Have Nonbank Banks Become a Nonissue Issue

Joseph P. Savage
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In the last five years, few industries have changed as rapidly as the banking industry. Once viewed as stodgy and conservative, banks have become increasingly aggressive and competitive. Banks and nonbank businesses have expanded both their financial services and geographic markets. Despite these changes, Congress, perhaps influenced by strong lobbies, has not reformed old banking laws to meet new market conditions. Consequently, federal courts and regulators have had difficulty applying dated laws to recent developments.

One such law is the Bank Holding Company Act of 1956 (the "BHCA" or the "Act"). The BHCA regulates a bank holding company's acquisitions of bank subsidiaries. The Act also limits a bank holding company's activities and interests in areas unrelated to banking. The Act defines a bank as any institution organized under state or federal law that meets both parts of the Act's two-pronged "bank" test. A bank "(1) accepts deposits that the depositor has a legal right to withdraw on


2. A "bank holding company" is defined as any company that controls any bank or other bank holding company. 12 U.S.C. § 1841(a)(1) (1982). A "company" is defined as:
   any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust but shall not include any corporation the majority of the shares of which are owned by the United States or any State.
   Id. § 1841(b).

   "Control" under the BHCA generally exists in three circumstances:
   (1) a company directly or indirectly or acting through one or more persons owns, controls, or has the power to vote 25 percent or more of any class of voting securities of a bank or other company;
   (2) a company controls in any manner the election of a majority of the directors or trustees of a bank or other company;
   (3) the Board of Governors of the Federal Reserve System determines that the company directly or indirectly exercises a controlling influence over the management or policies of a bank or other company. Id. § 1841(a)(2).

   There are exceptions to the "control" rule, primarily when a company owns or controls shares of a bank or other company in a fiduciary capacity or as security for a debt. See id. § 1841(a)(3).

3. Id. § 1842(a).

4. Id. § 1843(a).

5. The Act does not cover holding companies of federally chartered or insured savings and loans. Such institutions are regulated under the Savings and Loan Holding Company Act of 1967. Id. § 1730a.
demand, and (2) engages in the business of making commercial loans."\(^6\) In recent years, companies have avoided regulation under the BHCA by acquiring financial institutions that do not meet one of the two prongs of the "bank" test.\(^7\) These new financial hybrids, which often offer most other types of banking services, have become known as "nonbank banks."\(^8\) The Board of Governors of the Federal Reserve System ("Board"), which enforces the BHCA,\(^9\) and many members of Congress consider the BHCA "bank" definition to be a loophole that allows companies owning nonbank banks to evade the Act's purposes.\(^10\)

Parent companies see several advantages to owning nonbank banks. First, nonbank bank parent companies may avoid the restrictions on activities that otherwise would be imposed on them under the BHCA.\(^11\) Bank holding companies may not engage in nonbank activities, either directly or by controlling nonbank subsidiaries,\(^12\) unless the Board has determined that an activity is "so closely related to banking ... as to be a proper incident thereto."\(^13\) For example, Sears Roebuck and Company, J.C. Penney, and Gulf and Western have maintained their commercial businesses while entering the financial services industry by acquiring nonbank banks.\(^14\)

Second, by escaping BHCA regulation, parent companies of nonbank banks are able to provide a full array of financial services under one roof, including consumer loans, insurance, demand deposits, savings accounts, investment services, and real estate brokerage services.\(^15\) Tradi-
tional bank holding companies may not engage in such diverse activities without violating the Glass-Steagall Act\(^\text{16}\) or the BHCA.\(^\text{17}\)

Third, nonbank bank parent companies may use their subsidiaries as an inexpensive source of commercial credit. Financial institutions generally pay lower returns on consumer deposits, which are federally insured, than commercial firms pay on loans, bonds, or commercial paper.\(^\text{18}\) Nonbank bank subsidiaries may pass these savings on to their nonfinancial parent companies by loaning them funds at below-market rates.\(^\text{19}\)

Fourth, nonbank banks, like traditional banks, may insure deposits up to $100,000 per depositor through the Federal Deposit Insurance Corporation ("FDIC").\(^\text{20}\) This privilege gives nonbank banks a key competitive advantage over uninsured financial institutions, because depositors often prefer placing their money in federally insured accounts over uninsured or privately insured accounts. Although both nonbank banks and traditional banks may insure their deposits through the FDIC, nonbank banks have a competitive advantage over traditional banks as well, because they are able to offer this important source of financial security to depositors in addition to the other services not offered by traditional banks, such as selling insurance or interstate banking.

Fifth, nonbank banks are not subject to federal anti-tying laws.\(^\text{21}\) These laws forbid traditional banks from making the extension of credit to customers conditional on the customer's purchase of some additional service or credit from the bank or bank holding company.

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\(^{16}\) The Glass-Steagall Act (also known as the Banking Act of 1933) authorizes national banking associations, see infra note 24, to engage only in activities that are incidental and necessary to the "business of banking." 12 U.S.C. § 24 (1982). The Glass-Steagall Act also prohibits, with certain exceptions, national banking associations from affiliating with organizations dealing in securities and prohibits securities dealers from engaging in the business of banking. \textit{Id.} §§ 377-378.


\(^{19}\) However, if a nonbank bank is a member of the Federal Reserve System, it faces restrictions on transactions with its affiliates and shareholders. See 12 U.S.C. §§ 371b-371c (1982).

\(^{20}\) \textit{Id.} § 1821(a). An FDIC-insured institution need not meet the "bank" test under the BHCA, \textit{id.} § 1841(c); rather, it must be either a national banking association under the National Bank Act, \textit{id.} § 21, or a state-chartered institution "engaged in the business of receiving deposits" under applicable state law. See \textit{id.} § 1813(a); see also Brief for the Petitioner at 1a-7a, Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 106 S. Ct. 681 (1986) (listing FDIC-insured nonbank banks as of April 12, 1985).

