n.11), "'discounting' commercial paper is not part of the 'business of dealing' in securities" -- which, of course, is the only activity involved in the Section 16 exception.

The Board nevertheless contended in its Statement that nothing could be found in the legislative history indicating that securities brokerage was the "only" function permitted under Section 16. (JA 213.) Not only did the Board thus ignore what the Supreme Court has said, but in effect it approached the statute backwards. By looking in the legislative history to see whether Congress had expressly prohibited commercial paper marketing, rather than inquiring whether Congress had expressly permitted it, the Board "asked the wrong question." (JA 323.) Congress enacted the Glass-Steagall Act in 1933 as a broad prohibitory statute; accordingly, as an exception, Section 16 should be construed narrowly to effect the remedial purpose of the overall prohibition.* The Board did just the reverse, and as the

* It is of course a basic principle that exceptions to statutory prohibitions should be construed narrowly so that "the original objective of the Congress [is not] weakened or impaired unless it be by later legislative action." Baker, Watts & Co. v. Saxon, 261 F. Supp. 247, 252 (D.D.C. 1966), aff'd sub nom. Port of New York Authority v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968). See also Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

district court explained it, thereby incorrectly attempted to transform "a narrow exception addressed to a completely different activity into an expansive authorization that defeats the prohibition intended." (JA 323.)

Until Bankers Trust began its commercial paper marketing activities in 1978, no other commercial bank had done so in the decades since the Glass-Steagall Act was passed -- a fact, itself, of obvious significance. SIA, 104 S. Ct. at 2992. The Board attempted to explain away this commercial inactivity, saying that bankers did not previously have an economic incentive to deal in commercial paper. (JA 214.) The rationale of the Board's new Statement permitting banks to market securities, however, is in no way tied logically to commercial paper. Rather, if the Board's new analysis were correct, it would mean that banks are now, and since 1933 have been, free to solicit actively both issuers and purchasers to float new issues of all securities, whether stocks, bonds, options or any others -- a patently absurd conclusion given Congress' emphatic intent to "'separat[e] as completely as possible commercial from investment banking'" through "flat prohibitions." SIA, 104 S. Ct. at 2985.

In short, the legislative history of Section 16, as well as half a century of universal understanding of it, confirms the plain meaning of the language Congress used. The district court should be affirmed.

II.

THE BOARD'S ATTEMPT TO SUPPLEMENT THE PLAIN LANGUAGE OF THE ACT WAS IMPROPER

A. The Board Did Not Base Its Decision on the Act's Plain Language

Bankers Trust, citing Board of Governors v. Dimension Financial Corp., 106 S. Ct. 681 (1986), attempts to fault the court below for supposedly failing to follow the plain language of the Act. (BT Br. 16.) Actually it was the Board itself which "eschewed . . . statutory literalism," as the district court aptly stated (JA 336), in reaching its determination.

The Board did not simply apply the terms of Section 16 to reach its decision, as the bank implies. Rather, the Board expressly recognized that the "authorization in section 16 . . . is circumscribed by . . . the prohibitions in sections 16 and 21 against underwriting and distributing securities." (JA 214.) Accordingly, integral to the Board's definition of activities permitted under Section 16 was its analysis of the terms used in Section 21 of the Act. And, in analyzing the prohibitions of Section 21, the Board looked not to their plain language, but modified the terms by analogy to the exemption for "non-public" offerings in the federal securities laws. See infra at 30-37. Then, in applying that exemption to the Glass-Steagall Act, the

Board incorporated a host of criteria not in any way specified in, nor appropriate under, it. See infra, at 47-49.*

In short, the Board's decision quite clearly was not based on the Act's plain language. It thus is not surprising that the Board in its brief does not cite the Dimension decision. To the extent Dimension applies at all, it simply underscores the validity of the opinion below. Here, as in Dimension, the Board has gone beyond the plain terms of the statute and attempted to apply a policy nowhere found in underlying statutory objectives. And, as in Dimension, the "clearly expressed intent of Congress" (106 S. Ct. at 686) is not to be altered.

---

* The Board's entire reasoning was that: Even though (a) the bank's activities fall within the literal meaning of "selling" in Section 21 of the Act (JA 204), that prohibition (b) is modified by the limited "dealing" exception in Section 16 (JA 203), which (c) is in turn "circumscribed" by the prohibitions against "underwriting" and "distributing" in Section 21 (JA 214), as (d) narrowed by reference to the exception for non-public offerings in the Securities Act of 1933 (JA 221), applied (e) through measurement by various criteria nowhere found in either Act. (JA 222-24.) The circularity and convolution of the Board's logic is, itself, a sure sign that the plain language of the statute is being circumvented.

Even under Section 16 alone, the Board concluded that the bank was acting as an agent rather than as a principal only because it adhered to a "framework" of lending restrictions and recordkeeping practices that the Board superimposed on the statutory language -- again illustrating that the Board did far more than simply apply the language of the statute as written. (JA 206-08.)

B. The Board Improperly Attempted to Engraft an Exemption from the Securities Act onto the Glass-Steagall Act

As discussed, Section 21 prohibits, without qualification, "underwriting," "selling" and "distributing" -- terms that on their face do not distinguish between sales to the general public, sales to a limited group of investors or even sales to a single investor. Congress plainly intended Glass-Steagall to remove banks from all distribution activities in any security not otherwise exempted. Indeed, by contrast, the same Congress passed the Securities Act of 1933 a few days later, including an express registration exemption for transactions "not involving a public offering," 15 U.S.C. § 77d(2).

That difference in congressional approaches should have underscored for the Board the strength of the unqualified Glass-Steagall bar. Earlier in this case, the Supreme Court rejected the Board's attempt to exempt commercial paper from the phrase "notes, or other securities" in the Glass-Steagall Act by analogy to the express exemption of commercial paper from "securities" registration requirements contained in the Securities Act of 1933. SIA, 104 S. Ct. at 2987. The real significance of the Securities Act exemption, the Court made clear, was that the same Congress simultaneously passed the Glass-Steagall Act without it. Id.

