Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

1983

Perspectives on the United States' Banking System

Joseph J. Norton

Southern Methodist University, Dedman School of Law

Recommended Citation

Joseph J. Norton, Perspectives on the United States' Banking System, 12 ANGLO-AM. L. REV. 1 (1983)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

PERSPECTIVES ON THE UNITED STATES' BANKING SYSTEM*

By JOSEPH JUDE NORTON**

I. INTRODUCTION

Banking law is traditionally thought of as an extension of commercial law and principles. While the commercial law aspect remains important, United States' banking laws have become subsumed under a maze of legislation and governmental regulation. An understanding of this legislative and regulatory framework is essential for both US and foreign transactors, particularly as foreign investment and banking activities in the United States continue to increase. For example, certain of the recent major banking acquisitions in the United States have been effected by British and Continental European banks, and virtually all major foreign banks have numerous offices in the United States and are expanding their commercial activities and services¹.

The primary purpose of this article is to provide the foreign transactor with guidance on the United States' banking system. After discussion of the historical development of the banking laws and their traditional objectives, the main current issues and concerns in the US banking industry will be considered, with particular emphasis on the interrelated problems of regulatory division and bank "deregulation."

*This article is based in part upon a recently published book entitled *Banking Law Manual*, by Mr Norton and Ms S. C. Whitley, published by Matthew Bender Publications. The author and publisher reserve all copyrights.

Unless otherwise indicated, the law reflected herein is at October 15, 1982, the effective date of the Garn-St Germain Repository Institutions Act of 1982. The reader should be aware that this Act contemplates various significant implementary regulations most of which should be in effect at the time of publication of this article, but which could not be reflected herein.

**LL.B. (Edinburgh), LL.M. (Texas), SJD (Michigan), Diplome (Hague); Professor of Law, Southern Methodist University.

II. HISTORICAL BACKGROUND

To appreciate the regulatory complexity of the US banking system and the "deregulation" process now occurring, an understanding of the historical context of banking regulations is helpful.

A. The First Banks

In colonial days, the corporate entity was a suspect creature². This distrust, based in large measure upon agrarian opposition, spilled over to banking institutions. Those corporate financial institutions which existed in colonial days were dissimilar to their present day counterparts³.

However, with the American Revolution, new economic pressures and requirements were made on the colonies. Responding to these pressures and requirements, the Continental Congress, in 1781, conferred a perpetual charter on the Bank of North America, which was established as a bank of deposit, discount, and issue. Because of uncertainties surrounding this charter, the Bank of North America accepted, contemporaneously with its perpetual charter, a state charter under the laws of the State of Pennsylvania. This bank was the first true American bank⁴.

While enjoying economic success, political opposition to the Bank of North America forced the repeal of its perpetual charter in 1785, thereby restricting its authority to its Pennsylvania state charter. For this, and other reasons, the Bank of North America (which continued in business 147 years before being absorbed into the First Pennsylvania Banking and Trust Company) never achieved the status of a central bank⁵.

The Constitution of the United States contains no express reference to the authority of the federal government with respect to banking institutions. Despite this silence, individuals like Alexander Hamilton exerted considerable influence upon President Washington in arguing for the economic necessity and the constitutionality of a national bank⁶. In 1791, Congress enacted a Bill, which the President consented to, establishing the First Bank of the United States, with a 20-year charter⁷. In addition to its 20-year life, some of the more important provisions of the charter of this Bank were: (i) \$10 million in capital, of which the federal government would subscribe to one-fifth, (ii) a board of 25 directors, (iii) bank debts could not exceed bank capital, (iv) prohibition on the purchase and sale of goods or real estate not acquired as forfeited collateral, (v) prohibition on purchase of federal government stock, and (vi) restriction of bank interest rates not to exceed 6 per cent on loans and discounts: 1 Stat. 192 (1791).

By the time its charter expired in 1811, the First Bank of the United States appears to have evolved toward a central bank, by making significant loans to the government, co-operating with the

US Treasury in assisting state banks, and circulating its own notes which were becoming a uniform currency for the nation. Moreover, in economic terms, the Bank appears to have been a success. This growth of functions and economic success, however, only added to the strong populist, anti-bank fear of undue concentration of financial power. This sentiment blocked the rechartering of the Bank in 1811⁸.

For the five-year period before 1816, there was no national bank in the United States. With this void, and also with the demands of the War of 1812, there arose an increase in state banking activities. State banks had existed since 1784 with the organization of the Bank of New York and of the Massachusetts Bank. By 1809, there were approximately 75 state banks in existence, with no reported bank failures⁹.

It is estimated that between 1811 and 1816 bank-note circulation through state banks increased from \$28 million to \$68 million. An over-issue of bank notes led to a depreciation in value of these notes, which contributed to an increase in prices, particularly as no taxes were exacted to reduce the excess currency. In addition, this over-issue and the absence of a national bank to provide assistance, led to a number of bank failures¹⁰.

The Second Bank of the United States was chartered in 1816, however, this Bank appears to have been plagued from the beginning with a series of problems, the least of which was initial mismanagement¹¹. The validity of the Second Bank's charter and the constitutionality of the federal government's authority to create a national bank was challenged in the case of *M'Culloch v. Maryland*: 17 US (4 Wheat.) 316; 4 L. Ed. 579 (1819). In this case, Chief Justice Marshall went into considerable detail to provide a constitutional basis supporting the establishment of the Bank, relying primarily upon the necessary and proper clause and the money and war powers granted by the Constitution to the national government. The Bank was determined to be "a convenient, a useful and essential instrument" in the furtherance of the federal government's fiscal operations. The constitutionality of the bank was again upheld by the Supreme Court in its 1824 decision of *Osborne v. Bank of the United States*: 22 US (9 Wheat.) 738; 6 L. Ed. 204 (1824).

Notwithstanding its constitutionality and an improved management, President Jackson, in 1832, vetoed the bill for the Second Bank's recharter, with the charter expiring in 1836. Thus, the Second Bank of the United States was compelled to discontinue its operations as a federal entity, to sell its branches, and to pursue its business under a restrictive Pennsylvania state charter. It continued as a state bank for only four years, failing in 1841¹².

B. The Rise of State and "Free" Banking

Between 1836 to 1863, there existed no national bank and essentially no federal currency. The primary form of currency was issued by

state chartered banks¹³. The authority of a state to charter banks had been upheld by the Supreme Court in its decision in *Briscoe v. Bank of Kentucky*: 36 US (11 Peters) 257; 19 L. Ed. 709 (1837).

This period became known as the "free banking" era. Traditionally banks, as other corporate entities, were organized under special legislative charters. Such special chartering practices, however, came under sharp attack and political pressure for an "enabling" procedure increased¹⁴. An "enabling" procedure meant any person or group complying with the statute could incorporate a bank without the necessity of any special legislation.

The New York legislature was the first to consider a bank enabling Act. However, the first "free banking" Act was adopted by Michigan in 1837 (based on the New York plan), followed by New York in 1838¹⁵. Thereafter, "enabling" acts for bank incorporation became prevalent in the United States, and provided the model for a charter of a national bank under the National Bank Act of 1863.

The success of the free-banking system varied from state to state. Certain states saw a significant increase in bank failures and others witnessed "wildcat" banking. In some states the reaction against banks became so dramatic that, for example, in 1845 the Texas Constitution expressly outlawed banks¹⁶. However, other states at an early stage endeavoured to adopt responsible safety mechanisms. In fact, as early as 1829, the State of New York had accepted the New York Safety Fund System under which any bank applying for a new charter or a renewal of an existing charter was required to contribute one-half of one percent of its capital for a six year period to a fund used to aid insolvent banks. In this sense, the New York Safety Fund System may be viewed as a predecessor of the Federal Deposit Insurance Corporation. The System also placed limitations on bank note issues and loans and created a governmental examination structure for state banks¹⁷. From 1834 through 1863, the number of state banks increased from 506 to 1466¹⁸.

During this "free-banking" era there were various unsuccessful attempts to reinstitute a national banking system¹⁹.

C. National Bank Act of 1863 - Dual Banking System

In 1861, and again in 1862, the Secretary of the Treasury, Salmon P. Chase, in his annual reports presented compelling arguments for the creation of a uniform currency and a national banking system. In January 1863, President Lincoln urged Congress to accept this position²⁰. Secretary Chase persuaded Senator John Sherman to introduce and sponsor the banking bill, which was ultimately passed by Congress and signed into law on February 25, 1863: 12 Stat. 665.

This Act, originally known as the Sherman Act, established a single authority, named the Comptroller of the Currency ("Comptroller"), to provide the formation of national banks. The Sherman Act was repealed and replaced in its entirety by an Act of

June 3, 1864, which subsequently has become known as the National Bank Act: 13 Stat. 99. The National Bank Act is, today, primarily located within Ch. 2 of Title XII of the US Code, but various provisions are scattered throughout other parts of Title XII and other Titles of the Code²¹.

In addition to the provision for the Comptroller, the main features of the 1864 Act were the establishment of reserve requirements, the prohibition of loans on a bank's own stock, the limitation of loans to any single borrower, the subjection of national banks to examination, the limitation of interest rates on loans made by national banks, and a procedure for conversion of state banks to national banks. The chartering procedures for a national bank were of an "enabling" character²².

In an effort to put an end to the issuing of paper currency by state banks and otherwise to limit the state banking systems, Congress imposed a 10 percent tax on the amount of any state bank notes paid out by any national or state bank after July 1, 1866: 13 Stat. 484 (1865). This legislation was re-enacted in 1866 and was held constitutional by the Supreme Court in its 1869 decision in *Veazie Bank v. Venno*: 75 US (8 Wall) 533; 19 L. Ed. 482. The continuance of this tax effectively resulted in stopping the issue and circulation of state bank currency. Also, it resulted in a significant number of conversions of state banks to national banks. In fact, by 1868 there were only 247 state banks in existence.

State banks, however, began to readapt their operations to obtain funds from the solicitation of deposits, rather than through the issue of notes. Moreover, the provisions of state laws permitting branch banking and the exercise of trust powers (powers at that time not accorded national banks) provided additional bases for a resurgence of state banking. By 1890 state banks achieved a numerical pre-eminence over national banks, a fact that has continued to the present date²³:

D. The Federal Reserve System

The banking system that emerged from the National Banking Act was not a panacea. There was a widespread financial crisis in 1873 and a more limited one in 1884 with respect to New York. Indeed, financial crises arose during the 1890s and came to a head with the financial panic of 1907²⁴.

Congress reacted to the 1907 panic by passing the Aldrich-Vreeland Act, which established a National Monetary Commission to study these problems and to make recommendations: 35 Stat. 546 (1908). The initial conclusions of this Monetary Commission called for the establishment of a single banking authority with central banking functions. However, the Commission's ultimate conclusion recommended a regional bank system, as it was thought best suited to the diverse conditions of the nation: House Report No. 1593, 62nd Cong., 3rd Sess., 2 (1912).

The Monetary Commission's report led to the enactment of the Federal Reserve Act: 38 Stat. 251 (1913). The preamble of the Act, as originally passed, stated that its purpose was "To provide for the establishment of federal reserve banks, to furnish an elastic currency, to afford means of rediscount and commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes".

E. Major Legislation in the 1930s.

The financial crisis of the 1920s and the bank crises of 1932 and 1933 led to the enactment of a series of legislation which have had a profound impact upon the present structure of bank regulation.

After long and vigorous debate, the Banking Act of 1933 (48 Stat. 162 known then in its entirety as the "Glass-Steagall" Act) became law in June of that year²⁵. Section 16 of this Act required a complete divorce between commercial banking and investment banking functions. The underlying philosophy was that investment banking was an inherently risky and speculative venture and, therefore, was an improper pursuit for banks which had the responsibility of protecting the deposits of the general public. This dichotomy is one of the major current issues in commercial banking and investment banking²⁶.

The Banking Act of 1933 also established the Federal Deposit Insurance Corporation ("FDIC") for the purpose of protecting bank depositors, helping to maintain confidence in the banking system, and promoting safe and sound banking practices²⁷. This was the first time the federal government had entered into the deposit insurance business. All national banks and other member banks of the Federal Reserve System ("FRS") were required to obtain this insurance, which was also available to other state banks upon application and qualification. With the creation of the FDIC, the third major federal bank supervisory agency came into existence²⁸. This "trifurcation" of authority remains the essential federal regulatory structure existing today with respect to commercial banks²⁹.