Sixth, parent companies may establish out-of-state nonbank bank subsidiaries. The BHCA forbids bank holding companies from establishing bank subsidiaries across state lines without state authorization under the Douglas Amendment.²² Because of the competitive advantages of interstate banking, large nonbank bank parent companies are eager to expand their financial services networks across state lines by acquiring limited-service banks.²³

Seventh, parent companies may use nonbank banks to charge interest on outstanding credit card balances at rates that are higher than permissible under their home state usury laws. Nonbank banks are often nationally chartered banking associations under the National Bank Act²⁴ and thus have “most favored lender” status.²⁵ This status allows nationally chartered nonbank banks to charge interest at the maximum rate allowed by state law to any competing state-chartered lending institution.²⁶ Thus, when a parent company owns a nonbank bank in another state with more permissive usury laws, the parent company may charge higher interest rates on its outstanding credit card balances by issuing the credit cards through its out-of-state nonbank bank subsidiary.

Because of these competitive advantages, the nonbank bank loophole recently led to a proliferation of applications to the United States Comptroller of the Currency for national bank charters,²⁷ which have been challenged by private banking associations.²⁸ In 1984, the Board

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²². Id. § 1842(d); see infra notes 38-44 and accompanying text.
²⁴. 12 U.S.C. §§ 21-216d (1982 & Supp. III 1985). A “banking association” under the National Bank Act need not be a “bank” under the BHCA; rather, it must only “carry on the business of banking.” Id. § 21. The Eighth Circuit has stated that the “business of banking” consists of “accepting deposits, cashing checks, discounting commercial paper, and making loans of money.” Melton v. Unterreiner, 575 F.2d 204, 207 n.4 (8th Cir. 1978). Although national banking associations have the power to make commercial loans and accept demand deposits, some associations have become “nonbank banks” simply by not engaging in one or both activities. See supra note 7 and accompanying text.
²⁸. An issue related to the nonbank bank controversy, but not discussed here, is whether the Comptroller of the Currency has the authority to issue national bank charters to nonbank banks even if they arguably defeat the purposes of the BHCA. In a series of cases instituted by the Independent Bankers Association of America and others, the plaintiffs attempted to enjoin the Comptroller from issuing any charters to nonbank banks. See Independent Bankers Ass’n of Am. v. Conover, 603 F. Supp. 948, 958 (D.D.C. 1985) (plaintiffs’ motion to enjoin the Comptroller from granting national bank charters to nonbank banks denied for failure to raise a substantial issue of whether the nonbank banks were actually “banks” under the BHCA and thus capable of violating the Act); Deerbrook State Bank v. Conover, 568 F. Supp. 696, 699 (N.D. Ill. 1983) (preliminary injunction denied because the Comptroller had not threatened to
attempted to tighten the loophole and slow the spread of nonbank banks by broadening the BHCA "bank" definition through Board orders, opinions, and new regulations that liberally interpreted the "demand deposit" and "commercial loan" prongs of the BHCA definition.29 Thus under the Board regulation, more nonbank banks qualified under the "bank" definition and were subject to Board supervision.

Until 1986, federal appellate courts diverged over the proper interpretation of the BHCA "bank" definition and over the extent of the Board's authority to prevent evasions of the congressional purposes underlying the BHCA. The Third30 and Eleventh31 Circuits held that the Board has the power to broaden the literal definition of "bank" under the BHCA to prevent the spread of nonbank banks. The Tenth Circuit,32 in contrast, held that the BHCA should be read narrowly to limit the Board's authority to prevent evasions of the Act's purposes. The Tenth Circuit also considered congressional purposes to be narrower than did the Third or Eleventh Circuits.

In January 1986, the United States Supreme Court ended the conflict among the circuits with its decision in Board of Governors of the Federal Reserve System v. Dimension Financial Corp.33 In Dimension, the Supreme Court affirmed the Tenth Circuit's holding that the Board's power under the BHCA should be read narrowly and that the "bank" issue any charters and substantial BHCA issues remained outstanding). In a related action, the United States District Court for the Middle District of Florida enjoined the Comptroller from issuing final charters to nonbank banks on the ground that a nonbank bank is not engaged in the "business of banking" under the National Bank Act. See Independent Bankers Ass'n of Am. v. Conover, [1985 Current Binder] Fed. Banking L. Rep. (CCH) ¶ 86,178 (M.D. Fla. Feb. 15, 1985). To date, this injunction is still in effect.


32. First Bancorporation v. Board of Governors of the Fed. Reserve Sys., 728 F.2d 434, 438 (10th Cir. 1984); see Oklahoma Bankers Ass'n v. Federal Reserve Bd., 766 F.2d 1446 (10th Cir. 1985); Dimension Fin. Corp. v. Board of Governors of the Fed. Reserve Sys., 744 F.2d 1403 (10th Cir. 1984), aff'd, 106 S. Ct. 681 (1986); infra notes 107-22 and accompanying text.

definition must be read literally to determine which institutions fall within the Act. The decision is unsatisfactory, however, because the Court misread the legislative history of the "bank" definition and thus preserved a loophole that the Board was entitled to close. Even if the Court had supported the Board’s interpretation of the "bank" definition, many nonbank banks would have continued to escape BHCA regulation, but the decision further frustrates the congressional purposes in enacting the BHCA of preventing the mix of commerce and banking and of preventing interstate banking without state authorization.

Although the Supreme Court’s decision in Dimension struck down the Board’s interpretation of the BHCA “bank” definition, it did not end the uncertainty of the definition. Given this uncertainty and the ease with which the Act can be evaded, Congress must redefine “bank” under the BHCA to include all types of institutions that could threaten the Act’s purposes. This Note proposes to redefine “bank” as any institution that accepts deposits insured by the Federal Deposit Insurance Corporation. This redefinition would end the current transaction-based loophole.