Even so, the Board on remand repeated the same approach. Analogizing to the securities laws, the Board (JA

214-22) found it permissible -- despite the unqualified prohibition in Section 21 -- to exempt from Glass-Steagall all "non-public" offerings undertaken by banks. Following the Supreme Court's instruction, the district court appropriately rejected this analysis. The court explained (JA 342-43):

> [T]he Securities Act exemption demonstrates that Congress was aware of the sometimes different nature of public and non-public distributions of securities, and that when it deemed those differences relevant to a given statute's purpose, it drew appropriate distinctions between the two types of offerings. The Glass-Steagall Act contains no such distinctions, however, compelling the conclusion that the statute prohibits banks from <u>all</u> distributions, be they public or non-public.

Reference to <u>this</u> Securities Act exemption in the context of the Glass-Steagall Act is indeed particularly inappropriate, given their differing objectives. The Supreme Court could not have been clearer in this respect. Addressing the intent and reach of the so-called "private placement" exemption in Section 4(2) of the Securities Act in <u>SEC</u> v. <u>Ralston Purina Co.</u>, 346 U.S. 119 (1953), the Court stated:

> Since exempt transactions are those as to which "there is no practical need for [the bill's] application," the applicability of § 4[(2)] should turn on whether the particular class of persons affected needs the protection of the Act. <u>An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering."</u>

346 U.S. at 125 (emphasis added). In complete contrast to the Securities Act, the ability of investors to "fend for themselves" is utterly irrelevant under the Glass-Steagall Act. As the Court put it earlier in this case:

> In its prohibition on commercial-bank underwriting, the Act admits of no exception according to the particular investment expertise of the customer. The Act's prohibition on underwriting is a flat prohibition that applies to sales to both the knowledgeable and the naive.

SIA, 104 S. Ct. at 2991 (emphasis added). As the district court also recognized, "the hazards which prompted passage of that Act are just as likely to occur in sales to private institutions as in sales to the general public."* The court therefore correctly rejected the Board's "attempt to create an exemption for non-public distributions where none was

---

* (JA 341.) Transactions with large sophisticated investors outside the scope of the Securities Act may actually be of particular concern under the Glass-Steagall Act:

> Bank depositors who are financially able to purchase commercial paper in large denominations are likely to be among the bank's most important and influential clientele. Loss of their good will as a result of losses on investments which the bank recommended and sold could be detrimental to the bank's commercial operations.

A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 154 (D.C. Cir. 1982) (Robb, J., dissenting), rev'd, 104 S. Ct. 2979 (1984). See also SIA, 104 S. Ct. at 2990. The policies that led to the private placement exemption in the Securities Act thus are not merely immaterial to the Glass-Steagall Act; they are inimical to it.

provided nor apparently intended" (JA 343), and nullified its "attempt to superimpose the private placement exemption of the securities laws onto the Glass-Steagall Act" as "simply inconsistent with the Act's purpose." (JA 347-48.)

The Board nevertheless attempts to portray its current position as reflecting previously "unchallenged" and "settled" agency interpretation. (Board Br. 16, 55.) Actually, the Board's last decision on the subject held that best efforts activities by banks in the context of private placements did constitute prohibited "underwriting, selling or distributing." First Arabian Corp., 63 Fed. Res. Bull. 66 (1977), discussed infra, at 41-43. Avoiding its own rulings, the Board instead cites a study of bank private placement activities done in 1977 by its staff which the Board attempts to bootstrap into authority for its current position. (Board Br. 12, 27, 51.) In that study,* the Board's staff argued that private placements were appropriate under the Glass-Steagall Act, finding a "compelling analogy" for them in the private placement exemption of the Securities Act of 1933.

The rationale of that 1977 study, however, has been under challenge in these proceedings since they were begun in

---

* Federal Reserve Staff, Commercial Bank Private Placement Activities: A Staff Study (1977).

1978.* And, if it ever had any validity,** the study's rationale was repudiated completely by the Supreme Court's ruling earlier in this case. In its study, the staff

(a) found the "Securities Act definition of underwriting, with its exclusion for private offerings" to be a "compelling analogy" to the Glass-Steagall terms (p. 89);

(b) observed that the "exclusion" reflected Congress' objective under the Securities Act to protect only those who cannot "fend for themselves," a goal the staff found also satisfied under its own interpretation of the Glass-Steagall Act (p. 90);

(c) viewed "the actual investment of funds in securities by the bank itself" as constituting "the preponderant dangers" against which the Glass-Steagall Act was directed (p. 91); and

---

* We will not comment on the temerity of the Board's suggestion (Board Br. 28) that the 1977 study has "never, until now, been subject to court challenge," except to recall that the SIA -- for literally years in these proceedings -- has been attempting to challenge the so-called "underwriting issue," only to have the Board repeatedly avoid it until the Supreme Court specifically forced it to be addressed. It is particularly anomalous for the Board to imply that the study of its staff might otherwise have been challenged earlier, given the inevitability of a "ripeness" defense to any such challenge. See, e.g., New York Stock Exchange, Inc. v. Bloom, 562 F.2d 736, 741 (D.C. Cir. 1977), cert. denied, 435 U.S. 942 (1978). Even in this case, the Board moved to dismiss at the outset on "ripeness" grounds, which were not abandoned until the Board published its commercial paper "guidelines." See 519 F. Supp. at 609 n.6.

** The staff's conclusions were contrary to the position taken by the Board itself barely six months earlier. The Board had decided First Arabian Corp. in December 1976, and the staff's Private Placement Study was dated June 1977.

(d) concluded that promotional pressures on the bank would be "minimal" in light of the "independent and sophisticated investor judgment" involved (pp 98-99).

In this case, the Supreme Court:

(a) confirmed that the significance of express exemptions in the securities laws is that, by contrast, they were not included and obviously therefore not intended in the Glass-Steagall Act (104 S. Ct. at 2987);

(b) pointed out that the substantial sophistication of investors which renders Securities Act disclosure requirements unimportant, if relevant at all, has just the opposite import to Glass-Steagall policies (104 S. Ct. at. 2990-91);

(c) reiterated that financial risks to banks were not the "preponderant dangers" leading to the Glass-Steagall prohibitions, but rather that possible conflicts of interest were equally of concern (104 S. Ct. at 2984-86, 2989); and

(d) made clear that merely "minimizing" such conflicts of interest was not sufficient under the Glass-Steagall Act, which was meant instead to eliminate them completely (104 S. Ct. at 2990).