The year after the enactment of the Securities Act of 1933 (which provided disclosure and registration procedures for the public distribution of securities, as to which banking securities were generally exempt (48 Stat. 74; 15 USC No. 77a, et seq.)). Congress enacted the Securities Exchange Act of 1934: 48 Stat. 881 (1934); 15 USC No. 78a, et seq. This Act authorized the Federal Reserve Board of Governors ("FRB") to regulate and to limit the amount of credit that may be extended for purchasing and carrying securities registered on national exchanges or FRB designated "over-the-counter" margin stocks (ie, "margin securities"). This authority covered not only brokers and broker-dealers and others who trade in stock, but also all bank loans extended for purposes of financing the purchase or carrying of "margin" securities: 15 USC §78 (g) and (h).

The 1934 Securities Exchange Act, was subsequently amended in 1964, and required banks and other entities, with widely distributed

stock, to disclose, for public record and on a continuing basis, certain detailed financial and other information in the interest of protecting the investing public³⁰. Jurisdiction was divided among the Comptroller, the FRS and the FDIC, according to the nature of the bank involved.

In addition, the 1975 amendments to the Securities Act made further extensive amendments to the 1934 Act by subjecting banks to provisions relating to (i) institutional investment manager reports, (ii) municipal securities dealers, (iii) stolen and counterfeit securities, (iv) clearing agencies and transfer agencies, and (v) prohibition against the combination of brokerage and money management³¹.

In 1935, Congress passed the Banking Act, which extended the regulatory power of the FRS by requiring state banks with deposits in excess of \$1 million to be members and restructured the FRB into a seven-member board of governors (disqualifying membership by the Secretary of the Treasury and the Comptroller of the Currency). This Act also empowered the FRB to determine reserve requirements for member banks respecting time and savings deposits: 49 Stat. 684 (1935). The aspect of the Act requiring state membership was subsequently repealed: 53 Stat. 842 (1939).

The 1930s also evidenced the establishment of the US present federal systems respecting savings and loan associations ("S & Ls") and credit unions. In 1932, the Federal Home Loan Bank Act was passed, which established the Federal Home Loan Bank Board ("FHLBB") and the Federal Home Loan Bank System ("FHLBS"): 47 Stat. 725; 12 USC, §1421, et seq. The Home Owner's Loan Act of 1933 provided the basic framework for the Federal Savings and Loan System ("FSLS") by providing for the federal charter of S & Ls and supervision by the FHLBB: 48 Stat. 128; 12 USC No. 1461. The Federal Savings and Loan Insurance Company ("FSLIC") was in turn established under Title IV of the National Housing Act of 1934: 48 Stat. 1255; 12 USC, §1724, et seq.

The Federal Credit Union Act of 1934 was designed "to establish a Federal Credit Union System, to establish a further market for securities of the United States and make more available to people of small means credit for provident purposes through a national system of co-operative credit, thereby helping to stabilize the credit structure of the United States": 48 Stat. 1216; 12 USC, no. 1751, et seq.

Thus, from the depths of the Depression, rose a strengthened FRS, a newly created FDIC, and a powerful Comptroller. In addition, federal systems for S & Ls and credit unions were established. Along side these federal regulatory structures, however, remained strong state-banking systems. The "dual banking" system, as well as the division of regulatory authority on the federal level, was firmly in place.

F. The Bank Holding Company Act of 1956, as amended (BHCA)

The BHCA, as enacted in 1956, was the first comprehensive federal

legislation dealing with bank holding companies³². The BHCA gave the FRB responsibility for the administration of the Act, and, as amended in 1966 (Public Law 89-485; 80 Stat. 236, 237) and 1970³³, this Act endeavours to control bank holding company expansion to avoid the creation of monopoly or restraint of trade of banking and to allow bank holding companies to expand into non-banking activities related to banking while maintaining a separation between banking and commerce. As originally enacted, the BHCA exempted one-bank holding companies from regulation. However, with the increased use of the one-bank holding company in the late 1960s by many large banks, the Act was amended in 1970 to embrace all one-bank holding companies. Use of bank holding companies has continued to increase in popularity for a variety of reasons, particularly as it (i) provides banks with a functional alternative to branch banking in states where branching is prohibited, (ii) facilitates interstate bank activities, and (iii) enhances a banking group's ability to provide bank-related and non-bank services³⁴.

G. The 1960s - Rise of Civil Rights and Consumer

Legislation

The 1960s saw a spate of civil rights orientated legislation, which, directly or indirectly, affected the operations of banks³⁵. This legislation foreshadowed consumer protection legislation. For example, in 1968, the Consumer Credit Protection Act, the primary title of which was the Truth-In-Lending Act (TILA), was enacted: Public Law 90-321; 82 Stat. 146. It required creditors for the first time to state cost of borrowings in uniform terms, so a consumer could assess the cost of credit and could shop for credit. This legislation provided the basis for substantial consumer legislation in the 1970s.

The 1960s also saw the enactment of (i) the Bank Merger Act of 1960, which amended the Federal Deposit Insurance Act to provide safeguards against mergers or consolidations that might be anti-competitive or monopolistic Public Law: 86-463; 74 Stat. 129; 12 USC §1828 (c); (ii) the Financial Institution Supervisory Act of 1966, which strengthened the powers of the federal banking authorities in ensuring sound and effective operations of these banks (eg, through cease and desist orders and suspension and removal orders: Public Law 89-695; 80 Stat. 1028); and (iii) the enactment of the Interest Rate Control Act of 1966, which permitted the FHLBB to impose interest rate ceilings on banking institutions under its supervision: Public Law 89-597; 80 Stat. 823.

H. The 1970s - A Social Agenda and Commencement of "Deregulation"

The early 1970s saw the commencement of Congressional discussions of the restructuring and deregulation of the banking industry. However, before Congress came actively to consider these matters,

it faced a number of "social" issues affecting bank activities. Though such issues stalled the deregulation scheme, they did lay a necessary social underpinning to this eventual scheme.

The 1970s brought significant banking regulation in the area of consumer protection.

1. *Equal Credit Opportunity Act of 1974, as amended.* The Equal Credit Opportunity Act (ECOA) is often described as the first civil rights statute to deal with consumer credit. The thrust of this Act is to ensure that all consumers and businesses have the right to an equal opportunity to obtain credit. A creditor cannot discriminate against an applicant for credit on the basis of race, colour, religion, national origin, sex, marital status, age, receipt of public assistance benefits or exercise of consumer credit rights. The Act applies to all persons who, in the ordinary course of business, regularly participate in decisions whether or not to extend credit or regularly refer applicants to creditors³⁶.

The ECOA comes within the regulatory authority of the FRB, which in turn has established a Consumer Advisory Council to advise and consult with the FRB in the exercise of its functions under the Act. The Act is implemented by the FRB through its Regulation B, which became effective on March 23, 1977: 12 CFR §202.

2. *Community Reinvestment Act of 1977 (CRA).* The CRA was designed as an integral part of the over-all scheme of the Housing and Community Development Act of 1977, with its primary objective being to encourage more co-ordinated efforts between private investment, federal grants and insurance to increase the viability of urban communities³⁷. This legislation was directed, in part, against the so-called practice of "red-lining," that is, the conscious or unconscious use of funds, deposited by residents in neighbourhood institutions, outside the neighbourhood or without benefiting the depositors of the neighbourhood³⁸.

CRA's objectives are more normative than regulatory. This Act does not establish specific requirements for bank performance, but seeks to use the bank examination process as a device for fostering acceptable "standards" of performance by placing an affirmative obligation upon a bank to help meet the credit needs of the local community served by it. The standard for assessing the over-all performance in meeting these credit needs is subjective. This standard is whether each institution serves "the convenience and needs of the community in which it is chartered to do business." The concept of "convenience and needs" includes "the need for credit services as well as deposit services."³⁹

While appearing innocuous in wording, the CRA has, however, been used as a powerful tool by the federal regulators in assessing "applications" from regulated financial institutions. For example, with respect to a national bank, the term "application" would

include, among other matters an application to the Comptroller for a charter for a national bank, and for mergers or acquisitions. In assessing such an application, regulators may consider the bank's record of meeting the credit needs of its community, including low and moderate income neighbourhoods, all consistent with a "safe and sound" operation⁴⁰.

The CRA is administered by the various federal regulatory authorities with respect to banks over which they have supervisory authorities. Each of these federal authorities has issued implementing regulations respecting the CRA⁴¹.

3. Electronic Fund Transfer Act of 1978 (EFTA). The EFTA, enacted as Title XX of FIRA, is designed to protect consumers in the use of electronic fund-transfer services⁴². Such services could include uses of automated teller machines, point of sale terminals, preauthorized payments and credits, cheque guarantees, telephone authorized payments, and wire transfers. The Act endeavours to provide the basic framework establishing the rights, liabilities and responsibilities of the participants in electronic-fund transfer systems. The over-all objective is to provide the individual consumer or user with protection and rights comparable to those provided in other circumstances by existing legislation⁴³. The FRB has regulatory responsibility for implementing this Act, and its implementing regulation is controlling: FRB Regulation E, 12 CFR, §205.

4. Other Consumer-Related Legislation. There were also major amendments to the Consumer Protection Act (including Fair Credit Reporting Act⁴⁴ and TILA Amendments)⁴⁵, major real estate related legislation (eg, Real Estate Settlement and Procedures Act⁴⁶, Home Mortgage Disclosure Act⁴⁷ and Housing and Community Development Act)⁴⁸, and enactment of the Fair Debt Collection Practices Act⁴⁹.

I. International Banking Act of 1978 (IBA)

Before the enactment of the IBA in 1978, there was effectively no federal regulation concerning foreign banking operations in the United States⁵⁰. The IBA recognizes the internationalization of US money markets and banking activities by attempting to create a regulatory framework with respect to foreign bank entry and participation while endeavouring to achieve regulatory parity for domestic and foreign banks in their US operations⁵¹. The IBA also was used to amend the Edge Act by eliminating requirements that have adversely affected the lending capacity of Edge Act corporations (ie, international banking corporations in which national and state member banks of the FRS may purchase stock and which may engage in a number of international banking and foreign financial activities, subject to the restrictions contained in FRB Regulation

K)⁵². In addition, recent FRB regulations under the IBA permit the creation of international banking facilities (IBFs). United States and foreign banks may establish IBFs in the US to handle foreign international banking free of domestic legal reserve requirements and interest rate controls: 46 FR 32426 (June 23, 1981).

J. Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA)

With the exception of the 1980 Omnibus Banking Act and the 1982 Banking Act (both discussed in Part V below), FIRA may be the most significant piece of banking legislation since the 1930s: Public Law 95-630; 92 Stat. 3641 (1978). The purposes of this Act are omnibus in nature: and include such significant pieces of legislation as the Change in Bank Control Act of 1978, Right to Financial Privacy Act of 1978⁵³ and EFTA. The most notable impact of FIRA on bank activity is its restrictions on inside and affiliated bank transactions, inspired by the alleged indiscretions of Bert Lance, former director of the Office for the Management of the Budget in the Carter Administration⁵⁴. However, in long-term significance, FIRA initiated the statutory "deregulation scheme." For example, Title VII of FIRA commenced the broadening of the loan and investment powers of federal S & Ls.

III. REVIEW OF BANKING OBJECTIVES

To understand present US banking legislation and to discern the direction and impact of future legislation, an understanding of some of the objectives of banking regulation is important. Some of the traditional banking objectives are:

A. Safety and Soundness

Part of banking regulation has been seen as ensuring the "safety and soundness" of the banking system. In some instances this appears to be directed toward protecting the individual depositor from a loss on a deposit balance; however, with the institution of federal deposit insurance, this concern has been greatly minimized. In other instances, the term appears to be concerned with prevention of bank failures, which in turn could result in an undermining of confidence in the banking system. In still other instances, it appears to be directed toward preventing major disruptions in the money supply. In fact, one federal court suggests that the progressive definition of the term rests with the expertise of the appropriate regulatory agencies⁵⁵. This suggestion appears to be supported by the fact that the major statutes (eg, FIRA, 1980 Omnibus Banking Act, and the 1982 Banking Act) laying the deregulation framework do not expressly confront the safety and soundness issue, but appear to deal with it by increasing the powers and sanctions of the federal bank regulations.