Section One of this Note discusses the legislative history of the BHCA. The Note will show that, as originally proposed in 1956, Congress intended the BHCA only to separate commerce and banking, but that as amended the Act was also intended to bar interstate banking. Section One also discusses the legislative history of the “bank” definition. Section Two discusses prior Board interpretations of the “bank” definition under the BHCA. The Board originally interpreted the “bank” definition literally, but as more institutions evaded BHCA regulation, the Board defined “bank” more liberally. Section Three discusses court of appeals decisions prior to Dimension that interpreted first, the BHCA bank definition in light of congressional purposes, and second, the Board’s power to interpret the Act. A split of authority existed on both issues; the Tenth Circuit generally construed the bank definition and the Board’s authority narrowly, and the Third and Eleventh Circuits interpreted these issues broadly. Section Four discusses the Supreme Court’s holding in Dimension, which narrowed both the bank definition and the scope of the Board’s power. Section Four shows that Dimension did not resolve the judicial confusion over the “bank” definition and the Board’s power under the BHCA. Section Four also discusses the likely consequences of the Court’s decision in Dimension and the flaws in the present regulatory system.

Section Five proposes that Congress resolve the nonbank bank problem by defining “bank” as any institution that accepts deposits insured by the Federal Deposit Insurance Corporation. This reform would level the playing field of competition among all commercial banks. This amendment is necessary before Congress further allows banks to enter

34. Id. at 685-88.
new product and geographic markets by expanding the powers of bank holding companies. By amending the definition, Congress may improve service to consumers while retaining a sound and competitively fair banking system.

I. Legislative History of the BHCA

A. Competitive Purposes of the BHCA

In 1956, Congress saw several inadequacies in federal banking laws. Federal regulation reached only a limited number of bank holding companies and expansion by such companies was entirely unregulated. There was also no limitation on the acquisition of nonbanking subsidiaries.35

Congress therefore passed the BHCA with two central competitive purposes. First, the Act was designed to prevent bank holding companies from having the unrestrained ability to add to the number of their banking units and thus to avoid the concentration of commercial bank facilities under the control and management of a few companies. Second, the Act was intended to prevent the combination of banking and commercial activities under single control.36

By fulfilling these two purposes, Congress intended to prevent four types of anticompetitive abuses that might have occurred before the Act. First, banks could make unsound lending decisions and could give unwarranted amounts of credit to nonbank affiliates. Second, banks could make discriminatory lending decisions against competitors of their nonbanking affiliates. Third, banks could require borrowers to purchase nonbanking goods and services from their affiliates to obtain credit, thus increasing their economic power. Fourth, banks could use confidential information obtained from customers to enable their nonbanking affiliates to compete unfairly with these customers.37

B. Interstate Banking Purposes

Senator Douglas of Illinois added a provision to the bill that proscribed interstate acquisitions of banks by bank holding companies unless authorized by the state of the acquired bank.38 This provision became

35. Prior to the enactment of the BHCA, a few holding companies were regulated under the Banking Act of 1933. However, the Banking Act applied only if (1) a bank subsidiary of a bank holding company was a member of the Federal Reserve System, and (2) the bank holding company voted the bank’s stock. See 102 CONG. REC. 6,750 (1956) (statement of Sen. Robertson).
known as the "Douglas Amendment." Senator Douglas argued that this limitation on interstate banking was necessary to "prevent undue concentration and financial power." Instead, the amendment would diffuse private control of credit: "[W]hen the credit resources of a country become concentrated and fall into a few hands, then the industry and trade of that country also become concentrated." Senator Douglas considered his amendment to be "in principle almost identical with" and a "logical continuation" of the principles of the McFadden Act:

By the McFadden Act and other measures, national banks have been permitted to open branches only to the degree permitted by State laws and State authorities.

I may say that what our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely our amendment will permit out-of-state holding companies to acquire banks only to the degree that State laws expressly permit them; and that is the provision of the McFadden Act.

In addition, Senator Douglas intended to give the Federal Reserve Board final jurisdiction over both intrastate and interstate acquisitions of banks and bank holding companies. Thus, the Douglas Amendment incorporated a third purpose into the BHCA of protecting states' rights to prevent entry by out-of-state holding companies.

C. The "Bank" Definition

The term "bank" has been defined in three different ways since the BHCA's enactment in 1956. Originally, the BHCA defined "bank" as any national bank, state bank, savings bank, or trust company, but excluded foreign banks.

In 1963, the Board of Governors faced the issue of whether to interpret this definition to include industrial banks. At that time, "industrial banks" or "industrial loan companies" were state-chartered institutions that furnished consumer credit and, in some cases, accepted savings deposits. The Board concluded that an industrial bank clearly was not a national banking association, savings bank, or trust company, but could

41. Id.
42. Id. at 6,860.
43. Id. at 6,858. The McFadden Act is presently codified at 12 U.S.C. § 36 (1982). It defines a "branch" as any place of business "at which deposits are received, or checks paid, or money lent." Id. § 36(f).
be considered a "State bank" if the institution "engaged in commercial banking." The Board concluded that

industrial banks are not within the purview of the term "State bank" as used in the Act, unless in a particular case, regardless of the title of the institution or form of the transaction, it accepts deposits subject to check or otherwise accepts funds from the public that are, in actual practice, repaid on demand, as are demand or savings deposits held by commercial banks.

Thus, prior to 1966, the test of whether an industrial bank fell within the BHCA "bank" definition was whether the institution accepted either demand deposits or savings deposits that in actual practice were payable on demand. The Board restated this test in 1965.

Industrial bankers objected to this interpretation and, in 1966, lobbied for an amendment to the "bank" definition that would specifically exclude industrial loan companies. Lobbyists argued that such companies were not engaged in commercial banking because they were not eligible for FDIC insurance, did not accept "checking accounts," and generally had the right to require ninety days' notice prior to a depositor's withdrawal of funds from a savings account.

Upon request from the Senate Banking Committee, Federal Reserve Board Governor J.L. Robertson commented on this proposal to exclude industrial banks from the "bank" definition. Governor Robertson suggested that the definition "be amended to cover only 'an institution that receives deposits payable on demand,' thereby limiting coverage to commercial banks (i.e., banks that offer checking accounts), and excluding not only industrial banks but other savings banks that accept funds from the public that are paid on demand." Thus, the Board appears to have acquiesced in industrial bankers' requests that the Act exclude from its coverage institutions that accept savings deposits but not demand deposits.