Having been rejected by the Supreme Court, the staff's rationale provides no support at all for the Board.

For all its reliance on terms in the Securities Act, the Board in significant respects actually disputes the views of the Securities and Exchange Commission, the one agency Congress vested with the authority to explain those terms. For example, unable to explain away the bank's failure to satisfy stated requirements of the SEC's Regulation D, defining permissible "private placements," the Board merely dismissed them as not "germane."* Also, the Board rejected completely the view of the SEC's staff that "the fact that an offering is exempt from Securities Act registration under Regulation D does not necessarily mean that no 'distribution' has occurred."** The Board instead interpreted the Glass-Steagall Act in light of its understanding of the securities laws, and now it equally brushes off as a mere "conclusory observation" (Board Br. 43 n.32) the public statement of the SEC itself that effectively confirms the views of its staff.***

---

* (JA 225.) Regulation D promulgated by the SEC specifies the kinds of conditions a transaction must meet to qualify for the "private placement" exemption of Section 4(2) of the Securities Act. See 17 C.F.R. §§ 230.501-506 (1984). As the district court noted (JA 315), however, the Board allows banks to advertise to the general public their role as a distributor of commercial paper, a general solicitation violating SEC Rule 502(c). 17 C.F.R. § 230.502(c). See also SEC, Securities Exchange Act Release No. 34-22205, 50 Fed. Reg. 28385, 28392 n.58 (July 12, 1985). Further, the Board does not require that commercial paper distributed by banks have any restriction on its resale, violating Rule 502(d). 17 C.F.R. § 230.502(d).

** The Board circulated a draft of its Statement on remand to the staff of the SEC for its comments. The language quoted in the text above is from the staff's reply. Letter of April 16, 1985, p. 2, from Daniel Goelzer, General Counsel of the SEC, to Michael Bradfield, General Counsel of the Board, set forth at page 298 of the Supplemental Record before the district court.

*** SEC, Securities Exchange Act Release No. 34-22205, 50 Fed. Reg. 28385, 28392 n.58 (July 12, 1985) (rejecting the view that no "distribution" occurs simply because an offering is exempt from registration; see JA 342 n.12).

Not only has the Board thereby inappropriately followed a "pick-and-choose approach to statutory construction" (JA 344), but, in one stroke, it has also appropriated the SEC's authority to define what constitutes a valid "private placement" of securities. The Board's determination thus "raises serious questions concerning the respective roles of the Board and the SEC in regulating the securities industry." (JA 345 n.4.) It also reflects a "regulatory reversal" that, as the district court observed, "is extremely doubtful that Congress could have envisioned."*

In sum, the policies that led to the "non-public" exemption in the Securities Act have absolutely no relevance to the Glass-Steagall Act. Transactions with investors who can "fend for themselves," which may be of no concern under the Securities Act disclosure requirements, are of great concern under the Glass-Steagall prohibitions. In any event, the transactions at issue are not valid private placements under the Securities Act, even if that were a relevant consideration, which it is not. For these reasons, too, the opinion below should be affirmed.

---

* (JA 344 n.14.) Not surprisingly, the SEC has been forced to react. In recently adopting regulations to govern banks which enter the securities business, it stressed that the determination of whether a transaction involves a public offering "must be made by reference to the federal securities laws." SEC, Securities Exchange Act Release No. 34-22205, 50 Fed. Reg. 28385, 28392 n.58 (July 12, 1985).

III.

BANKERS TRUST'S MARKETING ACTIVITY IS CONTRARY TO THE POLICY ESTABLISHED BY CONGRESS

A. Congress Sought to Remove from Banks the Promotional Incentives of Selling Particular Securities

The Board maligns the district court for creating an "amorphous test" making "promotional pressure the touchstone of a statutory violation." (Board Br. 33.) The test, however, is neither "amorphous" nor created by the court below. It was the Supreme Court in this case which confirmed the congressional belief that "the role of a bank as a promoter of securities was fundamentally incompatible with its role as a disinterested lender and advisor" (SIA, 104 S. Ct. at 2989) and pointed to the "pecuniary incentive in the marketing of a particular security." Id. at 2990. The Court has made the same point repeatedly. Earlier, in Investment Co. Institute v. Camp, 401 U.S. 617 (1971) ("ICI"), the Court also had noted Congress' intent to remove from banks "a promotional or salesman's stake in a particular investment." ICI, 401 U.S. at 638. And, in permitting discount brokerage in Schwab, the Court pointed to the absence of any "salesman's stake" in particular securities. Schwab, 104 S. Ct. at 3011.

There can be no doubt that prohibited conflicts are inherent in banks' commercial paper marketing. The Supreme Court has already catalogued some of them in this case:

-- "[B]anks might use their relationships with depositors to facilitate the distribution of securities in which the bank has an interest, and that the bank's depositors might lose confidence in the bank if the issuer should default on its obligations . . . [which] concern would appear fully applicable to commercial-paper sales." 104 S. Ct. at 2989-90.

-- "By giving banks a pecuniary incentive in the marketing of a particular security, commercial-bank dealing in commercial paper also seems to produce precisely the conflict of interest that Congress feared would impair a commercial bank's ability to act as a source of disinterested financial advice." 104 S. Ct. at 2990.

-- "[A bank] may feel pressure to purchase unsold notes in order to demonstrate the reliability of its distribution system, even if the paper does not meet the bank's normal credit standards." 104 S. Ct. at 2989.

In short, as a "promoter for specific securities" (JA 327), Bankers Trust inevitably faces just those "pernicious promotional pressures" (JA 335) that Congress sought to eliminate.

Contrary to the bank's contentions (e.g., BT Br. 44-47), this congressional policy decision applies regardless of whether a bank acts as a principal or as an agent in its securities promotion. As Senator Bulkley, one of the major sponsors of the Act, explained during the debate on it:

> Obviously, the banker who has nothing to sell to his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors than the banker who uses the list of depositors in his savings department to distribute circulars concerning the advantages of this, that, or the other investment on which the bank is to receive an originating profit or an underwriting profit or a distribution profit or a trading profit or any combination of such profits.