To achieve the "safety and soundness" of the banking system, banking regulators, on both a federal and state level, often direct themselves to a number of common matters.

1. *Control of "excessive" competition.* Banking regulation traditionally has been protective in nature. While competition among banking institutions had not been entirely discouraged; the regulations, at least until recent times, endeavoured to control excessive competition. This goal has been met by statutorily separating the power of differing types of banking institutions and by controlling the entry of banks through chartering and branching regulations. This approach toward the control of competition is presently under serious questioning by Congress and the courts⁵⁶.

2. *Deposit rate ceilings.* In the past, unfettered competition among banks for deposits was seen as a cause of economic difficulties. If deposit interest rates were permitted to float with the market then, as such rates increased, banks would seek riskier investments or loans in order to generate appropriate earnings. This rationale was directly associated with the 1933 legislative prohibition of payment of interest on the demand deposits and conferring authority for prescribing ceilings rates for time and safety deposits (12 USC §§371a and 371b) and with the rationale for the promulgation of FRB Regulation Q: 12 CFR §217. Differentials in deposit rate ceilings, however, were permitted under Regulation Q for differing banking institutions to protect the continuing existence of certain of these institutions and to encourage their specific objectives. For example, federal S & Ls have been permitted by law to pay higher rates of interest on time deposits than have national banks. The 1980 Omnibus Act, as modified by the 1982 Banking Act (see §V below), requires the elimination of interest rate differentials under FRB Regulation Q between thrift institutions and commercial banks by January 1, 1984 and of the other aspects of Regulation Q by March 1, 1986.

3. *Control over portfolio.* Banking regulation has often been concerned with the riskiness of certain types of loans and investments. For example, until the 1982 Banking Act there had been extensive regulation of real estate loans with respect to national banks and federally chartered S & Ls, placing limitations on the ratio of loan amounts for appraised value, maturity, amortization, and location of the security⁵⁷. With respect to bank investments, regulations have generally been designed to limit banks to purchase of government debt securities, and to prohibit them (with certain exceptions) from equity securities: 12 USC §24 (Seventh). The 1982 Banking Act appears to be moving towards easing or eliminating statutory restrictions on portfolio controls and toward conferring upon the federal banking authorities discretionary regulatory power in this area.

4. *Borrowing Limits.* Another form of portfolio regulation concerns the amount of credit a bank can extend to a single borrower. Historically, this so-called "single borrower limitation" was justified as a credit allocation device; however, today, justification rests more on diversifying risk. For a national bank (with the new 1982 Banking Act amendments), the limit is (subject to a number of statutory exceptions) 15 per cent of bank capital and surplus respecting unsecured loans and extensions of credit, *plus*, an additional 10 per cent for loans secured by marketable collateral having a reliable and continuously available price quotation: 12 USC §84, as amended by §401 of the 1982 Banking Act.

B. Reserve Requirements

The historical theory behind statutory reserve requirements was enhancement of a bank's liquidity in order to meet its current liabilities. This rationale has come to be overshadowed by the use of reserve requirements by the FRS in implementing monetary policy. National banks, like state member banks and other depository institutions, are required to maintain the reserve requirements for "transaction accounts" (as distinguished from time accounts such as savings accounts) set by the FRB within a statutorily and regulatorily prescribed range⁵⁸. With the rise of non-bank financial intermediaries offering transactions such as "cash management accounts," the FRB is monitoring the possible impact on the national money supply, with the existence of a significant effect probably leading to Congressional or regulatory efforts to apply reserve requirements to any such methods.

C. Capital Requirements

Every federal and state banking statute sets forth minimum capital requirements. In theory, this is to protect depositors; however, statutory requirements are static in nature and over a period often bear no relationship to a bank's over-all balance sheet as it grows⁵⁹.

D. Investor Protection

The concept of investor protection does not appear to be deeply ingrained as an objective of bank regulation. The main emphasis of bank supervision is directed toward the bank customers. As the ownership of banks has diversified, the need for investor protection has grown. Presently, banks and bank holding companies, having \$3 million or more in assets and having 500 or more shareholders, are subject to continuing disclosure requirements of the 1934 Securities Act, with enforcement divided among the SEC and the various federal banking authorities. Moreover, while the public offerings of bank stock remain exempt from registration in the 1933 Securities Act, the various federal and banking authorities have their own disclosure requirements for such distributions, which are substantially similar to the SEC requirements⁶⁰.

In addition, under FIRA, legislative concern was expressed for the possibility of abuse in inside transactions within the banking system. These provisions can be justified on a number of grounds, including investor protection. Other grounds would be prevention of unsafe and unsound practices and the safeguarding of depositors. Further, the Change In Bank Control Act of 1978, under FIRA, provides a form of shareholder protection by requiring advance notice to the appropriate federal banking agency of any transfer of 25 per cent or more of the voting stock of a federally insured bank or its holding company: 12 USC §1817 (j) (7).

With banks now being permitted to offer depository instruments "equivalent to and competitive with" money market mutual funds and with pressures continuing for banks or holding company units to engage in securities activities, concern for "investor protection" may increase.

E. Credit Allocation

The "single borrower" limitation can be justified on grounds of credit allocation. A more recent example of credit allocation was former President Carter's authorization to the FRB, under the Credit Control Act of 1969⁶¹, to adopt temporary regulation designed to restrain the expansion of credit⁶². These regulations came into effect in March 1980 and were lifted in July 1980: 45 FR 46064 (July 9, 1980). More generally, the CRA (directly) and the ECOA (at least indirectly) can be characterized as legislation directed to credit allocation.

With present economic conditions causing a "crowding out" of certain credit users (eg, homebuyers and consumers), pressures will be on Congress to remain sensitive to credit allocation concerns.

F. Consumer Protection

A recent banking objective deals with consumer protection. The enactment of the numerous statutes during the 1970s requires banks to ensure community-wide opportunities for access to banking services. An example is the CRA, which requires a bank to meet the credit needs of a community, (including those of low and moderate income families). The primary example of consumer protection, however, remains the Truth-In-Lending Act and its numerous amendments: on CRA and TILA see Part II, §H, *supra*.

In addition, there exist various state and federal laws respecting usury and loan rate ceilings, which serve as a form of protection to bank borrowers: see CCH, *Consumer Credit Guide*, vol. 1, 1301.

G. Community Convenience and Needs

The term "community convenience and needs" has been used in a number of federal banking statutes, dating back to the Bank Act of 1935: 12 USC §1816. The phrase appears to have been directed

originally to the requirement that the community be able to support the banking facility to be chartered. The term is also used under the Bank Merger Act (12 USC No.1828 (c) (5) (B)) and the Bank Holding Act, (12 USC §1842 (c)) where it appears to be associated with traditional considerations of competition and sufficient business to ensure the success of the bank, as distinguished from any inherent obligation of the bank to the community credit needs. However, it now appears that under the CRA, a new emphasis has been placed on the term, which equates it to equal lending practices within a community.

IV. THE REGULATORY FRAGMENTATION

As evidenced by the discussion in Part II, the development of banking regulation in the United States has been divided and often disjointed, rooted more in reaction to specific events than in any coherent economic or legal theory and scheme of regulation. This is not to say that the present bank regulatory scheme is a result of historic coincidences; to the contrary, the present division (on the federal level) is directly attributable to deep and consistent beliefs respecting a fear of undue concentration of financial power in the hands of banks and the ensuing belief that the statutory framework should separate the various classes of financial institutions. However, particularly with the "deregulation scheme" (discussed in Part V), the underpinnings of this federal regulatory system are, more and more, being called into question. Yet, notwithstanding "deregulation" and the challenge to the present components of the federal system, the existence of the dual banking system (ie, federal and state) appears to be firmly entrenched and to be viewed as "sacrosanct" by federal legislators.

A. The Setting

As has been discussed in Part II, federal supervision of banks has arisen during periods of economic crisis. During the period preceding 1863, state banks, the only type of banks then in existence, issued notes without uniformity. The chaotic economic conditions brought about by the Civil War further aggravated the situation with counterfeiting and bank failures becoming prevalent. These conditions led to the creation of the national bank system in 1863 under the auspices of the Comptroller⁶³.

Financial difficulties recurred in 1890, 1893, and in 1907, after which Congress appointed a National Monetary Commission. The report of this Commission led to the enactment of the Federal Reserve Act⁶⁴ which created a system of regional Federal Reserve Banks supervised by the FRB. All national banks are required to be members

of the FRS and qualified state chartered banks may become members

Between 1913 and 1933 the only division of parallel authority between the Comptroller and the FRB was with respect to examinations⁶⁵. The Comptroller examined all national banks and the FRB examined all state chartered Federal Reserve member banks.

The Banking Act of 1933 expanded parallel authority between federal banking authorities by requiring Comptroller approval for investment in bank premises by national banks and by requiring FRB approval for such investment by state member banks: 48 Stat. 162 §14; 12 USC §371d. The Act also created the FDIC to insure the deposits of all FRS member banks and qualified state non-member banks: 48 Stat. 168, ch. 89; 12 USC §1811.

The Banking Act of 1935 gave the FDIC authority to limit the payment of interest on deposits by non-member insured state banks parallel to the FRB's authority with respect to member banks: 48 Stat. 436, ch. 614, §101 (v) (8); 12 USC §1828 (g). In addition, the Act trifurcated authority for approval to establish domestic branches among the federal banking authorities: Banking Act of 1933, 48 Stat. 162, §5 (a) and §338; 12 USC §321.

In the 1950s Congress divided parallel authority among the federal banking authorities for approval of mergers⁶⁶ and reduction of capital stock⁶⁷. The only exception to the continued division was in the area of the regulation of bank holding companies, the federal authority for which was vested in the FRB: Bank Holding Company Act 1956, 70 Stat. 133, §5 (b); 12 USC §1844 (b). Similarly, in the 1960s Congress expanded the division of authority in the areas of mergers⁶⁸, bank service corporations⁶⁹, securities issuances⁷⁰, administrative remedies⁷¹, lotteries⁷², bank protection⁷³, and consumer protection⁷⁴.

In the 1970s Congress continued the pattern of trifurcation as evidenced primarily by the enactment of various consumer protection laws⁷⁵. In the late 1970s this pattern was followed in anti-trust matters⁷⁶ and the change of control of banks⁷⁷.

However, in 1978 Congress enacted FIRA, (92 Stat. 3641) which interrupted (and, perhaps, brought into question) the divisions by establishing the Federal Financial Institutions Examination Council (FFIEC): 12 USC No. 3305. The primary purpose of the FFIEC is to prescribe uniform principles, standards and reports for the federal examination of banks by the FRB, the FDIC, the FHLBB, the National Credit Union Administration (NCUA), and the Comptroller. For the first time in the history of the bank regulatory system the authorities were mandated to promote consistency in federal examinations of banks.

In 1980 Congress established the Depository Institutions Deregulation Committee (DIDC) comprised of the federal banking authorities: 12 USC §3501. The purpose of the DIDC is, under a unitary committee, to phase out, before January 1, 1984, the interest rate differential between commercial banks and thrift institutions,

and, by January 1, 1986, all interest rate ceilings on all types of deposits and accounts.

B. Present Regulatory Pattern

The present regulatory system for banks is a "dual banking system" of state and federal regulation, with the regulation on a federal level being further divided among various regulatory authorities. As mentioned above, this system, at least for the foreseeable future, appears to be firmly in place. The divided federal system of regulation is also deeply entrenched; but is presently subject to considerable congressional debate and analysis. For example, Vice President Bush is presently heading a presidential task force on the matter.

1. *Commercial Banks.* With respect to commercial banks, there are various patterns of regulation: (i) national banks are chartered and supervised by the Comptroller, automatically are members of the FRS and are insured by the FDIC; (ii) state chartered banks are regulated by the relevant state bank authority, and may choose to become members of the FRS, in which case they are automatically insured by the FDIC; (iii) state banks may, however, choose to remain outside the FRS but to be insured by the FDIC; and (iv) state banks, unless otherwise required by state law, may choose to operate independently from the FRS and the FDIC⁷⁸.