The 1966 amendments to the BHCA defined "bank" as any institution which "accepts deposits that the depositor has a legal right to with-
draw on demand.” Senator A. Willis Robertson, chairman of the Senate Banking and Currency Committee, noted that “the [BHCA] was intended to apply to commercial banks of a sort which might have relationships with businesses and business firms which should be avoided.” The Senate Report accompanying the amendments stated that the Act’s purposes could be achieved without regulating savings banks or industrial banks because such banks were usually too small to threaten its purposes: “To avoid [regulating companies that control industrial and savings banks], the bill redefines ‘bank’ as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank...” Congress chose to define a checking account according to the depositor’s “legal right” to distinguish it from a savings account that, as a matter of practice, was payable on demand.

In 1970, Congress again revised the “bank” definition by making an exception for banks that did not make commercial loans. This redefinition was in part a reaction to another major amendment to the BHCA. Originally, the BHCA regulated only bank holding companies that controlled two or more banks. Congress amended the BHCA in 1970 to include holding companies that controlled only one bank subsidiary. This amendment was intended to close a “loophole” for one-bank holding companies.

Partly in response to this amendment, Senator Edward Brooke of Massachusetts proposed an exception to the “one-bank” amendment by changing the BHCA “bank” test: a bank “is engaged in the business of making commercial loans” and accepts demand deposits. This amendment apparently benefitted only one bank, Boston Safe and Trust Com-

54. S. REP. No. 1179, 89th Cong., 2d Sess. 7, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2385, 2391. It seems clear that Congress chose the “demand deposit” test because in 1966 commercial banks were the only financial institutions permitted by law to accept demand deposits. Thus, the BHCA “bank” definition excluded industrial and savings banks. See United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 326 n.5 (1963).
pany, a constituent of Senator Brooke's that would have become subject to the Act because of the 1970 one-bank amendment.\textsuperscript{58}

The "commercial loan" prong may also be seen as a promise fulfilled by William M. Martin, Jr., Chairman of the Federal Reserve Board. Congress had also considered amending the BHCA to include one-bank holding companies in 1966.\textsuperscript{59} The Boston Company, the holding company of Boston Safe and Trust, had lobbied to include "commercial banking" language in the 1966 "bank" definition to exclude Boston Safe from coverage under the BHCA, but ended its efforts after Congress declined to bring one-bank holding companies within the Act in 1966. In a letter to the Senate Banking Committee, Chairman Martin noted:

I am impressed by the argument that a bank that does not make commercial loans is not apt to be involved in the kind of abuses the Act is designed to prevent. . . . If in the future the Congress should be disposed to adopt the "one-bank" amendment, I would be happy to cooperate with you in working out provisions to ensure against coverage of such a bank.\textsuperscript{60}

The Senate Banking and Currency Committee Report explained the 1970 amendment to the "bank" definition as follows:

The definition of "bank" adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the Act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would exclude institutions that are not engaged in the business of making commercial loans from the definition of "bank."\textsuperscript{61}

Congress understood this amendment as having a very limited impact. In response to an inquiry regarding the new "bank" definition from the Senate Banking and Currency Committee, Board Governor J.L. Robertson replied:

[T]his amendment would have very limited application at present, possibly affecting only one institution. Since there is less need for concern about preferential treatment in extending credit where no commercial loans are involved and in view of the very limited application of this


\textsuperscript{59} 112 CONG. REC. 12,381 (1966) (statement of Sen. Robertson).

\textsuperscript{60} Id. at 12,386 (Letter from William M. Martin, Jr., Chairman of the Federal Reserve Board, to Senator A. Willis Robertson, Chairman of the Senate Committee on Banking and Currency).

amendment, the Board would have no objection to its adoption.62

Although the House bill did not include a new "bank" definition, the House conferees agreed to the change, cautioning that the Board should construe this exemption narrowly:

It will be seen that [the "commercial loan" exemption] . . . appl[ies] to a very small number of special cases that, it is felt, require special treat-
ment. The Board should interpret th[is] exemption[ ] as narrowly as possible in order that all bank holding companies which should be cov-
ered under the Act, in order to protect the public interest, will in fact be covered.63

The BHCA "bank" definition thus evolved from a comprehensive charter test, encompassing nearly all depository institutions, to a function-defined test intended to exempt certain institutions from regulation. In 1966, the "bank" test was based on whether an institution offered checking accounts. This test exempted industrial and savings banks, which then lacked the statutory authority to offer checking accounts, because Congress believed their small size and limited purposes made it unlikely that they would engage in the anticompetitive abuses that the BHCA was designed to prevent. In 1970, Congress exempted banks that did not make commercial loans. The record indicates that Congress also saw this amendment as a narrow exception for a very few banks that did not threaten the Act's original purposes. Neither change indicated a purpose to exclude a potentially large number of limited-purpose institutions or to alter the congressional intent to prevent the mix of commerce and banking and to allow states to prohibit interstate banking.

II. Federal Reserve Board Interpretations of the BHCA "Bank" Definition

Section 5(b) of the BHCA authorizes the Federal Reserve Board "to issue such regulations and orders as may be necessary to enable it to admini-
ster and carry out the purposes of [the BHCA] and prevent eva-
sions thereof."64 After the 1970 BHCA amendments, the Board defined "bank" under Regulation Y as having the same meaning as under the Act.65 To supplement this regulation, the Board issued opinions inter-

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62. One-Bank Holding Company Legislation of 1970; Hearings on S. 1052, et al., Before the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 136-37 (1970). In addition to following Governor Robertson's approval of the changes to the BHCA "bank" definition, Congress also followed his disapproval of a proposed amendment that would have exempted certain bank holding companies owning one bank as a part of a commercial conglomerate. See S. REP. 1084, supra note 61, at 34-39, 1970 U.S. CODE CONG. & ADMIN. NEWS at 5549-54.
65. Regulation Y implements the BHCA. 12 C.F.R. § 225.1(a) (1972). For the current version of Regulation Y, see id. § 225 (1986).
preting the "demand deposit" and "commercial loan" prongs of the "bank" test. Although the Board interpreted these prongs literally during the early 1970s, the Board has more recently construed its authority broadly when defining the "demand deposit" and "commercial loan" prongs of the BHCA "bank" definition.