75 Cong. Rec. 9912 (1932) (emphasis added; quoted in SIA, 104 S. Ct. at 2990). The congressional concern thus did not depend at all on whether the bank was acting as agent or principal, or upon what kind of fee the bank earned as a result.

The Supreme Court has also made this clear. The Court's analysis in ICI, for example, did not in any way depend upon whether the bank was subject to financial risk as a principal. ICI, 401 U.S. at 631-34, 636-38. The bank there assumed no such risk; the securities the bank sold were not even issued to a customer until the bank already had the customer's funds on hand. Id. at 622. The Court nevertheless found the bank's marketing activities illegal because the bank had "a particular investment to sell," and therefore it was "not a matter of indifference to the bank whether the customer buys [the security sold by the bank] or makes some other investment." Id. at 636 (emphasis added). As the Court there put it: "The hazards that Congress had in mind were not limited to the obvious danger that a bank might invest its own assets. . . ." Id. at 631 (emphasis added).*

---

* In this case, too, the Supreme Court's discussion of hazards did not depend on any agency/principal distinction, but rather upon the "promotional" role played by Bankers Trust as an agent. SIA, 104 S. Ct. at 2989-90. As the Court stated, it was "the role of the bank as a promoter of securities" that Congress found "fundamentally incompatible" with its banking obligations. Id. A bank which, as here, has "a pecuniary interest in the marketing of a particular security" has "precisely the conflict of interest" that Congress meant to eliminate. Id.

The Court in ICI also rejected the suggestion, renewed by the Board here (JA 230-32), that the "pecuniary stake" of concern under the Act arises only out of fees earned as a "principal" on the spread between the purchase price and sale price of a security. The fees received by the bank in ICI were a percentage of the assets of the mutual fund whose shares it sold; thus, while the bank's fees depended on its success in marketing those shares they were not derived from any such "spread." ICI, 401 U.S. at 636. Its conduct was illegal nonetheless.*

Prior to these proceedings the Board itself had left no doubt it understood the importance of a bank's "promotional interest" in securities it places as agent. In First Arabian Corp., 63 Fed. Res. Bull. 66 (1977), the Board denied a bank holding company's request to retain an interest in a securities broker-dealer which engaged in just the sort of "best efforts"

---

* Obviously, therefore, an annual fee paid to a bank, as here (JA 114, 230), upon the amount of securities outstanding during a given year, directly implicates the concerns of the Glass-Steagall Act. See Board of Governors v. Investment Co. Institute, 450 U.S. 46, 68 n.40 (1981), in which the Court contrasted a fee based solely on the annual value of an investment portfolio with one, as in ICI and here, that also reflects sales during a given year.

private placement activity now authorized.* Citing similar prior rulings by the Comptroller of the Currency, the Board said:

> . . . national banks and their subsidiaries should not participate in any substantial degree in negotiations between their clients and prospective purchasers of securities, nor should they charge a fee contingent upon a successful placement of securities since such a middleman role "lies at the heart of the investment banking business," and such a fee arrangement is a "strong incentive for the bank to locate a purchaser with whom a deal can be made." It is precisely this promotional interest of the investment banker that the Glass-Steagall Act intended to separate from the commercial banker's interest in acting as an impartial source of credit and providing impartial investment advice.

---

* The Board described Bates North America, the company there involved as one which

> . . . engages in the business of assisting business enterprises in the private placement of debt and equity. . . . [It] places securities with large institutional investors in the United States, but does not take an equity position in the businesses it serves, and does not deal with the general public. It further appears that Bates North America in almost all cases participates in negotiations between its clients and prospective purchasers, and in most cases charges a fee that is contingent upon a successful placement.

63 Fed. Res. Bull. at 68 (emphasis added).

Id. at 69 (footnote omitted).*

Nor does the Schwab decision, cited by Bankers Trust, provide any support for the principal/agent distinction it now reads into the Act. First, the Court there took pains to avoid even the possibility that its decision could be cited as holding that all agency activities are permitted by the Glass-Steagall Act.** Second, as the district found,

---

* The Office of the Comptroller of the Currency also had recognized that "underwriting" as used in the Glass-Steagall Act reaches both agency and principal underwriting:

> [A] bank may not extend a firm commitment to purchase an issue with a view to selling the same, nor may a bank promise only its "best efforts" to market an issue. These activities rest at the heart of the business known as investment banking and undoubtedly constitute a proscribed underwriting, selling or distribution of securities.

Letter, dated January 15, 1975, from Deputy Comptroller of the Currency Watson to Joe Selby, Regional Administrator of National Banks, reprinted in Securities Industry Association, Bank Securities Activities: Memorandum for Study and Discussion, 14 San Diego L. Rev. 751, 812 (1977) (emphasis added).

** The Court said it did not need to decide whether "best efforts" (i.e., agency) underwriting came within the Act, because Schwab's activities did not involve any of the processes normally associated with offering securities to investors. Schwab, 104 S. Ct. at 3008 and n.17. If the Court had agreed that "best efforts" underwriting, as an agency activity, was outside the statute, it need not have said anything in this regard. Obviously, the Court wanted to avoid any possibility that its holding could be so construed -- just exactly what the bank is now attempting to do.

Schwab's operations are of a "wholly different character" (JA 326) from those of Bankers Trust. Indeed, the Supreme Court determined that Schwab's discount brokerage <u>cannot</u> give rise to just the Glass-Steagall hazards that are <u>inherent</u> in the bank's promotion here.* Equating Schwab's discount brokerage operations to Bankers Trust's commercial paper promotion is roughly akin to equating a public library to an encyclopedia salesman. Third, the footnote on which Bankers Trust bases its argument does not even say what the bank claims. The footnote states (104 S. Ct. at 3011 n.23) that Congress was concerned about hazards that arise when banks affiliate with entities that purchase and sell "particular investments on their own account" (<u>i.e.</u>, on their own merit). The <u>Schwab</u> footnote thus was consistent with the Supreme Court's textual discussion in this case, the Court's

---

* The Supreme Court explained that (a) "Schwab does not engage in issuing or floating the sale of securities" (at 3010), (b) its business is exclusively "upon the unsolicited order of, and as agent for, a particular customer" (at 3012) and (c) Schwab acts "without the provision of investment advice to the purchaser or seller" (at 3007).