2. *Savings and Loans Associations (S & Ls).* With respect to S & Ls, the patterns of regulation include: (i) federal S and Ls are chartered and supervised by the FHLBB, automatically are members of the FSLs and are insured by the FSLIC; (ii) a state chartered S & L may belong to the FSLs and as a policy matter must secure FSLIC insurance of accounts in order to secure membership in the FSLs; (iii) state chartered S & Ls may obtain FSLIC insurance on accounts; and (iv) a state chartered S & L may choose not to be insured by the FSLIC or be a member of the FSLs⁷⁹.

3. *Credit Unions.* Federal credit unions are chartered and supervised by the NCUA and must insure their share accounts with the National Credit Union Share Insurance Fund. Any credit union may join the NCUA Central Liquidity Facility, a central bank for credit unions.⁸⁰

4. *Depository Institutions Generally.* The FFIEC and DIDC are two entities which affect all banks and other depository institutions. The FFIEC is comprised of a representative from the FRB, the FDIC, the FHLBB, the NCUA, and the Comptroller. As discussed above, the purpose of the FFIEC is to prescribe uniform principles, standards and report forms for federal examination of financial institutions: 12 USC §3305. The DIDC is comprised of the heads of the five bank regulatory authorities except that the Comptroller is a non-voting member and the Secretary of the Treasury is an additional member.

The DIDC's purpose is to provide an orderly phase out and the ultimate elimination of the limitations on maximum rates of interest and dividends that may be paid on deposits and accounts: 12 USC §3501.

C. The Regulators

The primary federal regulators of banking institutions in the United States are the Federal Reserve System (through the FRB), the Comptroller and the FDIC. Other regulators exist for S & Ls (eg, FHLBB and FSLIC and credit unions, eg, National Credit Union Administrator and the Central Liquidity Fund). The following briefly discusses the role and functions of FRS, Comptroller and FDIC⁸¹.

1. *The Federal Reserve System (FRS)*. The FRS is comprised of member banks, twelve Federal Reserve Banks, and the FRB. The FRB formulates and implements monetary policies and regulates and supervises member banks and bank holdings companies.

Membership in the FRS consists of all national banks and any state bank accepted into membership. Each member bank is entitled to participate in the election of six of the nine directors of the appropriate Federal Reserve Bank. The remaining three directors are appointed by the FRB. Historically FRS membership has provided numerous other privileges; however, the enactment of the 1980 Omnibus Banking Act has reduced the privileges of membership by making many FRS services available to non-members: 94 Stat. 1321.

The twelve Federal Reserve Banks serve separate geographic districts under the supervision of the FRB. Each bank is incorporated with the Comptroller and is managed by its own Board of Directors consisting of nine members. Class A directors, who generally are bankers, and Class B directors who are non-bankers are elected by member banks in each Federal Reserve District. The FRB appoints three Class C directors from the public sector and designates one of them as chairman and one other as deputy chairman of the bank's board. Under the supervision of the FRB the directors of each Reserve Bank oversee the operations of their bank: 12 USC §§302, 305, 321 and 341.

There are three primary operations each bank performs for the nation's banks. First, each Bank operates a payment system which, among other things, clears and collects checks for depository institutions which include United States branches and agencies of foreign banks, and S & Ls, credit unions, and banks. As a part of the payment system, a wire transfer network aids banks in transferring reserve balances, securities, and information. The payment system also entails the distribution of coin and currency to banks. Second, each bank extends credit to these depository institutions. Various

types of credit including short and long term credit are available with special consideration for smaller banks that lack access to other sources of funds. Each bank acts as a fiscal agent of the United States, its agencies, and certain international agencies⁸².

The third component of the FRS is the FRB, which is entrusted with the over-all responsibility for making and executing monetary policy and supervising Federal Reserve Banks and the member banks. Each of the Governors is appointed by the President and confirmed by the Senate. FRB members are appointed for terms of 14 years and their terms are arranged so that one expires every two years. The Chairman and Vice Chairman of the FRB are named by the President from the Board members: 12 USC §§241 and 242.

The FRB is assisted by the Federal Open Market Committee (FOMC). The FOMC, comprised of the FRB and five Reserve Bank presidents, determines the Federal Reserve's conduct in the open securities market. This Committee authorizes trading of United States government securities, securities of federal agencies, bankers' acceptances, and foreign and domestic currencies. The time, character and volume of the purchases and sales of the trades are conducted so as to accommodate commerce and business and the credit condition of the country⁸³.

Two statutorily prescribed advisory councils confer with the FRB. The 12-member Federal Advisory Council may make presentations to the FRB on matters within its jurisdiction: 12 USC §261. The 30-member Consumer Advisory Council consults with the FRB concerning its functions under the Consumer Credit Protection Act and other consumer related matters: 15 USC No. 1691 (b).

The FRS, primarily through the FRB, is entrusted with two principle functions: formulation of monetary policy and regulation responsibilities. The FRB influences national monetary policy in four ways: (i) participating in the operations of the FOMC, (ii) issuing rules that govern the administration of Reserve Bank discount functions, and (iv) setting margin requirements on credit purchases in the stock market⁸⁴.

The FRB also exercises broad supervisory and regulatory responsibilities over member banks, bank holding companies, and others. For example, it has authority to formulate and issue regulations that apply to all member banks. While supervisory authority for nationally chartered member banks rests with the Comptroller, the FRB directly supervises state member banks and their affiliates through periodic examinations: 12 USC §325 et seq.

The FRB also has exclusive federal responsibility for administering the Bank Holding Company Act. This Act was designated to achieve two basic objectives: (i) to control bank holding company expansion in order to avoid the creation of a monopoly or restraint of trade in banking, (ii) to allow bank holding companies to expand into non-banking activities related to banking⁸⁵.

Further, it exercises additional supervisory and regulatory respon-

sibilities in the areas of mergers (12 USC §1828 (c)), consumer credit under the TIL (15 USC §1601 et seq.), unfair or deceptive acts or practices (15 USC §58 (f)), and international banking activities (12 USC §601).

With respect to thrift institutions, the federal counterparts to the FRS and FRB are the Federal Home Loan Bank System and the (FHLBB)⁸⁶.

2. *Comptroller of the Currency*. The Comptroller charters, regulates, and supervises the operations of national banks. The Office of the Comptroller of the Currency is a bureau in the Treasury Department. In contrast to the pervasive authority of the FRB, the Comptroller is empowered to charter and to supervise and regulate the operations of national banks⁸⁷.

He is appointed by the President and confirmed by the Senate for a term of five years. The Secretary of the Treasury is authorized to appoint up to four Deputy Comptrollers to ensure management succession in the event of absence or disability: 12 USC §§2 and 3.

In addition to granting or denying national bank charters, the Comptroller also approves certain corporate or structural changes, including an increase or decrease in capitalization, payment of dividends, and establishment of a branch or of an operating subsidiary: 12 USC §§30, 36 57 and 60.

The Comptroller appoints National Bank Examiners to report to him on each national bank's soundness, the quality of management and directors, and compliance with applicable laws, rules and regulations. The National Bank Act allows him to examine every national bank as often as necessary. He may utilize a variety of administrative remedies in order to regulate national banks some of which remedies include a civil-money penalty, a cease and desist order, removal, suspension and prohibition of an individual associated with the bank, and formal investigation. The Comptroller's authority also extends to taking possession of the assets of a national bank and appointing a receiver. The Office of the Comptroller of the Currency is funded through assessments based upon the size of each national bank⁸⁸.

3. *Federal Deposit Insurance Corporation (FDIC)*. The FDIC insures bank deposits, supervises insured banks which are not members of the FRS, and for insured state non-member banks approves applications for structural or corporate changes. The FDIC also serves as receiver of all "closed" national banks for insured non-member banks and may serve as receiver for insured state chartered banks⁸⁹.

The management of the FDIC is vested in a bipartisan three-member board. Two of the directors are appointed by the President and confirmed by the Senate for a six-year term. One of the appointed members is elected Chairman of the Board. The third Board member is the Comptroller, who, in the absence of an elected chairman, serves as chairman: 12 USC §1812.

The FDIC insures the deposits of national banks upon certification by the Comptroller and insures the deposits of state member banks upon certification by the FRB. State non-member banks must apply directly to the FDIC for insurance coverage. A branch of a foreign bank must post a bond or pledge assets sufficient to provide protection against the risks entailed in insuring the deposits of a foreign bank whose activities and assets are, for the most part, outside of the jurisdiction of the United States: 12 USC §§1814 (b) and 1815 (b).

Once a bank is insured, it pays a semi-annual assessment to the FDIC Insurance Fund. The Fund which is maintained to protect depositors up to \$100,000 is invested in obligations of the United States or obligations guaranteed as to the principal and interest of the United States. The FDIC may borrow up to three billion dollars from the United States Treasury for insurance purposes: 12 USC §§1817 (b) (2), 1823 (a) and 1824.

The FDIC conducts regular examinations of insured state non-member banks and affiliates and review reports of examination made by the Comptroller, in the case of national banks and by the FRB in the case of state member banks. The FDIC also must approve the establishment of a domestic or foreign branch. Relocation of an insured state non-member bank's main office or domestic or foreign branch must obtain FDIC consent: 12 USC §§ 1817 (a) (2) and 1828 (d) (1) and (2).

Finally, the FDIC serves as receiver for any national bank declared insolvent by the Comptroller. The FDIC must accept appointment as receiver for an insured bank if requested by the state banking authority and permitted by state law: 12 USC §§ 1821 (c) and (e). The FDIC's authority to provide direct and merger related assistance to a troubled bank has been expanded by the 1982 Banking Act. The FDIC may now authorize mergers across state lines between dissimilar banking institutions. However, statutory preference is given to intrastate, similar-institution mergers. This authority expires three years from the date of enactment⁹⁰.

For thrift institutions, the federal counterpart of the FDIC is the Federal Savings and Loan Insurance Corporation.

D. Present Regulatory Debate

Since 1919 when it was proposed that the Comptroller's regulatory functions be transferred to the FRB, a debate on the consolidation of federal banking authorities has persisted. The debate has historically been couched in terms of the three federal commercial bank regulatory authorities⁹¹; but, today, with "deregulation", the debate embraces the federal regulators of thrift institutions and credit unions.

There are three principal arguments in favour of a divided federal regulatory system. First, the system provides flexibility conducive to innovative banking. Second, the system has worked reasonably well

and differences among the authorities have been resolved through co-ordination, consultation, and co-operation. Third, a monopolistic power over banks would lead to abuses, would eliminate the present system of cheque and balances, and would destroy the dual banking system.

The principal arguments in favour of a consolidated regulatory system are that a divided system is inefficient and promotes "competition in laxity" and thereby encourages shopping for the most lenient regulator⁹². In addition, the cheques and balances analogy is considered inappropriate as this concept is applicable to divisions among distinct government branches and not to a single functional area such as banking regulation⁹³. Further, a consolidated federal banking authority is viewed as preserving the dual banking system inasmuch as the state and federal chartering authority would continue.

In the context of this debate, in the early 1970s two major comparative studies considered the nature of commercial banks, S & Ls, credit unions, and considered the fragmented banking regulations⁹⁴. One study recognized that the wisdom of integrating federal regulation of S & Ls with that of commercial banks appears proportional to the degree to which they become less distinct from commercial banks⁹⁵, a situation that has substantially unfolded with the statutory "deregulation scheme." These studies influenced the enactment of FIRA which expanded the powers of S & Ls and credit unions to those similar to commercial banks and created the FFIEC⁹⁶. The studies also contributed to further expanded powers of S & Ls and credit unions and to the establishment of the DIDC under the 1980 Omnibus Banking Act⁹⁷ and the 1982 Banking Act⁹⁸. The convergence of the powers of banking institutions and the creation of the FFIEC and the DIDC suggest that the historical development of the fragmented bank regulation may be yielding gradually to the philosophy of regulatory consolidation⁹⁹.

One more specific aspect of this issue, the latest report of the General Accounting Office, dated April 24, 1981, recommends consolidation of the FDIC, FRB, and the Comptroller for examination purposes¹⁰⁰. Moreover, with the recent rise of financially troubled banking institutions and the pattern of statutory relief under the 1982 Banking Act, substantial discussion within Congress and among the regulators will undoubtedly occur concerning the eventual consolidation of the various federal insurance agencies (ie, the FDIC, FSLIC and the Central Liquidity Fund for credit unions).