A. Demand Deposits

For many years, the "demand deposit" test was self-explanatory because most banks offered only two types of accounts: checking accounts and savings accounts. Checking accounts did not pay interest, were payable to third parties by check, and gave the depositor the legal right to withdraw funds on demand. Savings accounts paid interest, were not payable to third parties by check, and reserved to the bank the right to require advance notice prior to withdrawal. The BHCA "demand deposit" test was obviously intended to apply to banks that offered checking accounts.

In 1972, however, Massachusetts and New Hampshire authorized their state-chartered savings banks to offer negotiable order of withdrawal ("NOW") accounts, which are essentially interest-bearing checking accounts. Although banks must reserve the right to require advance notice from NOW account holders prior to withdrawal as they do with savings accounts, depositors may make third-party payments by check. In many cases, holders of non-interest-bearing checking accounts have shifted to NOW accounts. In 1973, Congress responded to the NOW account phenomenon by enacting legislation that effectively prohibited institutions outside of Massachusetts and New Hampshire from offering NOW accounts. In 1980, however, Congress authorized banks in every state to offer NOW accounts.

68. Id. § 371b.
69. G. KAUFMAN, supra note 13, at 422.
Thus, in 1982, the Board faced the issue of whether to classify NOW accounts as “deposits that the depositor has a legal right to withdraw on demand” under the BHCA “bank” test. The Board held that, although NOW account holders do not possess a “legal right” to withdraw funds on demand, NOW accounts should be considered demand deposits under the bank test because Congress was concerned with the “substance rather than the form of the deposit.” In 1984, the Board codified this ruling when it revised Regulation Y. Under the revised regulation, “deposits that the depositor has a legal right to withdraw on demand” meant “any deposit with transactional capability that as a matter of practice is payable on demand and that the depositor may withdraw by check, draft, negotiable order of withdrawal, or other similar instrument for payment to third parties.”

This extension of the “demand deposit” prong of the BHCA “bank” definition was significant because it represented an attempt by the Board to equate the BHCA bank test with banks’ new powers—powers banks did not have in 1966 when the definition was enacted. The new regulation expanded the Board’s jurisdiction by including any financial institution—other than a savings and loan—that made commercial loans and offered some type of transaction account, such as a NOW account. Thus, the Board attempted to prevent nonbank banks from using their newly acquired powers to evade BHCA regulation, a use of those powers that the Board viewed as an unintended result of congressional authorization of NOW accounts.

B. Commercial Loans

Of the two prongs of the “bank” test, the commercial loan prong has received greater scrutiny. Since 1970, the Board’s staff has issued numerous letters interpreting the phrase “engages in the business of making commercial loans.” Prior to 1980, these opinions generally held that short-term money market transactions, such as the purchase of com-

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77. See id. at 833-42 (Board justification for expanded demand deposit definition).
78. See, e.g., Dreyfus Decision, supra note 29, ¶ 86,609 (summarizing an unpublished letter from Michael A. Greenspan, Assistant Secretary, Federal Reserve Board, to Lee J. Aubrey, Vice President, Federal Reserve Bank of Boston (May 18, 1972), which advised that Boston Safe and Trust's short-term money market transactions did not constitute engaging in the "business of making commercial loans" under the BHCA "bank" test, and an unpublished letter from Baldwin B. Tuttle, Deputy General Counsel, Federal Reserve Board, to Michael A. Greenspan (January 26, 1976), which advised that money market transactions such as com-
mercial paper, the sale of federal funds, banker's acceptances and broker call loans were not "commercial loans" under the "bank" test. The Board distinguished these indirect money market transactions from traditional commercial loans because a direct commercial lender may exert more economic power over the borrower than an indirect lender, which acts as an investor in money market securities through an intermediary.

Later Board interpretations changed this position. In a letter to Chrysler Corporation regarding a Chrysler nonbank bank subsidiary, the Board warned that the institution could become a "bank" under the BHCA if, in addition to accepting demand deposits, it invested in commercial paper and banker's acceptances, because those instruments "could substitute for commercial loans." In a December 1982 Board ruling disapproving the purchase of a nonbank bank by Dreyfus Corporation, the Board stated that "commercial loan" under the BHCA "bank" test included such money market transactions as the purchase of commercial paper, banker's acceptances and certificates of deposit, the extension of broker call loans, the sale of federal funds, the deposit of interest-bearing funds, and "similar lending vehicles." The FDIC and

79. In this context, commercial paper is an unsecured promissory note of a large, nationally known corporation, with an initial maturity of less than 270 days and in a minimum denomination of $25,000. Firms sell commercial paper either directly or through dealers as a substitute for short-term bank loans. This mode of borrowing is advantageous to commercial firms because they may avoid the minimum compensating deposit balance required by banks on most traditional commercial loans agreements, and thus pay a lower effective interest rate on their debt. G. KAUFMAN, supra note 13, at 60.

80. "Federal funds" are reserve balances that depository institutions, primarily commercial banks, have on deposit at the Federal Reserve Bank in their district. If a bank has reserves over the legally required minimum, it may lend the excess amount overnight to other institutions that have deficient legal reserves so that they may comply with the minimum requirement. Lending this excess amount is referred to as "selling" federal funds. Id. at 59-60.

81. Banker's acceptances are short-term credit instruments used by firms engaged in international trade. A banker's acceptance is a draft on a commercial bank, generally payable to the exporter of goods, based on funds that will be deposited at the bank by the corresponding importer within a certain time period. The draft is secured by the goods traded and guarantees the exporter payment for its goods. Id. at 60-61.

82. A call loan is a loan that the lender may require the borrower to repay at any time, usually on 24 hours' notice. BLACK'S LAW DICTIONARY 185 (5th ed. 1979).