By contrast, the bank (a) <u>is</u> engaged in floating the sale of new issues, (b) <u>is</u> continuously soliciting both potential new issuers, to sell their securities, and potential purchasers, to buy the issues it is promoting and (c) <u>is</u> providing investment advice to both its issuers and the purchasers of the paper it is selling. As the court below stated, "promotional hazards that were absent from Schwab's activities . . . are clearly present here." (JA 332.)

prior discussion in ICI and the discussion in the text of the Court's opinion in Schwab itself.*

In sum, the Act reflects Congress' concern about the inevitable conflicts of interest that arise when banks become promoters of securities, whether as principal or agent. Plainly, those conflicts inhere in this bank's activities.

B. The Board Acknowledged the Existence of Hazards but Improperly Sought to Minimize Them Through Regulation

Unlike other contemporaneous legislation conferring discretionary, regulatory authority,** the Glass-Steagall Act is a prohibitory statute, the terms of which are to be construed broadly and applied literally. ICI, 401 U.S. at 639. As the Supreme Court put it in this case:

---

* According to Bankers Trust (BT Br. 25), the Supreme Court meant this footnote to say that the Glass-Steagall hazards arise "solely when a bank acts for its own account" (i.e., the bank's account as principal). That, of course, is not what the footnote says. It describes "entities that purchase and sell particular investments on their own account,"--not entities that purchase and sell "for their own accounts," a very significant difference in the context. Indeed, Section 16 of the Act uses the phrase "for its own account" in describing principal purchases. It is highly unlikely that Justice Powell, using different language, did not mean what he said. (Compare footnote 11 with the quotation of Section 16 at p. 3008 of the opinion.)

** E.g., Securities Act of 1933, § 2, 15 U.S.C. § 77b; Securities Exchange Act of 1934, §§ 3, 15(a)(2), 23(a), 15 U.S.C. §§ 78c, 78o(a)(2), 78w(a). See also Public Utility Holding Company Act of 1935, §§ 9, 20, 15 U.S.C. §§ 79i(c)(3), 79t.

> Congress rejected the view of those who preferred legislation that simply would regulate the underwriting activities of commercial banks. Congress chose instead a broad structural approach that . . . [operates] [t]hrough flat prohibitions. . . .

SIA, 104 S. Ct. at 2985. The Court emphasized that "Congress rejected a regulatory approach when it drafted the statute, and it has adhered to that rejection ever since" (id. at 2988) and confirmed "Congress' refusal to give the Board any rulemaking authority over the activities prohibited by the Act." Id. at 2989.

The Court then was addressing the Board's original approach to statutory construction in this case. The Board had conceded that commercial paper was a "note, or other security" within the ordinary meaning of those terms and that marketing of those securities could give rise to unsound banking practices. Id. at 2986, 2988. The Board, however, had applied a number of specific factors having no basis in the statutory language (e.g., the breadth of distribution, the sophistication of the investors, the denominations of the instruments, etc.) to conclude that commercial paper was not a "security." The Board had then sought to minimize potential conflicts of interest through administrative "guidelines." Agreeing with the SIA that the Board had thereby "effectively convert[ed] a portion of the Act's broad prohibition into a system of administrative regulation," the Supreme Court flatly rejected the Board's "subtle and ad hoc" analysis. Id. at 2988-89.

Remarkably, the Board on remand again attempted the same kind of analysis. Again, the Board admitted that the matter at issue came within the literal language of the statute (JA 204), and that it could well give rise to conflicts of interest that are "of particular concern" to the Board. (JA 233.) In light of these problems, the Board constructed a regulatory "framework" (JA 207, 212) within which banks can market securities, provided they also ensure that any credit extended is unrelated to any commercial paper issue marketed and that records are maintained reflecting this. (JA 207.) Such an extra-statutory "framework" and "conditions" are unmistakable earmarks of just the sort of regulatory regime that the Supreme Court rejected.*

Leaving no possible doubt about its entire approach, the Board stated that, by "marketing securities to an ever-broadening class of customers, the character of the offering eventually could change from nonpublic to public and the provisions of the Act could then apply" (JA 226), and that

---

* Chairman Volcker was prepared to concur in the Board's Statement only on the basis that the framework's "conditions be strictly adhered to." (JA 245.) Further, on this basis, the Board found promulgation of specific new guidelines not to be essential. (JA 246.) This conclusion is hardly surprising. The "framework" established now is simply a set of regulatory guidelines by another name. Whatever it is called, such regulation is plainly improper under the Act. SIA 104 S. Ct. at 2988.

"any significant change in the structure or operations of the recognized commercial paper market might change the Board's views." (JA 231 n.38, 243.) As the district court pointed out, however, any criteria the Board would apply to define the "magic threshold" between public and private offerings would have to come from an extra-statutory, ad hoc approach, "since the Act draws no distinction between public and private distributions." (JA 346.)

The Board's Statement confirmed its incorporation of a host of such definitional factors, none of which is found in the Glass-Steagall Act and most of which the Supreme Court has already rejected in this case. These include: the nature of the security sold; the type of investor; the number of investors; the marketing and solicitation practices followed; the size of the minimum purchase involved in the transaction; and whether the security is registered with the Securities and Exchange Commission. (JA 222-24.) As the district court recognized, the Board's current approach converts the Act's "clear statutory commands into sliding scale prohibitions necessitating guidelines and agency oversight." (JA 347.) And, it involves just the sort of "nebulous inquiry" (SIA, 104

S. Ct. at 2988), directed toward the same end, as its initial effort.*

The Board's arguments based on the low-risk nature of commercial paper (JA 240) or the sophistication of its purchasers certainly provide no answer. About the former, the Supreme Court has already admonished:

> [T]he Act's underwriting prohibition displays no appreciation for the features of a particular issue; the Act just prohibits commercial banks from underwriting any of them.

SIA, 104 S. Ct. at 2990 (emphasis added). The Court was equally firm about the latter:

> [T[he Act admits of no exception according to the particular investment expertise of the customer.