Debates on the issue and the various sub-issues of regulatory consolidation will be heated and complex, particularly in light of long standing vested interests of the regulatory authorities and also because of the differing statutory roles of the federal authorities. This complexity is further increased as the discussion now encompasses the regulators of thrift institutions.

V. THE "DEREGULATION" SCHEME

Overshadowing (and, perhaps, ultimately controlling) the issue of regulatory fragmentation, is the true "revolution" that involves a process of "deregulation" within the bank industry and also between it and that of non-bank financial institutions. Pressures for this deregulation result from recent Congressional and regulatory action and from rapidly changing marketplace conditions and demands. The marketplace pressures include (i) the increasing efforts of non-bank financial intermediaries (eg, investment bank houses such as Merrill Lynch, insurance companies such as Prudential, and retail creditors such as Sears and Roebuck and American Express) to provide a broad range of financial services, (ii) the demands of thrift institutions for increasing powers in order to permit portfolio diversification, and (iii) reactions of commercial banks to inter and intra-industry developments. As such, in recent years, a significant and sustaining objective of bank regulation is "deregulation" of the banking industry¹⁰¹.

Essentially, deregulation (from an intra-industry perspective) is directed toward eliminating statutory and regulatory barriers that have divided the banking industry between commercial banks and thrift institutions and tended to eliminate competition. More broadly, deregulation is directed towards reducing traditional barriers separating banking industries from non-bank financial intermediaries.

Deregulation is primarily being effected through the easing of the asset side (ie, new bank powers and business opportunities) and the liability side (ie, new depository opportunities), particularly of thrift institutions. Ironically, this process may challenge and redefine notions of bank "safety and soundness" and other fundamental banking objectives and may lead to additional (but perhaps different) bank regulation in the attempt to deregulate (ie, may result in a "reregulation")¹⁰².

A. The Depository Institution Deregulation and Monetary Control Act of 1980 (1980 Omnibus Banking Act)

Although FIRA commenced the statutory deregulation process, the 1980 Omnibus Banking Act set the broad foundation for the "deregulation" of commercial banks and of the various thrift institutions. Uniform reserve requirements were set, deposit interest rate limitations were required to be eliminated and the differentiation in powers among various institutions were lessened¹⁰³. This statutory "deregulation" generated a new form of competition among banks and between banks and non-banking financial institutions. However, it appears this process will inevitably lead to an increase in bank failures and a "weeding out" (through mergers or liquidations) of many of the weaker institutions.

The 1980 Omnibus Banking Act addressed a wide range of subject matter from NOW (ie, negotiable order of withdrawal) accounts to usury laws to consumer protection¹⁰⁴. The following is a brief summary of the more significant Titles of the Act:

Title I. - Monetary Control Act of 1980: Imposes uniform FRB reserve requirements on all depository institutions. It also requires all depository institutions to make periodic reports of their assets and liabilities to the FRB. In addition, the FRB is required to set a pricing schedule for Federal Reserve Bank services: 46 FR 1338 (January 6, 1981).

Title II. - Depository Institution Deregulation Act of 1980: Provides for the orderly phase-out and elimination of interest ceilings under FRB Regulation Q over a 6-year period and establishes the Depository Institutions Deregulation Committee for purposes of affecting this "deregulation". It sets targets for meeting these statutory objectives.

Title III. - Consumer Checking Account Equity Act of 1980: Authorizes a continuation of authority of banks to provide automated transfer services from savings to checking accounts, establishes remote service units for S & Ls, provides for share draft account for federally insured credit unions, extends nationwide the authority of depository institutions to offer NOW accounts and increases insurance of accounts in federally insured banks, S & Ls and credit unions, from \$40,000 to \$100,000.

Title IV. - Powers of Thrift Institutions and Miscellaneous Provisions: Expands investment powers of federally chartered S & Ls, permits them to offer credit card services and to exercise trust and fiduciary powers, provides for the conversion of a state S & L to a federal counterpart and expands power of federal mutual savings banks.

Title V. - State Usury Laws: Pre-empts state usury laws respecting certain types of loans (eg, until April 1, 1984, unless extended, certain mortgage loans and business and agricultural loans in excess of \$25,000 or more (subsequently amended to \$1,000 or more)). Moreover, state usury laws are pre-empted generally to permit insured state banks, branches of foreign banks, insured S & Ls, insured credit unions, small business investment companies and any other person to charge interest on loans at a rate of one per cent above the FRB discount rate.

Title VI. - Truth In Lending Simplification and Reform Act: Amends the TILA Act of 1969 for the purpose of simplifying that Act,

the objective being to increase consumer understanding and to facilitate creditor compliance with the provisions of the TILA. The Act went into effect as of April 1, 1981, being implemented by FRB Revised Regulation Z: 46 FR 20848 April 7, 1981.

Title IX. - Foreign Control of US Financial Institutions: Provided a moratorium until July 1, 1980 (which was not extended) regarding certain bank acquisitions by foreign persons.

B. Garn-St Germain Depository Institutions Act of 1982 (1982 Banking Act).

The 1982 Banking Act, signed into law on October 15, 1982, is another omnibus piece of legislation that continues to accelerate the deregulation process. It complements, and is generally consistent with, the deregulation objectives of the 1980 Omnibus Banking Act: Pub. Law No. 97-320; 96 Stat. 14 ("1982 Banking Act").

The immediate objective of the 1982 Banking Act is to provide relief to financially troubled banking institutions through facilitating mergers and reorganizations, expanding powers of the FDIC and FSLIC, and establishing a federal programme whereby troubled banks may exchange capital notes with the federal insurance agencies to bolster their net worth. However, long-term, the significance of this Act is to expand further the loan and investment powers of thrift institutions, to remove certain restrictions on the lending activities of national banks, and to liberalize further the depository abilities of all banking institutions. Although addressing, in draft form, the Glass-Steagall investment-commercial dichotomy and a broad pre-emption of state usury laws, the final version omits all such provisions¹⁰⁵.

A brief summary, by Title, of each activity affected by the 1982 Banking Act follows:

Title I - Deposit Insurance Applicability (the "Depository Insurance Flexibility Act") expands the authority of federal depository institution's insurance agencies to assist financially distressed banking institutions: see generally, 1982 Banking Act, §§101-142. For example, the FDIC and FSLIC are given broadened powers as to the forms of financial assistance such agencies may render. Further, these agencies and the NCUA are provided with specific statutory procedures for effecting acquisitions or merger of failed and failing banks: 12 USC §1823 (f) (6) (B). These emergency acquisition powers, which are subject to a three year "sunset" provision, (1982 Banking Act §141) are granted within a priority structure for such acquisitions:

- (i) first, between institutions of the same type within the same state;

- (ii) second, between institutions of the same type in different states;
- (iii) third, between institutions of different types in the same state;
- (iv) fourth, between institutions of different types in different states.

Title II - Net Worth Certificates (the "Net Worth Certificate Act") provides a mechanism for capital assistance for insured banks having net worth equal to or less than three per cent of assets. Essentially, the troubled institution issues capital instruments ("net worth certificates") that are purchased by the insuring agencies with promissory notes. To qualify for such assistance, an insured bank must have (in addition to meeting the three per cent ceiling) a net worth equal to or greater than one-half per cent of its assets after the issuance of net worth certificates. Insurance agencies having discretion to consider special circumstances of minority are thrift institutions when considering this one-half per cent minimum requirement. Also for an institution to be available for such assistance, it must have a mortgage portfolio equal to 20 per cent of its outstanding loans: see generally 201-206, 1982 Banking Act.

The partial formula for such capital assistance is:

Net Worth	Level of Assistance
3 % or less	50 % of period loss
2 % or less	60 % of period loss
1 % or less	70 % of period loss

The determination of a period loss is restricted to operating losses as established by the appropriate federal insurance agency and does not include extraordinary items for the period: 1982 Banking Act §203.

So long as a stock bank institution has net worth certificates outstanding, the payment of dividends on its common stock is prohibited. In the event of liquidation, the net worth certificates are to be treated similarly to preferred stock, that is, with a higher priority than common stock, but following other creditors: 12 USC §1823 (i)(1).

State insured banking institutions are eligible for this capital assistance provided the state fund that insures or guarantees the deposits agrees to indemnify the appropriate federal insurance agency for any losses incurred as a result of providing such assistance: 12 USC §1823 (i) (12).

Title III - Thrift Institutions Restructuring (the "Thrift Institutions Restructuring Act") provides increased investment powers for

federal S & Ls and federal savings banks. These institutions now have the authority to accept demand deposits from commercial corporate and agricultural customers who have established a loan relationship with them. In addition, they are given expanded real estate and investment authority and expanded authority to invest in commercial, corporate and agricultural loans up to a specified percentage of assets. In terms of corporate power, these federal thrift institutions are granted more liberal chartering options and now have the ability to offer stock: see generally, 1982 Banking Act, §§ 301-35.

This title also directs the Depository Institution Deregulation Committee ("DIDC") to establish within 60 days of enactment of the Act an account that is "directly equivalent to and competitive with money market mutual funds." Such an account would not be considered a "transaction account" for FRB reserve requirements: 1982 Banking Act §327. On November 15, 1982, the DIDC established this new form of account. Generally, it is eligible to all types of bank customers (including commercial customers); has no interest ceiling; requires a minimum denomination and average monthly balance of \$2,500; permits up to six account transfers a month without subjecting the amount to FRB reserve requirements; is insured by the relevant federal insurance agency; and contains no minimum maturity requirements, although there are limitations on the period for which a banking institution may guarantee an interest rate¹⁰⁶. On December 6, 1982, the DIDC also established a new "Super NOW" market account, which permits unlimited transactions, but which is subject to a 12 per cent reserve requirement: 47 FR 56320 (December 16, 1982).

The 1980 Omnibus Banking Act's efforts to eliminate the interest rate differentials between banking institutions are hastened as the DIDC is directed to eliminate all such differentials on or before January 1, 1984: 1982 Banking Act §326.

The Title also provides a broad (but not absolute) federal preemption of state laws and judicial decisions which restrict the enforcement of due on sale clauses and real estate loans: 1982 Banking Act, No. 341.

Title IV - Provisions Relating to National and Member Banks affects a number of significant provisions which revise or repeal certain of the national banking laws. Such changes include:

- (i) The single borrower lending limit is changed from 10 per cent of a bank's capital and surplus to 15 per cent for unsecured extensions of credit, *plus* an additional 10 percent for extensions of credit fully secured by readily marketable collateral having a reliable and continuous price quotation. The Comptroller of the Currency is given regulatory power to determine when bank

commitments (as distinct from actual advances) would be included within the term "loans and extensions of credit" for purposes of determining compliance with the lending limit and has the authority to promulgate "aggregation" rules respecting when a loan putatively made to one person is attributed to another. (1982 Banking Act §401); see controversial proposed Comptroller lending limit regulations at 47 FR 56862 (December 21, 1982);

(ii) The prior statutory exclusions from the single borrower lending limit are consolidated (1982 Banking Act §401 (c));

(iii) The aggregate borrowing limitation under 12 USC §82 for national banks is repealed, although the Comptroller has the regulatory authority to establish a limitation for purposes of ensuring "safety and soundness (1982 Banking Act §402 (a));"

(iv) The restrictions on real estate loans by national banks under 12 USC §371 are effectively deleted, with authority to regulate this area resting with the Comptroller (1982 Banking Act §403); and

(v) The Comptroller is authorized to issue certificates of authority to national banking associations formed to be "bankers' banks" (1982 Banking Act §404).

The Title also makes significant amendments to the Federal Reserve Act with respect to restrictions on transactions between bank affiliates, by closing several unintended loopholes, liberalizing certain duly restricted provisions, and simplifying the prior provisions.

Amendments are also made to FIRA, primarily through the elimination of the statutory limits on mortgage and educational loans to executive offices of FRS member banks, by removing the \$25,000 threshold figure for the prior approval of inside loans, and by placing authority to establish thresholds requirements with the appropriate bank supervisory agency. In addition, certain of the FIRA reporting requirements have been softened. However, FIRA provisions respecting management interlocks and correspondent bank relationships have been modified to make them more stringent: 1982 Banking Act §§421-429.