85. See P. HELLER, supra note 57, at 10-11.


the Comptroller of the Currency criticized this ruling as "dramatically recast[ing] the definition of commercial loan by including within it cer-
tain activities that clearly had been excluded from the definition in the past. . . . [W]e believe such a radical departure from the traditional view
of what constitutes a commercial loan raises issues beyond the scope of regulatory interpretation." 88 Nevertheless, on January 5, 1984, the Board
codified its Dreyfus ruling in a broad definition of commercial loans in its
revisions to Regulation Y. 89

The new commercial loan definition, like the new demand deposit
definition, was an attempt by the Board to expand its jurisdiction over
nonbank banks which previously had avoided BHCA regulation. Unlike
the new demand deposit test, however, this new definition of commercial
loans could not be justified by pointing to the expanded powers of banks.
In 1984, banks enjoyed many of the same commercial lending powers
they had enjoyed in 1970, when the commercial loan prong was added to
the "bank" test. Thus, this redefinition altered the traditional notion of
commercial loans simply to expand the Board's jurisdiction over "loop-
hole" banks.

III. Court Decisions Under the BHCA

The controversy over Board orders and regulations concerning non-
bank banks extended into federal appellate courts. Private parties on
both sides of the nonbank bank debate challenged Board actions. Prior
to Board of Governors of the Federal Reserve System v. Dimension Finan-
cial Corp., 90 federal courts disagreed about the proper interpretation of
the BHCA "bank" definition in light of the Act's legislative history and
congressional purposes, and they also disagreed about the scope of the
Board's authority to enforce provisions of the BHCA. While the Tenth
Circuit narrowly interpreted the BHCA "bank" definition and the
Board's administrative power to enforce the Act's purposes, the Third
and Eleventh Circuits generally interpreted the "bank" definition
broadly and gave substantial deference to the Board's actions under the
Act. In Dimension, the Supreme Court ended the split among the cir-
cuits when it held that the "bank" definition should be read literally and,

88. Dreyfus Decision, supra note 29, ¶ 86,608 n.1.
89. 12 C.F.R. § 225 (1986). Section 225.2(b) stated:
"[C]ommercial loans" means any loan other than a loan to an individual for per-
sonal, family, household, or charitable purposes, and includes the purchase of retail
installment loans or commercial paper, certificates of deposit, banker's acceptances,
and similar money market instruments, the extension of broker call loans, the sale of
federal funds, and the deposit of interest-bearing funds.
Id. § 225.2(b). The Tenth Circuit set aside this new regulation in Dimension Fin. Corp. v.
Board of Governors of the Fed. Reserve Sys., 744 F.2d 1203 (10th Cir. 1984), aff'd, 106 S. Ct.
681 (1986); see infra notes 118-22 and accompanying text.
90. 106 S. Ct. 681 (1986); see infra notes 123-39 and accompanying text.
contrary to its earlier decisions, held that the Board has limited power to interpret this definition.

A. The Third and Eleventh Circuits' Broad Construction of the BHCA

Prior to the Supreme Court's ruling in *Dimension*, the Third and Eleventh Circuits had read the BHCA "bank" definition broadly to bring nonbank banks within the Act. In *Wilshire Oil Co. v. Board of Governors of the Federal Reserve System*, the Board ruled that Wilshire violated the BHCA by engaging in impermissible nonbanking activities—the production and refinement of oil and gas. It ordered the Texas bank holding company either to divest itself of its oil and gas operations or to divest itself of its New Jersey banking subsidiary, Trust Company of New Jersey ("TCNJ").

Wilshire attempted to place itself outside the Board's jurisdiction by converting TCNJ into a nonbank bank. TCNJ notified its demand depositors that it was reserving the right to require fourteen days' notice prior to withdrawal, but indicated that it never intended to exercise this right. Wilshire argued that because TCNJ's depositors no longer held a "legal right to withdraw on demand," TCNJ was no longer a "bank" for BHCA purposes. The Board rejected this argument and ordered divestment.

On appeal, the Third Circuit affirmed the Board's order and held that the Board should look to the purposes of the BHCA rather than to its literal terms when literalism would lead to "absurd or futile results," or merely an unreasonable result "plainly at variance with the policy of legislation as a whole." The Third Circuit held that the "demand deposit" test was satisfied by the depositor's ability in practice to withdraw on demand rather than the depositor's legal right to withdraw on demand. The court also held that the Board has broad regulatory power under section 5(b) of the BHCA to prevent evasions of the Act. The Supreme Court subsequently denied certiorari.

Prior to *Dimension*, the Eleventh Circuit interpreted the BHCA

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92. Id. at 773; see 12 U.S.C. §§ 1842(d), 1843(a) (1982).
93. *Wilshire*, 668 F.2d at 734.
94. Id. at 736 (quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940)).
95. Id. at 737.
96. Id. at 736 ("the construction of a statute by those charged with its administration is entitled to substantial deference" (citing United States v. Rutherford, 442 U.S. 544, 553 (1979))); id. at 738 n.13 ("Congress enacted § 5(b) [12 U.S.C. § 1844(b) (1982), which gives the Board the power to issue regulations and orders to prevent evasions of the Act] as a catch-all, to cover any other evasions attempted through activity conforming to the letter, but not the spirit, of the statute.").
"bank" definition even more liberally than the Third Circuit. Many considered Florida Department of Banking and Finance v. Board of Governors of the Federal Reserve System to be a landmark case foreclosing the possibility of future nonbank banks. U.S. Trust, a New York bank holding company, applied for Board approval under section 4(c)(8) of the Act to expand the activities of its nonbanking subsidiary in Florida. The proposed expansion would include the acceptance of demand deposits and the making of commercial loans. The Board approved the expansion subject to the conditions that the subsidiary would neither make commercial loans nor engage in commercial transactions with any U.S. Trust affiliate.

The Florida Department of Banking and the Florida Bankers Association appealed this decision to the Eleventh Circuit. The court reversed the Board's order, holding that Board approval of the acquisition of a nonbank bank by an out-of-state bank holding company violated the spirit of the BHCA. The court recognized Congress' two original pro-competitive purposes in enacting the BHCA: (1) to prevent the concentration of control over banking facilities; and (2) to prevent the combination under single control of banking and commercial enterprises, which would permit bank holding companies to use bank deposits to finance unrelated nonbanking activities. The court also recognized Senator Douglas' purpose of "prohibit[ing] the creation of interstate deposit-taking networks by bank holding companies without specific state authorization."