---

* The Board even confused the statutory approach required under the Glass-Steagall Act with that dictated by the federal securities acts when it addressed a bank's promoting the commercial paper of an issuer who intends to use the proceeds from the paper to repay a loan to that bank. The Board assumed that the lending relationship would be "disclosed" and therefore that the obvious conflict of interest would be "lack[ing]." (JA 238.) Disclosure, however, confirms, rather than eliminates, the possibility of conflicts of interest. Disclosure was the regulatory means Congress expressly adopted in the securities acts, to achieve investor protection, but equally rejected in the Glass-Steagall Act, which is to protect banks and their depositors. (SIA, 104 S. Ct. at 2985, 2988.) The Glass-Steagall Act was intended to prohibit even the possibility of conflicts of interest, so that there would simply be nothing to disclose. Karmel, Glass-Steagall: Some Critical Reflections, 97 Banking L.J. 631, 640 (1980).

SIA, 104 S. Ct. at 2991 (emphasis added). Ad hoc analysis, in short, is simply inappropriate under the Act.

Unable to regulate all potential hazards, the Board merely dismissed many as "unlikely," and, as the court below put it, again "miss[ed] the mark." (JA 333.) The Act is concerned with possible, not simply proven, risks. In ICI, for example, the Court constantly referred to "potential" conflicts that "might" arise, noting that Congress sought to eliminate even that potential. ICI, 401 U.S. at 637-38. Again, in this case, the Court repeatedly referred to conflicts that "might" arise (104 S. Ct. at 2989-90) and, if that were not sufficient, expressly pointed out that the Act's prohibition "reflects Congress' conclusion that the mere existence of a securities operation, 'no matter how carefully and conservatively run, is inconsistent with the best interests' of the bank as a whole." SIA, 104 S. Ct. at 2990-91 (emphasis added).

As the district court observed, Congress designed the Act so that "bankers might not be 'led into temptation,' no matter how subtle or imperceptible those temptations might be." (JA 335.) When a bank begins selling particular investments, the activity "places new promotional and other pressures on the bank which in turn create new temptations." ICI, 401 U.S. at 630-31. The commercial paper market, as the Board concedes, is "highly competitive." (JA 230.) Commercial banks in the market must compete with investment banks that are permitted to, and do, offer firm commitment underwriting of commercial paper programs. To compete, a bank obviously must prove that it, too, can sell out an issue and do so under "the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking." SIA, 104 S. Ct. at 2989 (quoting ICI, 401 U.S. at 637). The temptation to succumb to the competitive pressures of the commercial paper market place will always exist.

There can be no absolute assurance that banks will cease making the issue-specific loans the Board sought to prohibit. (JA 206-08.) Nor can there even be assurance banks will stop backing with their own letters of credit the commercial paper they promote, a practice the Supreme Court has made absolutely clear is illegal under the Glass-Steagall Act* and a practice the Board, too, has sought to prevent. (JA 319-20, 398-411.) The record indeed confirmed that Bankers Trust had been backing with its own letters of credit various commercial paper issues it sold, before the remand of this

---

* Specifically addressing a bank's issuance of letters, or lines, of credit while at the same time serving as marketer for the commercial paper backed by that credit, the Court made clear that practice violated the Act (SIA, 104 S. Ct. at 2990):

> [I]t appears that a bank can make a particular issue "prime" simply by extending back-up credit to the issuer. Such a practice would seem to fit squarely within Congress' concern that banks would use their credit facilities to aid in the distribution of securities.

case. The practice apparently had continued after the Board issued its new Statement, even though it was premised on the absence of such credit enhancement.* The practice may continue even today. But, whether or not it does, its existence confirms (a) that temptations fueled by the marketplace will lead to Glass-Steagall conflicts, as long as banks can market particular securities, and (b) that Congress was correct in perceiving how subtle and complex those conflicts could become, if permitted to exist at all, and accordingly prohibiting them entirely.**

In sum, the Board's Statement is once again a classic example of administrative "*ad hoc* analysis of probabilities and

---

* (JA 318-20; 398-408.) The Board is thus dead wrong when it suggests (Board Br. 51) that the district court was "devoid . . . of factual support" for its view that the possibility of conflicts was self-evident. As the court stated, "obviously, Bankers Trust can, and for six years did, increase the profitability of its placement services through various credit extensions to issuers." (JA 327.) The bank provided letters of credit to its issuers "in order to enhance the marketability of its commercial paper." (*Id.*) The Board's recent statement, that it was looking into the current letter of credit practices of Bankers Trust (JA 319, 409), was itself "a tacit concession that promotional processes absent from retail brokering arise naturally in sales activities such as Bankers Trust's." (JA 328.)

** Bankers Trust, for example, issued a letter of credit to back an issue of commercial paper of Renault Industrias Mexicana (JA 318, 398), leading to a top "Prime-1" rating "solely" for that reason. (*Id.*) In September 1985, counsel for the bank denied it any longer bore "letter of credit risk" on the transaction (JA 304, 318, 398-408), but the rating services continued the Prime-1 rating expressly

(Footnote Continued)

likelihoods" (JA 334) that is prohibited under the Act. Having conceded that conflicts of interest could arise from banks' promoting commercial paper -- "likely" or not -- the Board should have concluded, pursuant to the congressional mandate, that the activities are barred. The court below was unquestionably correct that, by "regulating the most immediate promotional incentives and dismissing the more subtle as unlikely or insignificant," the Board's action was "inconsistent with Congress' desire to separate as completely as possible commercial and investment banking and must therefore be invalidated." (JA 335.)

IV.

THE DISTRICT COURT PROPERLY ENJOINED THE ILLEGAL ACTIVITY OF BANKERS TRUST

A. Factual Background

This dispute began with the decision of Bankers Trust in 1978 to depart from "traditional banking,"* and to begin

(Footnote Continued)

"on the support provided by a letter of credit issued by Bankers Trust Company." (*Id.*) In February 1986, bank counsel described the transaction as an "odd, intricate thing," in which "Bankers Trust is backed by a letter of credit from another bank." (JA 448.) Aside from the question this latest statement raises as to why the rating services are still carrying Bankers Trust as the credit enhancer, it begins to show how subtle Glass-Steagall hazards can become, a subtlety that can increase immeasurably when two or more banks are involved.