Title V - Amendments to Federal Credit Union Act effects numerous changes to the Federal Credit Union Act in order to facilitate the establishment and management of federal credit unions and to provide these institutions with greater operating flexibility. A greater operating flexibility for the NCUA and the National Credit Union Insurance Fund and the Central Liquidity Fund is also provided. Further, the ability of state credit unions to convert to federal credit unions is enhanced: 1982 Banking Act §§501-533.

Title VI - Property, Casualty, Life Insurance and Activities of Bank Holding Companies generally prohibits bank holding companies and their subsidiaries from providing insurance (including property and casualty insurance) as a principal, agent or broker subject to six specific statutory exceptions. In effect, it limits the types of insurance activities that could meet the "closely related" test of §4 (c) (8) of the Bank Holding Company Act of 1956.

Title VII - Miscellaneous addresses minor amendments to the Truth In Lending Act, among other matters, permits banking institutions to offer NOW accounts and share draft accounts to state and local governments; permits one or more banks to form a bank service company in which they may invest up to 10 per cent of their capital surplus (but no more than five per cent of assets); and provides a phase-in of reserve requirements for banks that have previously withdrawn from the Federal Reserve System: see generally 1982 Banking Act, §§701-712.

Title VIII - Alternative Mortgage Transactions (the "Alternative Mortgage Transaction Parity Act of 1982") authorizes non-federally chartered housing creditors to offer alternative mortgages in accordance with the federal regulations issued by the appropriate federal regulatory agencies. Accordingly, these creditors will have parity with federally chartered banking institutions respecting such mortgage instruments. A state has three years within which to reject the authority granted by this provision: 1982 Banking Act, §§801-807.

C. Summary of Powers of Banking Institutions

In "bottom-line," practical terms the significance of the deregulatory bank legislation must be translated in terms of the marketplace, that is, the impact upon the powers (ie, business opportunities) of the various types of banking institutions. As discussed above, from the background of a traditionally structured and divided industry, the banking industry has become greatly compressed and competitive due to the drastic increases in interest rates and the efforts of non-commercial banking financial institutions to expand their financial services and business opportunities.

Generally speaking, a banking institution has express or implied powers. Today, these powers are:

1. Express Powers. The express powers of federal banking institutions may include corporate, depository, business and investment, and trust powers.

(a) - *Corporate Powers*. As corporate entities, banks possess substantially similar corporate powers such as the power to make contracts, to adopt a seal, to sue and be sued, to buy, hold and dispose of property, and to adopt bylaws. Deregulation has made little impact on this area, except for the facilitation of institutional conversions and mergers.

(b) - *Depository Powers*. Presently federal credit unions are permitted to pay any rate of interest on their deposits. Since 1966, federal S & Ls have been limited by the FHLBB to paying one-quarter of one per cent more interest than the interest rate ceilings prescribed by the FRB (12 CFR §545.1) for FRB member banks (including all national banks): 12 CFR §217.7. The interest rate limitations for S & Ls and banks were established to restrain excessive competition for funds between banks and S & Ls and to prevent banks from diverting deposits from S & Ls, which would thereby create adverse effects upon the homebuilding industry: (1980) *US Code Cong. & Ad. News* 236, 238.

In enacting the 1980 Omnibus Banking Act, Congress determined that limitations on interest rates payable on deposits discourage savings, create inequities for depositors, impede the ability of banking institutions to compete for funds, and do not provide an even flow of funds for home mortgage lending. Congress also concluded that depositors are entitled to receive a market rate of return on their deposits: (1980) *Code Cong. & Ad. News* 236, 238.

Based on these findings, the Depository Institutions Deregulation Committee (DIDC) was established to provide an orderly elimination of the restrictions on the maximum rates of interest that may be paid by banks on deposits. Under the 1982 Banking Act, the interest rate differential between commercial banks and S & Ls must be phased out by January 1, 1984: Pub. L. No. 97-230; 96 Stat. 14. Pursuant to the 1980 Omnibus Banking Act, (Pub. L. No. 96-221; 94 Stat. 132), the phase out of other limitations must be completed by March 31, 1986, at which time the DIDC dissolves.

The authority to set interest rates on deposits, formerly vested in the FRB and the FHLBB, has been transferred to the DIDC: 12 USC §§ 3501 and 3502. The DIDC's decisions are binding on all members except the NCUA, which may choose to abide with the decisions. The NCUA's authority to set interest rate ceilings for credit unions expires also on March 31, 1986.

As previously discussed, the 1982 Banking Act has required the DIDC (and the DIDC has established) a new bank depository instrument equivalent to and competitive with money market mutual funds.

(c) *Lending and Investment Powers*. While credit unions maintain a competitive advantage through their ability to pay any rate of interest on deposits, national banks possess the widest array of lending and investment powers. They may enter into any type of lending relation-

ship provided it does not exceed lending limits computed upon the bank's capital accounts. Real estate loans granted by a national bank cannot, by present regulation, exceed the greater of its capital stock and surplus or 100 per cent of its time and savings deposits. However, new regulations pursuant to the 1982 Banking Act may eliminate this restriction: Pub. L. No. 97-320; 96 Stat. 14.

In contrast, federal S & Ls lending activities are presently limited by aggregate lending limitations in several loan categories. Consumer loans cannot exceed 30 per cent of an S & Ls assets. Loans secured by non-residential real property cannot exceed 40 per cent of an S & Ls assets. Education loans and business or agricultural loans cannot exceed five per cent of the assets of a federal S & L: USC §1464, as amended by 1982 Banking Act.

Federal credit unions are severely limited in their lending activities since all loans or lines of credit may be granted only to those who qualify as members: 12 USC §1759. Federal credit unions may offer an assortment of loans including purchase money residential loans, mobile home loans, home improvement loans, and unsecured loans. These loans are limited primarily by the term of maturity and the type of collateral although loans to a member other than a natural person cannot exceed its deposits in the credit union: 12 USC §1757.

National banks may invest in obligations of the United States Government and its agencies, assessment and revenue bonds issued by states and their political sub-divisions, foreign corporate or government bonds, corporate debt instruments, and stock in corporations that engage in bank related activities (12 USC §24(Seventh)). Federal S & Ls may invest in all investments authorized for national banks except assessment and revenue bonds issued by states and political sub-divisions and foreign corporate or government bonds: 12 USC §1464 (c). Federal S & Ls may invest in personal property such as automobiles and manufactured homes up to 10 per cent of their assets. Federal credit unions may invest in obligations of the United States Government and its agencies, obligations of states and their political sub-divisions, and in stock of corporations that engage in bank related activities: 12 USC §1757 (72).

(d) - *Trust Powers*. A national bank may, upon separate application to the Comptroller, engage in trust activities: 12 USC §92 (a). Under the 1980 Omnibus Banking Act, federal S and Ls are now permitted to make application to the FHLBB for express trust powers not in contravention of state law: 12 USC §1464 (n). Federal credit unions have no express trust powers in the traditional sense: 12 USC §1765.

2. Implied Powers. In addition to express banking powers, banks possess powers incidental to their deposit, lending, and investment powers. For example, national banks, by statute, are permitted to

exercise "all such incidental powers as shall be necessary to carry on the business of banking. . ." Such incidental powers must be "convenient or useful" to traditional bank activities and must directly relate to the performance of one or more express powers: 12 USC §24 (Seventh). In this context, according to the Comptroller of the Currency, national banks may provide free travel advice, tax return preparation, payroll preparation, messenger service by armoured car, lease personal property, provide data processing services and general insurance agent services if the bank is in a locality with a population of under 5,000¹⁰⁷.

The incidental powers of a federal S & L do not arise directly from statute but from the following provision in their charters as required by FHLBB regulation (12 CFR §554.1 (a) (3)) charters as required by FHLBB regulation (12 CFR §554.1 (a) (3)):

...this association shall have the power to do all things reasonably incident to the accomplishment of its express objectives and the performance of its express powers.

Federal S & Ls possess the incidental power to cash cheques; to issue cashiers' cheques, to accept funds and to remit for public utility bills; to act as escrowee in loan and real estate transactions in which the S & L has an interest; to conduct a safe deposit business; to salvage loans; to prepare personal income tax forms; to collect accounts for members in connection with a savings account; and to guarantee customer signatures. To the extent possible under state insurance law, a federal S & L may engage in the insurance business¹⁰⁸.

Federal credit unions are authorized, by statute, to exercise "such incidental powers as shall be necessary or requisite to enable [them] to carry on effectively the business for which [they are] incorporated": 12 USC §1757 (15). The scope of such incidental powers has rarely been the subject of regulatory or judicial rulings. Examples of a credit union's incidental powers include leasing office space; entering into employment contracts; purchasing group insurance on the lives of credit union members; and providing a safe deposit box service. NCUA regulations permit a federal credit union to lease or to sell data processing software¹⁰⁹. A credit union may also sell data processing capacity in excess of its own capacity up to 10 per cent of its total operating income: 12 CFR §§701.27-1. NCUA regulations also set forth rules relating to federal credit union insurance and group purchasing activities.

Banking institutions are expanding their business opportunities through a liberal interpretation of their "incidental powers" authority and through the use of related corporate entities. For example, in recent years the regulators have been receptive to an expansion of the bank powers, either directly through broad interpretation of "incidental powers" or indirectly through the use of service corporations or of other related corporate entities (generally, within a holding company unit): 12 CFR §721¹¹⁰.

3. Prohibited Activities. Banking institutions are prohibited, by statutes or judicial decisions, from engaging in certain activities. For example, federal banking institutions are precluded from guaranting instruments in which they have no interest. In addition, they are prohibited from becoming involved in lotteries. Further, federal law prohibits (except through limited vehicles such as a political action committee) federally chartered banking institutions and other corporations from making contributions or expenditures in connection with political elections¹¹.

VI. OTHER CURRENT ISSUES OF SIGNIFICANCE

The following is a brief attempt to highlight certain other major current issues in the United States banking industry, most of which are inter-related with the issue of deregulation.

A. Scope of Banking Regulation

Closely associated with "deregulation" is the fundamental issue of which financial institutions should be the proper subject of banking regulation. There appears to be an inherent problem in defining what constitutes a "bank." For example, large insurance companies are acquiring investment banking houses. Investment banking houses are expanding their services in money market funds and cash management accounts, and they are also acquiring or directing interests in trust companies and finance companies. Large retailers are expanding their customer services thereby offering bank-like services¹⁰. Although, Congress, most likely, will not (directly) address this issue in the immediate future, but will leave the matter to the courts, it remains the overriding fundamental issue of bank regulations in the 1980s. The first discussion of this issue may come within the context of application of FRB reserve requirements to certain transactions of non-bank financial intermediaries which affect FRB control of the national money supply.

B. Branch Banking and Interstate Banking

Debate is underway with respect to amendment of the McFadden Act of 1929 federally to pre-empt state branch banking statutes¹³. Closely related to the issue of branch banking is that of interstate banking. Presently, major commercial banks are engaged, through various means (eg, representative offices, Edges, finance companies, and loan production offices), in operations on an interstate basis. Moreover, with respect to such matters as commercial lending and credit card facilities, interstate banking exists. Further pressures for interstate banking may lead to banks being permitted to establish in adjoining states or areas (eg, the District of Columbia and surrounding areas) or in acquiring failing banks in neighbouring states¹⁴. The McFadden Act appears to be beyond the embrace of direct repeal. It will most

probably give way through the realities of the marketplace and reciprocal state actions.

C. Glass-Steagall: Investment - Commercial Division

As financial institutions expand their services, banks and bank holding companies are lobbying to have Congress amend the Glass-Steagall presently prohibited under the Act¹¹⁵.

Act to allow them to provide various forms of investment services

Bank regulation has divided banking institutions from non-bank financial intermediaries. The best example of this is the enactment of the 1933 Glass-Steagall Act that separates commercial banking from investment banking (48 Stat. 162), in particular §§16, (12 USC 24 (Seventh)) 20, (12 USC §377) 21, (12 USC §378) and 32 (12 USC §78). Non-bank financial intermediaries have sized upon this limitation on bank activities to offer an increasing array of financial services and thereby compete for traditional bank customers. For example, a major merchandise retailer now provides multi-line insurance, operates an S & L, conducts one of the largest nationwide credit card systems, manages a money market mutual fund and owns a large real estate brokerage firm and large securities brokerage house. Other comparable examples involve an international services organization, investment banking house, and insurance company.