Although the U.S. Trust subsidiary did not meet the "commercial loan" prong of the BHCA "bank" test, the court held that it was nonetheless a "bank" for BHCA purposes with respect to the Douglas Amendment. The court refused to "employ literalism in statutory interpretation," reasoning that the "commercial loan" prong was nothing more than a "technical amendment of a definition of a bank" designed to exempt one institution—Boston Safe and Trust Co. To interpret the "bank" definition literally would be "a total emasculation of the long held policy giving states control over bank expansion."

The court also held that the Board has broad power under the BHCA to prevent evasions of the Act's purposes. The Eleventh Circuit concluded: "The Board is Congress' custodian of the Act. In that capac-

101. Florida Dep't of Banking, 760 F.2d at 1137-38.
102. Id. at 1141.
103. Id. at 1142; see supra notes 38-44 and accompanying text.
104. Florida Dep't of Banking, 760 F.2d at 1141.
ity, it is charged with insuring compliance with Congress' goals even when Congress muddies the waters.”

The Florida Department of Banking holding was especially remarkable because the court held that the Board had such power under the Act that it could ignore statutory language if the language appeared to be in conflict with the purposes of the Act as a whole. The court held that, for the purposes of the Douglas Amendment, the Board should have used this power to consider a deposit-taking institution to be a “bank” under the Act even if it did not make commercial loans.

Thus, prior to Dimension, the Third and Eleventh Circuits generally did not read the BHCA “bank” definition literally when doing so would defeat the purposes of the Act: preventing the mix of commerce and banking and maintaining state control over interstate banking. Instead, the courts held that if an institution was not technically a “bank” under the BHCA, the Board should use its broad administrative authority to subject the institution to BHCA regulation.

B. The Tenth Circuit’s Narrow Construction of the BHCA

Unlike the Third and Eleventh Circuits, the Tenth Circuit had read the BHCA “bank” definition literally in determining which institutions fall under the Act’s coverage. In First Bancorporation v. Board of Governors of the Federal Reserve System, First Bancorporation, a Utah bank holding company, applied for Board approval under section 4(c)(8) of the BHCA for the acquisition of Beehive Financial Corp., an industrial loan company that accepted NOW accounts and made commercial loans. The Board approved First Bancorporation’s acquisition of Beehive, but prohibited the loan company from making commercial loans and offering NOW accounts. The Board stated that allowing Beehive to engage in both activities would qualify it as a “bank” under the BHCA, thereby making it an improper nonbanking subsidiary under section 4(c)(8). At the same time, the Board sought to apply the same restrictions to Foothill Thrift & Loan, another First Bancorporation industrial loan company subsidiary. First Bancorporation protested, arguing that NOW accounts were not “deposits that the depositor has a legal right to withdraw on demand,” because Utah law required insu-

105. Id. at 1143-44.
106. Id.
107. 728 F.2d 434 (10th Cir. 1984).
109. Traditionally, industrial loan companies, or industrial banks, were small, uninsured state-chartered institutions that made small to medium-sized installment loans to households. In recent years, however, states have expanded the powers of industrial banks to allow them to insure their deposits through the FDIC and to make commercial loans. See Oklahoma Bankers Ass’n v. Federal Reserve Bd., 766 F.2d 1446, 1448-49 (10th Cir. 1985); G. KAUFMAN, supra note 13, at 205-06.
trial loan companies to reserve the right to require advance notice prior to withdrawal from NOW accounts.\textsuperscript{110}

The Tenth Circuit agreed with First Bancorporation, holding that the legislative history of the BHCA precluded categorizing NOW accounts as "demand deposits." The court noted that in 1966, when Congress amended the "bank" definition, it rejected the Board's suggestion that the definition include any institution that accepts deposits that, as a matter of practice, are payable on demand; instead, Congress chose to use "legal right" language. Thus, the court reasoned, Congress clearly intended to exclude all accounts that the depositor does not possess a legal right to withdraw on demand, including NOW accounts.\textsuperscript{111}

The court also distinguished the NOW accounts offered by Beehive and Foothill from the transaction accounts offered by TCNJ in \textit{Wilshire}. In \textit{Wilshire}, the banking subsidiary's legal right to require advance notice prior to withdrawal was created by contract to evade coverage under the Act, while Beehive's and Foothill's legal rights to require advance notice were required by Utah law. Thus, Beehive and Foothill accounts could not be viewed as attempts to evade the Act.\textsuperscript{112}

The court also held that the Board had narrow authority to interpret the "bank" definition. The court held that in determining that NOW accounts constituted demand deposits within the meaning of the bank definition, "the Board abused its discretion by improperly attempting to propose legislative policy by an adjudicative order."\textsuperscript{113}

A subsequent Tenth Circuit case dealing with the "demand deposit" prong of the BHCA bank definition blurred this distinction between the source of the withdrawal restriction—contract versus statute—and added confusion to the proper interpretation of the demand deposit prong. In \textit{Oklahoma Bankers Association v. Federal Reserve Board},\textsuperscript{114} the Bankers Association protested the Board's approval of Citicorp's acquisition of an Oklahoma consumer finance company. The company proposed to make commercial loans and accept time deposits that were not payable by check to third parties. An agreement with the depositors reserved to the company the right to require advance notice prior to withdrawal from the time deposit accounts.\textsuperscript{115}

The Bankers Association argued that by performing these activities, the company would qualify as a "bank" under the BHCA and thus Citicorp (a New York bank holding company) would be barred from acquiring the Oklahoma institution by the Douglas Amendment. The Board,

\textsuperscript{110} First Bancorporation, 728 F.2d at 435-36.
\textsuperscript{111} Id. at 436-37; see supra notes 46-54 and accompanying text.
\textsuperscript{112} First Bancorporation, 728 F.2d at 436.
\textsuperscript{113} Id. at 438.
\textsuperscript{114} 766 F.2d 1446 (10th Cir. 1985).
\textsuperscript{115} Id. at 1449.
however, approved the acquisition because the time deposits did not function as "demand deposits," that is, they were not payable to third parties on demand.\textsuperscript{116}