* *See* Bankers Trust New York Corporation, *1984 Annual Report* at 2-19 (describing its departure from "traditional banking" and stressing "the scope and creativity of our investment banking capability . . .").

marketing commercial paper. The bank has publicly touted in full-page advertisements that it has "combine[d] an investment bank with a commercial bank,"* even though the Glass-Steagall Act, as the Supreme Court confirmed, sought to separate commercial and investment banking "as completely as possible".** Bankers Trust continued to expand its activities throughout this litigation, even after the Supreme Court's ruling, in June 1984, against its position.*** And the bank has repeatedly sought publicly to deflect any impact from judicial decisions adverse to its commercial paper activities.****

---

* See, e.g., Wall Street Journal, June 29, 1984 at 51.

** Top officials of Bankers Trust reportedly have explained their view that Glass-Steagall has "stopped making sense," and are said to have described their present role as being "all about blurring the lines." Institutional Investor, 88, 90-91 (Nov. 1985).

*** See Bankers Trust New York Corporation, 1984 Annual Report at 11; New York Times, Feb. 6, 1986 at D5. It claims to have increased its commercial paper marketing during 1984 by two-thirds, and in 1985 its sales reportedly increased by another fifty percent.

**** The day after the Supreme Court's decision in this case, for example, Bankers Trust stressed in public statements that it intended "to continue to sell commercial paper." Washington Post, June 29, 1984 at D10. Simultaneously, it sponsored a full-page advertisement touting that it had "expanded the frontiers of both commercial and investment banking within a single integrated institution," and was "the first of the money center banks to act as agent for commercial paper." Wall Street Journal, June 29, 1984 at 51.

Bankers Trust was not originally named as a party in this action, although it participated at all levels, up to and including the Supreme Court, as an _amicus_. (The Bank, however, was sued by the SIA in the Southern District of New York (JA 387), which litigation was stayed upon joint consent.) When the SIA moved for further summary judgment on remand, however, the bank asked for and was granted permission to intervene as a defendant. (JA 247-51.) The district court permitted that intervention (JA 252) and, as a party, Bankers Trust cross-moved for summary judgment, briefed the issues and participated in oral argument conducted before the district court.

The day after the district court issued its opinion on remand, invalidating the bank's activities, Bankers Trust nevertheless announced that it would appeal and "continue to provide a commercial paper placement service . . . without interruption." _Wall Street Journal_, Feb. 5, 1986 at 2. The SIA immediately moved under Fed. R. Civ. P. 59(e), asking the district court to amend its judgment to include specific injunctive relief against Bankers Trust. (_See_ JA 459.) After receiving further affidavits and briefs from all parties and hearing oral argument (JA 413-51), the district court granted the SIA's motion, finding that "an injunction is essential 'to make a declared policy of Congress effective.'" (JA 470.) The court considered and denied Bankers Trust's cross-motion for a stay pending appeal, but deferred the effective date of its injunction until March 1, which date this Court has stayed until April 15, 1986. (JA 471.)

B. Legal Basis

Bankers Trust now asks this Court (BT Br. 52-58) to vacate the injunction entered by the district court. (JA 459-71.) The bank does not suggest that the district court's findings of fact were clearly erroneous,* or that the court abused its discretion in balancing the traditional factors for such relief.** Rather, Bankers Trust argues that the injunction should be vacated because the SIA supposedly has no private right of action against it under the Glass-Steagall Act.*** Its position is baseless.

---

* The lower court's determinations of fact in this regard are subject to the "clearly erroneous" standard on appeal. Foundation on Economic Trends v. Heckler, 756 F.2d 143, 152 (D.C. Cir. 1985).

** It is the long-standing rule in this Court that deference is to be accorded to the district court's "balancing of the traditional factors." Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 835 n.32 (D.C. Cir. 1984). Cf. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). NOW, Washington, D.C. Chapter v. Social Security Admin., 736 F.2d 727 (D.C. Cir. 1984).

*** The district court readily disposed of various procedural arguments raised by Bankers Trust below but now abandoned concerning the court's personal jurisdiction over the bank and the scope of relief available under Fed. R. Civ. P. 59(e). (JA 460-62.)

First, in issuing the injunction, the district court did not rely upon the Glass-Steagall Act, but upon the court's authority to issue orders to enforce its own judgments.* A district court has inherent power to issue "such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with by force, guile or otherwise."** Here, an injunction was necessary to effectuate the district court's Order of February 4, 1986. The day after the court declared that Bankers Trust's commercial paper activities violated the Glass-Steagall Act, the bank issued another of its announcements that it intended to continue to market third-party paper. See Wall Street Journal, February 5, 1986 at 2. Thus, absent an injunction, the district court order -- declaring Bankers Trust's activities illegal -- would have been rendered virtually meaningless. The court below was not required to sit

---

* (JA 462-63.) See United States v. New York Telephone Co., 434 U.S. 159, 172-73 (1977); Dugas v. American Surety Co., 300 U.S. 414, 428 (1937); Marshall v. Local Union No. 639, International Brotherhood of Teamsters, 593 F.2d 1297, 1302 (D.C. Cir. 1979).

** Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1, 6 (E.D. Mo. 1967), aff'd sub nom. Osbourne v. Mississippi Valley Barge Line Co., 389 U.S. 579 (1968). See Hamilton v. Nakai, 453 F.2d 152, 157 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972) ("equitable jurisdiction of a federal court extends to supplemental or ancillary bills brought for the purpose of effectuating a decree of the same court"); see also In re Baldwin-United Corp., 770 F.2d 328, 335-38 (2d Cir. 1985).

idly by; it had ample inherent authority to issue injunctive relief against Bankers Trust, as was done.*

Second, by intervening as a defendant (JA 247-53), Bankers Trust became a party for all purposes and thereby assumed the risk that an order adverse to it would be entered. Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985); District of Columbia v. Merit Systems Protection Board, 762 F.2d 129, 132 (D.C. Cir. 1985). Indeed, this Court has indicated in directly analogous circumstances that a bank intervening in a Glass-Steagall case, as here, becomes subject to a direct claim against it. New York Stock Exchange, Inc. v. Bloom, 562 F.2d 736, 742 (D.C. Cir. 1977), cert. denied, 435 U.S. 942 (1978).**

Third, even if it were necessary to reach the question of a private right of action, this Court has made it abundantly

---

* Moreover, the SIA commenced this action for declaratory and injunctive relief under, inter alia, the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. Section 2202 of that Act specifically enables the entry of "further relief," including injunctive relief. See, e.g., Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1981); Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co., 255 F.2d 518, 522 (2d Cir.), cert. denied, 358 U.S. 831 (1958).