A strong movement in Congress is underway to reverse the effects of the Glass-Steagall Act. In particular, legislation is pending which would authorize national banks or subsidiaries of bank holding companies to underwrite municipal revenue bonds and to offer mutual funds as part of the business of banking or as a non-banking activity of a bank holding company subsidiary. Many commentators have supported the removal of the Glass-Steagall barrier between commercial and investment banking on grounds that it restricts competition and inhibits market efficiency. The securities industry, in contrast, remains adamantly opposed to legislation expanding commercial bank powers into the securities business. That group argues that national banks have unfair competitive advantages over securities firms because of their easy access to capital. Moreover, the risks associated with the combination of commercial and investment banking activities, including the hazards identified in the judicial precedent, remain formidable obstacles to the expansion of bank powers under Glass-Steagall. Lacking legislative action, however, the debate over Glass-Steagall may continue¹¹⁶. S & Ls and credit unions do not appear to come within the statutory Glass-Steagall prohibitions.

Closely associated with the investment-commercial issue is the statutory expansion of "bank related" activities respecting bank holding companies¹¹⁷. Many, including the US Treasury Department, support an expansion of these activities (including securities, insurance and real estate) through the holding company. The rationale is that it would permit banking units to segregate banking from non-banking activities in a manner that would not unduly impair the "safety and

soundness'' of the banking subsidiaries.

D. Electronic Transfers and Consumer Protection

As the area of electronic fund transfer becomes more widely used and more sophisticated in nature, there will undoubtedly be continuing review of existing legislation to determine whether adequate safeguards are being provided for users of these services¹¹⁸. The use of electronic transfers will also affect the interstate banking issue. They are enabling differing financial intermediaries to interconnect their services (eg, Merrill Lynch and Bank One case management account services). Accelerated use of electronic transfers on multi-state, regional and national basis will also increase pressures for interstate banking.

Also related to electronic fund transfers, is the regulation of the cheque collecting system. Major structural changes are being made which may entail amendment of various federal regulations: see *Fed. Res. Bull.* 109, February (1981).

E. International Banking

International banking operations, both by US banks overseas and foreign banks in the United States, will continue to increase in the 1980s. The IBA considered many issues raised by foreign banking operations. However, there may undoubtedly be continuing regulation under the IBA, and perhaps additional substantive legislation in the coming years as it becomes more and more apparent that international banking activities are closely related to the "safety and soundness" and efficient function of the domestic banking system and to the state of the national economy¹¹⁹.

For example, Congress has recently passed the Export Trading Company Act of 1982 which establishes an export trading company promotion office in the Department of Congress; permits bank holding company units to create and operate such companies in competition with foreign trading companies; provides for the possibility of obtaining federal anti-trust immunity certification for such companies and otherwise modifies the federal anti-trust laws which have restricted export activities; and eases restrictions on banker acceptances: Pub. Law No. 92-290; 96 Stat. 1233. Remarkably, this Act has completely done away with the traditional separation of banking and commercial activities, at least within the context of this international trading vehicle.

Of immediate note are the numerous bills before Congress providing for the regulation of US bank-lending activities abroad, in the light of the much publicized problems of restructuring US bank loans to Poland, Mexico, Brazil and Argentina.

More generally, the whole process of bank deregulation in the United States has significant implications for the international activities of United States banks and for foreign banks doing business in the United States¹²⁰.

F. Bank Holding Companies

With "deregulation" has come the possibility of acquisition of various forms of banks. Opportunity for bank holding companies to expand exists in the acquisition of failing financial institutions and of interstate branching: see Title I, 1982 Banking Act. Moreover, as discussed above, the bank holding company may become a primary means for penetrating the Glass-Steagall wall and for otherwise permitting banking institutions to become more competitive with non-banking intermediaries.

G. Fiduciary Standards

Fiduciary standards in banks and other corporate related areas were generally thought to be a subject of the common law and state case-law.

FIRA, however, for the first time set forth various statutory restrictions with respect to inside and affiliated transactions respecting banks and their officers, directors and other insiders. Although there presently appears to be a predominate view that further legislation in this area is not appropriate, the issues of insuring fiduciary standards among bank insiders and affiliates (particularly, if the non-bank activities of holding company units increases) will undoubtedly be an issue of considerable discussion during the 1980s: see Title IV, 1982 Banking Act.

H. Disclosure

There is no question that the deregulation scheme turns "topsy-turvy" the traditional notion of "safety and soundness." As a countervailing force, it appears to this writer that the quality (and not quantity) of public bank disclosure will become a key issue in the 1980s. Disclosure will also be a central issue in such matters as domestic and international loan participations or syndications, and the securities related activities that may be permitted banking institutions.

VII. CONCLUSION

The 1970s was a period of significant federal legislation in banking in the United States. The 1980s, which began with the 1980 Omnibus Banking Act and the 1982 Banking Act, promises to be an even more active period of federal banking legislation. Traditional notions of bank regulation will continue to be re-examined (and, perhaps, challenged). Legal and regulatory divisions between financial institutions will further give way. This "deregulation," in turn, will create new problems and issues for the US Congress and the bank regulators. In addition, the entire fragmented scheme of federal banking regulation will come under close scrutiny. The implications and import of all these matters should be of pressing concern to all transactors doing business in, or with, the United States.

NOTES

1. See generally, Haupt, *Foreign Ownership and the Performance of U.S. Banks* (FRS Staff Study, 1980); and "Symposium: Regulation of Foreign Banks in the United States," (1980) *Univ. Ill. L. Forum* vol. 1.
2. See Du Bois, *The English Business Company After the Bubble Act, 1720-1800* (1938); and Davis, *Essays in the Earlier History of American Corporations* (1917).
3. On history of banking in the United States see generally Hammond, *Banks and Politics in America from the Revolution to the Civil War* (1957); Friedman and Schwartz, *A Monetary History of the United States, 1867-1960* (1963); and Studenski and Koos, *Financial History of the United States* (2nd ed., 1963).
4. See Lewis, Jr., *A History of the Bank of North America* (1882).
5. See White, *Banking Law*, at 2 (1976).
6. See Hamilton, "Treasury Report on a National Bank," in *American State Papers, Vol 5: Finance* (1832).
7. See Hammond, "Banking Before the Civil War," in *Banking and Monetary Studies*, 1 (E. Carson ed. 1963).
8. See Englert, "Bank Supervision in Historical Perspective," 34 *Bus. Lawyer* 1659, at 1664 (1979).
9. See White, *supra*, Note 5, at 8.
10. See Hammond, *supra*, Note 7, Ch. 6.
11. 3 Stat. 266 (1816). See generally, Dewey, *The Second United States Bank* (1910).
12. See Message by President Andrew Jackson vetoing Second Bank's recharter, VIII *Register of Debates*, 73 (1832).
13. See Englert, *supra*, Note 8 at 1666.
14. See Matthew Bender, *Banking Law Series*, Vol. 1, § 2.04[4] (1980).
15. See Hammond, *supra*, Note 78, Ch 18 (1957).
16. Texas Const., Former Art. XVI § 16 (amended Nov. 8, 1904).
17. See Chaddock, *The Safety Fund System of New York* (1910).
18. See FRB, *Banking Studies*, at 418 (1941).
19. *Eg.* The First Independent Treasury Act, 5 Stat. 385 (1840), repealed 5 Stat. 469 (1841).
20. See Senate Banking and Currency Comm., 88th Cong., 1st Sess., *Federal Banking Laws and Reports, 1780-1912*, at 3067 (Comm. Print 1963).
21. See Levin, "In Search of The National Bank Act," 97 *Banking L.J.* 741 (1980).
22. See generally, Davis, *The Origin of the National Banking System* (1910).
23. See FRB, *Banking Studies*, at 418 (1941).
24. See generally, Sprague, *History of Crises Under the National Banking System* (1910).
25. 48 Stat. 162 (1933). For historical discussion, see Comment, 47 *Harv. L. Rev.* 325 (1933) and Perkins, "The Divorce of Commercial and Investment Banking: A History," 88 *Banking L.J.* 483 (1971).
26. See *inter alia*, Karmel, "Glass-Steagall: Some Critical Reflections," 97 *Banking L.J.* 631 (1980); and Clark and Saunders, "Judicial Interpretation of Glass-Steagall: The Need for Legislative Action," 97 *Banking L.J.* 721 (1980); "Glass-Steagall Revisited: The Impact on Banks, Capital Markets, and the Small Investor," 97 *Banking L.J.* 811 (1980).
27. See Walles, "The Banking Act of 1933 in Operation," 35 *Colum. L. Rev.* 697 (1935).
28. See generally, Friedman and Schwartz, *A Monetary History of the United States 1867-1960*, Ch 8.
29. See Part IV *infra* for further discussion of FDIC and other federal banking authorities.
30. 78 Stat. 565 (1964); 15 U.S.C. § 781 (g) (1). The federal banking authorities are directed to issue securities regulations for banks that are "substantially equivalent" to those issued by the SEC. 15 U.S.C. § 781 (i).
31. Public Law 94-29, 89 Stat. 97 (1975). See, Finn, "Impact of the Proposed Federal Securities Code Upon the Banking Industry," 36 *Bus Lawyer* 397 (1981).
32. Public Law 511; 70 Stat. 133 (1956); 12 U.S.C. § 1841 *et seq.* For legislative history see U.S.C. Cong. & Adm. News 2482 (1956).
33. Public Law 91-607; 84 Stat. 1760 (1970). See also 1977 amendment (91 Stat. 1389) and 1978 amendment (92 Stat. 623).
34. See generally, Heller, *Handbook of Federal Bank Holding Company Law* (1976).
35. *Eg.* Civil Rights Act of 1964, 78 Stat. 240; Housing Act of 1964, 78 Stat. 769; Housing and Urban Development Act of 1965, 79 Stat. 451; and Housing and Urban Development Act of 1969, 83 Stat. 379.
36. Public Law 93-495, 88 Stat. 152; 15 U.S.C. §§ 1691 *et seq.*

37. Public Law 95-128, Title VIII; 91 Stat. 1147 (1977); 12 U.S.C. §§2901-2905.
38. See Givens, "The 'Antiredlining' Issue: Can Banks Be Forced to Lend," 95 *Banking L. J.* 515 (1978).
39. See Dennis, "The Community Reinvestment Act of 1977: Defining 'Convenience and Needs of the Community'," 95 *Banking L. J.* 693 (1978).
40. See Comment, "Community Reinvestment Act Regulations: Another Attempt to Control Redlining," 28 *Cath. U.L. Rev.* 635 (1979).
41. See Comptroller's CRA Regulations, 12 C.F.R. §25; FRB Regulation BB, 12 C.F.R. §228; and FDIC's CRA Regulations, 12 C.F.R. §344.
42. Public Law 95-630, Title XX; 93 Stat. 3728 (1978); 15 U.S.C. §1693.
43. See generally, Penney and Baker, *The Law of Electronic Fund Transfers* (1980).
44. Public Law 91-508, Title VI; 84 Stat. 1128 (1970); 15 U.S.C. §1681.
45. Public Law 93-495; Title III; 88 Stat. 1512 (1974); 15 U.S.C. §1666, as amended in 1980 (Public Law 96-221, Title VI; 94 Stat. 185).
46. Public Law 95-205; 89 Stat. 1157 (1976); 12 U.S.C. §2601 *et seq.*
47. Public Law 94-200; 89 Stat. 1125 (1976); 12 U.S.C. §§2801 *et seq.*
48. Public Law 95-128; 91 Stat. 1111 (1977).
49. Public Law 95-109; 91 Stat. 874; 15 U.S.C. §§1692 *et seq.*
50. See generally, Dept. of the Treasury, *Report to Congress on Foreign Government Treatment of U.S. Commercial Banking Organizations* (1979). Also see *Foreign Bank Act of 1975: Hearings Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong.; 2d Sess. 26 (1975).
51. Public Law 95-369; 92 Stat. 607; disbursed throughout various parts of 12 U.S.C.
52. See 12 U.S.C. §611. Also see FRB Regulation K, 12 C.F.R. §211 and Kelly, "Edge Act Corporations After the International Banking Act and New Regulation K: Implications for Foreign and Regional or Smaller Banks," 20 *VA. Int'l. L. J.* 37 (1979).
53. See Public Law 91-508; 84 Stat. 1114 (1970); 31 U.S.C. §§1141-1143. See *inter alia*, Fisher, "Financial Institutions and Privacy," 34 *Bus. Lawyer* 1103 (1979).
54. For legislative history of FIRA, see *U.S. Code Cong. & Adm. News* 9273 (1978).
55. See generally, Edwards & Scott, "Regulating the Solvency of Depository Institutions," in Edwards (ed.), *Issues in Financial Regulation*, 65 (1979). For the federal case, see *Groos Nat'l Bank v. Comptroller of the Currency*, 573 F.2d 889 (5th Cir. 1978).
56. See generally, Carstensen, "Regulating Banking in the Public Interest: The Case for an Open Approach to Chartering and Branching," 57 *Tex. L. Rev.* 1085 (1979).
57. See Scott, "The Patchwork Quilt: State and Federal Rules in Bank Regulation," 32 *Stan. L. Rev.* 687 (1980), at 703-706.
58. See "The History of Reserve Requirements for Banks in the United States," 24 *Fed. Res. Bull.* 953 (1938).
59. See Scott, "Interrelationships Between Federal and State Bank Regulatory Statutes," in Lapidus et. al., *State and Federal Regulation of Commercial Banks*, vol. 1, 145 at 155 (1980).
60. See generally, Matthew Bender, *Banking Law*, vol. 5 (1980).
61. Public Law 91-151; 83 Stat. 377 (1969); 12 U.S.C. s. 1901 *et seq.*
62. See Executive Order 12201 of March 14, 1980, 45 F.R. 17123 (March 18, 1980).
63. The National Bank Act, June 3, 1864, ch. 6, 12 U.S.C. §1 *et seq.* See generally, Englert, "Bank Supervision in Historical Perspective," 34 *Bus. Lawyer* 1659 (1979).
64. The Federal Reserve Act, Dec. 23, 1913, ch. 6 §1, 12 U.S.C. §221 *et seq.*
65. See Generally, Hackley, "Our Discriminatory Banking Structure," 55 *Va. L. Rev.* 1421 at 1464 (1969).
66. Federal Deposit Insurance Act, 64 Stat. 873, §2[18(c)], 12 U.S.C. §1828(c).
67. Act of July 15, 1952 §2(a), 12 U.S.C. §329; 12 U.S.C. §36, 59, 1828(d); 12 U.S.C. §1828(i)(1).
68. Bank Merger Act of 1960, 74 Stat. 129, 12 U.S.C. §1828(c).
69. Bank Service Corporation Act, 76 Stat. 1132, 12 U.S.C. §§1861-65.
70. 15 U.S.C. §781(i).
71. Financial Institutions Supervisory Act of 1966, 80 Stat. 1028, 12 U.S.C. §§1813 and 1818.
72. Bank Lottery Act of Dec., 1967, 81 Stat. 608, 12 U.S.C. §§25a, 339, 1829a.
73. Bank Protection Act of July 7, 1968, 82 Stat. 294, 12 U.S.C. §1881.
74. Truth in Lending Act, 82 Stat. 146, 15 U.S.C. §1601 and The Fair Housing Act, 82 Stat. 73, 42 U.S.C. §3605.
75. Fair Credit Reporting Act, 15 U.S.C. §1681; Flood Disaster Protection Act, 42 U.S.C. §4002; Real Estate Settlement Procedures Act, 12 U.S.C. §2601; Home Mortgage Disclosure Act, 12 U.S.C. §2801; Consumer Leasing Act, 15 U.S.C. §1667, Equal Credit Opportunity Act, 15 U.S.C. §1691; Fair Debt Collection Practices Act, 15

- U.S.C. §1692; Community Reinvestment Act, 12 U.S.C. §2901; Electronic Funds Transfer Act, 15 U.S.C. §1693.
76. Depository Institution Management Interlocks Act, 92 Stat. 3641, 12 U.S.C. §3201.
 77. Change in Bank Control Act of 1978, 92 Stat. 3641, 12 U.S.C. 1817(i)(13).
 78. See *inter alia*, Hackley, "Our Baffling Banking System," (pts 1-2), 52 *Va. L. Rev.*, 565, 771 (1966); Note, "The Federal Bank Commission Act: A Proposal to Consolidate the Federal Banking Agencies," 25 *Clev. St. L. Rev.* 475 (1977).
 79. See generally, Cohen & Freier, *The Federal Home Loan Bank System* (1980).
 80. Moody and Fite, *The Credit Union Movement, Origins and Development, 1850-1970* (1971).
 81. See generally, *White Banking Law*, ch. 1 (1976).
 82. See FRB, *The Federal Reserve System - Purposes and Functions* 20(6th ed. 1974).
 83. See *The Federal Reserve System*, *supra*, Note 83, at 15.
 84. See generally, *The Federal Reserve System*, *supra*, Note 83.
 85. See *U.S. Code Cong. and Adm. News* 2482 (1956).
 86. On federal banking authorities, see, *inter alia*, Norton and Whitley, *Banking Law Manual*, Chs. 2 & 3 (1983).
 87. 12 U.S.C. §1, originally passed by Congress in 1863 and subsequently amended.
 88. See generally, Comptroller of the Currency, *Handbook for National Bank Examiners-Commercial, International* (1979).
 89. See generally, Matthew Bender, *Banking Law*, vol. 4 (1980).
 90. See Garn-St. Germain Depository Institutions Act of 1982 ("1982 Banking Act"), Pub. L. No. 97-320; 96 Stat. 14 (Oct. 15, 1982), Title I.
 91. (1919); S. 3877, 75th Cong., 3rd Sess. (1938); H.R. 5229, 76th Cong., 1st Sess. (1919); S. 3877, 75th Cong., 3rd Sess. (1938%); H.R. 5229, 76th Cong., 1st Sess. (1939); *Task Force on Regulatory Commissions, Report Prepared for the Commission on Organization of the executive Branch of the Government* (1949); *Commission on Money and Credit, Money and Credit: Their Influence on Jobs, Prices, and Growth* (1961); *Commission on Financial Institutions, Report to the President of the United States* (1963).
 92. See generally, Scott, "The Dual Banking System: A model of Competition in Regulation," 30 *Stan. L. Rev.* 1 (1977).
 93. Via, "Some Thoughts on Evaluating the Tripartite Federal Bank Regulatory System," 93 *Banking L. J.* 509 (1976).
 94. *Report of the President's Commission on Financial Structure and Regulation, 1971*. Commonly known as the Hunt Commission Report in recognition of Reed O. Hunt, Chairman of the Commission. *Financial Institutions and the Nation's Economy: Committee on Banking, Currency and Housing, House of Representatives, 1976*. Commonly known as the FINE Study.
 95. Chase, "The Structure of Federal Regulation of Depository Institutions" in *Financial Institutions and the Nation's Economy*, 145 (1976).
 96. Act of 1978, 92 Stat. 3641; 1978 *U.S. Code Cong. and Adm. News* 9273.
 97. Depository Institutions Deregulation and Monetary Control Act, 94 Stat. 1321; 1980 *U.S. Code Cong. and Adm. News* 132.
 98. Garn-St Germain Depository Institutions Act of 1978, Pub. L. No. 97-320; 96 Stat. 14.
 99. Cf. *BNA Washington Financial Reports (WFR)*, Number 25, June 25, 1981.
 100. See General Accounting Office, *Report: Federal Examination of Financial Institutions: Issues That Need to be Resolved* (G-G-D-81-12, Jan. 6, 1981).
 101. See House Committee on Banking, Finance and Urban Affairs, *Financial Institutions in a Revolutionary Era*, 97th Cong., 1st Sess. (1981) ("Fire Report").
 102. See generally, Goldberg (ed.), *The Deregulation of the Banking and Securities Industries* (1979). On dissatisfaction of certain banking institutions see *inter alia*, "U.S. Leage May Sue DIDC Again Over 'Absolutely Disappointing' Decisions," *WFR*, at A-21 (July 6, 1981). Since 1979, many thrift institutions have faced serious economic losses due to the nature of their loan portfolios (largely with fixed low-return yields) and the increasing cost of funds. In response to these serious economic problems the FHLBB and the thrift industry have been extremely aggressive in pressing for expanded powers. Hence, the broad powers granted thrift institutions under the 1980 Omnibus Banking Act and 1982 Bank Act. Such legislation is eliminating any meaningful distinction between the operations of an S & L and other thrift institutions and a traditional commercial bank; however, federal tax laws providing special treatment for thrift institutions may still compel these institutions generally to remain significantly in the same prior lines of business. [see e.g., see Internal Revenue Code, §7701a(19)].
 103. Public Law 96-221; 94 Stat. 132 (1980). For legislative history see *U.S. Code Cong. & Adm. News* 236 (1980).
 104. See generally, Weaver and O'Malley, "The Depository Institutions Deregulation and Monetary Control Act of 1980," 98 *Banking L. J.* 100 (1981).

105. See generally, House of Representatives, Report of the Conference Committee on H.R. 6267 (Report No. 97-899, 97th Cong. 2d Sess., September 30, 1982); and *Senate Report*, together with Additional Views on S. 2879 (Report No. 97-536, 97th Cong., 2d Sess., Sept. 3, 1982).
106. 47 FR 53710 (November 29, 1982).
107. See generally Matthew Bender, *Banking Law*, Vol. 2, Ch. 26.
108. See, *inter alia*, opinion of the General Counsel of the FHLBB, No. T-70 (Sept. 15, 1981), *United States League of Savings Associations Guide*, at 8265-7.
109. See generally NCUA, Handbook for Federal Credit Unions (1964).
110. For leading cases on "incidental powers" of federal banking institutions, see *Arnold Tours, Inc. v. Camp*, 472 F. 2d 1147 (1st Cir. 1972); and *M & M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied* 436 U.S. 956 (1978).
111. See generally, Matthew Bender, *Banking Law*, Vol. 1 & 2 Chapters 4, 13 and 26 (1981).
110. E.g., see "Garn Tells Credit Groups 'Near Banks' are Unfair," *WFR*, at AA-1 (Jan. 12, 1981) and FIRE Report, *supra*. Note 171. For discussion of current issues in U.S. banking law, see generally Lapidus et al., *State and Federal Regulation of Commercial Banks*, 2 vols. (1980).
111. E.g., see *White House Staff Report on the McFadden Act which Restricts Interstate Branching by Banks*, as reported in part in *WFR*, at T-8 (January 5, 1981).
112. See FHLBB Policy Statement, adopted March 23, 1981, on Interstate Branching of S & Ls, 46 Fed. Reg. 19221 (March 30, 1981). Cf. 1982 Banking Act §334. For discussion of current issues in U.S. banking law, see generally Lapidus et al., *State and Federal Regulation of Commercial Banks*, 2 vols. (1980).
113. See *inter alia*, "Banks Seek Changes in Glass-Steagall Act," *WFR*, at A-16 & A-18 (March 16, 1981).
114. See FHLBB Policy Statement, adopted March 23, 1981, on Interstate Branching of S & Ls, 46 Fed. Reg. 19221 (March 30, 1981). Cf. 1982 Banking Act, §334. For discussion of current issues in U.S. banking law, see generally Lapidus et al., *State and Federal Regulation of Commercial Banks*, 2 vols. (1980).
115. See *inter alia*, "Banks Seek Changes in Glass-Steagall Act," *WFR*, at A-16 & A-18 (March 16, 1981).
116. See *inter alia*, Karmel, *Glas-Steagall: Some Critical Reflections*, 97 *Banking L. J.* 631 (1980).
117. E.g. *FRS Board of Governors v. ICI*, Sup. Ct. Docket N. 79-927 (Feb. 24, 1981); 101 S.Ct. 973 (1981).
118. See generally, Penny and Baker, *supra*. Note 43. In particular see, Electronic Fund Transfer Act of 1978, *supra*, Note 42.
119. See generally, Symposium: *Regulation of Foreign Banks in the United States*, (1980) U.II1. L.F. vol 1 at 1.
120. See generally, Woody, *International Economic Implications of Deregulating the U.S. Banking Industry*, 31 *Am. U.L. Rev.* 25 (1981).