** There, this Court noted that it had been unnecessary for the courts in ICI to reach the question of a private right of action under the Glass-Steagall Act because, in that case, the bank whose conduct was at issue had intervened in the ongoing action. 562 F.2d at 742 n.4. The intervention by Bankers Trust similarly obviates the need here to reach the private right of action question.

clear that an association such as the SIA may assert a claim under the Glass-Steagall Act directly against a bank, even without intervention.* In Bloom, for example, this Court stated it had "no reason to believe that appellant would not have a private right of action for injunctive relief under the Glass-Steagall Act." 562 F.2d at 742. Contrary to Bankers Trust's claim (BT Br. 57) that this Court reached its conclusion "without applying the standard enunciated in Cort v. Ash [442 U.S. 66, 78 (1975)]," this Court quoted exactly that test in Bloom, 562 F.2d at 742 n.5. And, this Court reiterated its conclusion more recently in Investment Co. Institute v. Federal Deposit Insurance Corp., 728 F.2d 518, 526-27 (D.C. Cir. 1984), decided three years after the most recent Cort v. Ash "progeny" upon which Bankers Trust relies.

In sum, the court below unquestionably had authority to enjoin Bankers Trust from violations of the Glass-Steagall Act contravening the court's February 4, 1986 Order. No basis exists for vacating the district court's injunction.

---

* Previously, upholding plaintiff's standing under 12 U.S.C. § 24 (Seventh) in Arnold Tours, Inc. v. Camp, 400 U.S. 45, (1970), the Supreme Court noted that plaintiff sought "declaratory and injunctive relief against the Comptroller of the Currency and the South Shore National Bank" (emphasis added). On remand, the district court held the Comptroller's ruling invalid and enjoined the bank defendant to cease its illegal conduct within six months. Arnold Tours, Inc. v. Camp, 338 F. Supp. 721 (D. Mass.), aff'd, 472 F.2d 427 (1st Cir. 1972). See also American Society of Travel Agents, Inc. v. Bank of America, 385 F. Supp. 1084 (N.D. Cal. 1974).

CONCLUSION

The Board's decision now at issue was particularly inappropriate given the ongoing congressional debate over what, if any, changes should be made in the statutory structure governing the financial services industries in this country. Just last term, the Senate passed a bill that, among other things, would have permitted banks to sell commercial paper -- as the Board administratively has now permitted. S. 2851, 98th Cong., 2d Sess. (approved by Senate, Sept. 13, 1984). The bill, however, did not pass the House. The one clear message that has emerged from the legislation concerning the financial services industry enacted over the last several terms, however, is that the plain terms of the Glass-Steagall Act are not to be changed administratively.* Still unsuccessful in its legislative efforts, and obviously under intense pressure to act from the institutions it regulates,** the Board essentially has attempted to legislate by administrative fiat nonetheless.

---

* As the Supreme Court pointed out, SIA, 104 S. Ct. at 2988-89, Congress in 1980 granted the Comptroller's office rulemaking authority for the first time, but in so doing expressly confirmed that the Comptroller has no authority to issue regulations concerning "securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act'." 12 U.S.C. § 93a.

** *Viz.*, the number of *amici* that have accompanied the Board into this Court.

The extent to which the Board is apparently willing to push aside what Congress, and the Supreme Court, have said is typified by its contention that "there is no evidence that Congress intended to limit competition" through the Act. (Board Br. 18.) Exactly to the contrary, the Court in ICI concluded that "Congress did legislate against the competition that the petitioners challenge." (401 U.S. at 621.) Even Justice Harlan in dissent stated that "the Act was adopted despite its anticompetitive effects." (Id. at 640.) As the Court there explained (id. at 630):

> The Glass-Steagall Act reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the "hazards" and "financial dangers" that arise when commercial banks engage in the activities proscribed by the Act.

Congress thus balanced just the kind of policy arguments for "competition" and "efficiency" appellants now make. It concluded that, regardless of the "costs in terms of efficiency and competition," a broad structural approach of "flat prohibitions" was warranted. SIA, 104 S. Ct. at 2986.

At bottom, the Board and its various amici simply disagree with the policy Congress has chosen to specify. The Act, however, remains the law. Although Bankers Trust and others may have concluded that the law is outmoded and have set about "blurring the lines,"* any change in the statute can properly be made only by Congress. Neither the Board nor any other administrator is free to "reform the Act under the guise of interpreting it" as the district court here found (JA 348) the Board had attempted to do.

The opinions and judgments entered below should be affirmed in all respects.**

Dated: March 17, 1986

Respectfully submitted,

James B. Weidner
David A. Schulz
Mark Holland
Peter Kimm, Jr.
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8235
Attorneys for Plaintiff-Appellee
Securities Industry Association

Of Counsel:

William J. Fitzpatrick
Securities Industry
Association
120 Broadway
New York, New York 10271

Donald J. Crawford
Securities Industry
Association
1111 19th Street, N.W.
Washington, D.C. 20024

---

* Institutional Investor at 88, 90 (Nov. 1985).

** The existence of material questions of fact, as the district court found (JA 317-20), in any event would preclude appellants' request that summary judgment be entered now in their favor.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the Securities Industry Association are being delivered by hand on this 17th day of March, 1986 to the offices of counsel listed below:

Anthony J. Steinmeyer, Esq.
Appellate Staff, Civil Division
U.S. Department of Justice
Room 3617, MAIN Building
Washington, D.C. 20530

John W. Barnum, Esq.
White & Case
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

David A. Schulz

David A. Schulz
Rogers & Wells
200 Park Avenue
New York, NY 10166
(212) 878-8000