The Tenth Circuit could have simply affirmed the Board's reasoning that a time deposit account did not function as a checking account and thus did not meet the demand deposit prong of the "bank" definition. Instead, however, the court chose to focus on the depositor's "legal right" to make withdrawals on demand. Noting that the "source of the withdrawal restriction" in this case differed from that in First Bancorporation, the court held that "[t]his difference, state regulation versus private contractual agreement, does not change the depositors' basic legal status." The court then concluded that the institution's actual banking practice is irrelevant in determining whether the account is a "demand deposit" under the BHCA "bank" test; rather, only the depositor's "legal right" is determinative. Nevertheless, the court qualified its holding by adding: "Should a subsidiary classified as a nonbank under the Act alter its deposit-taking practice so as to violate the Act the Board may order that institution to cease and desist from such practices."\textsuperscript{117}

Just as the First Bancorporation court had destroyed the Board's new interpretation of "demand deposit," Dimension Financial Corp. v. Board of Governors of the Federal Reserve System\textsuperscript{118} dispensed with the Board's broad definition of "commercial loan." Dimension Financial Corporation and others petitioned the Tenth Circuit to review the new definition of the commercial loan and demand deposit elements of the BHCA "bank" definition under Regulation Y. After stating that it endorsed the district court's rejection of the new demand deposit definition in First Bancorporation, the Tenth Circuit considered the new commercial loan definition.\textsuperscript{119} The court concluded that the Board's new definition did not resemble the commonly accepted meaning of the term either in 1970 or at the present; the court accordingly set the Board's definition aside.\textsuperscript{120}

The court maintained that Congress intended to permit the development of nonbank banks, and thus the operation of such banks could not be considered "evasions" of the Act that the Board has authority to prevent under section 5(b).\textsuperscript{121} The court also held that the Board has narrow authority to interpret the "bank" definition: "The authority of the Board under the Act is to be exercised in a restricted area. It does not have the broad scope to work in as do many other agencies. . . . Instead the BHCA limits the subject matter of the Board's functions basically to

\begin{footnotes}
\item[116] \textit{Id.; see supra} notes 52-54 and accompanying text.
\item[117] \textit{Oklahoma Bankers}, 766 F.2d at 1449-50.
\item[118] 744 F.2d 1402 (10th Cir. 1984), \textit{aff'd}, 106 S. Ct. 681 (1986).
\item[119] \textit{Id.} at 1404.
\item[120] \textit{Id.} at 1405, 1411.
\item[121] \textit{Id.} at 1407-08; \textit{see} 12 U.S.C. § 1844(b) (1982).
\end{footnotes}
anticompetitive considerations."\textsuperscript{122}

In sum, prior to the Supreme Court's decision in *Dimension*, federal circuit courts had taken two conflicting positions regarding the BHCA "bank" definition and the scope of the Board's authority to interpret the Act. The Tenth Circuit construed the "bank" definition literally, allowing nonbank banks to exist outside the Board's jurisdiction under the BHCA. The Tenth Circuit also held that the Board has narrow authority to interpret the "bank" definition to regulate nonbank banks regardless of whether regulation would advance the Act's purposes. The Third and Eleventh Circuits held that the "bank" definition should not be read literally in the light of Congress's original purposes under the BHCA, and that the Board has broad authority to prevent evasions of the Act.

IV. Analysis and Consequences of *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*

A. The Supreme Court's Ruling in *Dimension*

The Supreme Court ended the split among the federal courts of appeals over the proper interpretation of the BHCA "bank" definition in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*\textsuperscript{123} The Court affirmed the Tenth Circuit's holding that the "bank" definition must be read narrowly in the light of the Act's purposes. The Court also held that the Board's power to interpret the "bank" definition is limited by the literal language of the BHCA.\textsuperscript{124} One week later, the Supreme Court vacated *Florida Department of Banking and Finance v. Board of Governors of the Federal Reserve System*\textsuperscript{125} and remanded the case to the Eleventh Circuit for review in the light of the Supreme Court's decision in *Dimension*.

(I) "Bank" Definition

After briefly reviewing the Tenth Circuit's decision, the Supreme Court analyzed the legislative history of the BHCA. The Court stated that Congress amended the "bank" definition in 1966 because "[e]xperience soon proved that literal application of the statute had the unintended consequence of including within regulation industrial banks offering limited checking account services to their customers [that were] . . . 'in actual practice, repaid on demand.'"\textsuperscript{126} The Court stated that the

\textsuperscript{122} *Dimension*, 744 F.2d at 1408.
\textsuperscript{123} 106 S. Ct. 681 (1986).
\textsuperscript{124} Id. at 684.
\textsuperscript{125} 760 F.2d 1135 (11th Cir. 1985), vacated sub nom. U.S. Trust Corp. v. Board of Governors of the Fed. Reserve Sys., 106 S. Ct. 875 (1986); see *supra* notes 98-106 and accompanying text.
\textsuperscript{126} *Dimension*, 106 S. Ct. at 684 (quoting letter from J.L. Robertson, Governor, Fed.
Board at that time saw no policy reason to regulate industrial banks under the BHCA. Congress agreed and accordingly amended the “bank” definition to limit the Act’s application to institutions that accept “deposits that the depositor has a legal right to withdraw on demand.” The Court then stated that Congress again amended the “bank” definition in 1970 because the 1966 “bank” definition “included . . . institutions that did not pose significant dangers to the banking system. Because one of the primary purposes of the Act was to ‘restrain undue concentration of . . . commercial credit,’ it made little sense to regulate institutions that did not, in fact, engage in the business of making commercial loans.”

Next, the Court acknowledged that the Board found that nonbank banks pose three dangers to the banking system. First, nonbank banks have a significant competitive advantage over regulated banks despite the functional equivalence of the services offered. Second, nonbank banks threaten the regulatory structure limiting the mix of commerce and banking. Third, nonbank banks undermine the federal proscription on interstate banking under the Douglas Amendment and the McFadden Act.

The Court then analyzed the two elements of the “bank” definition. The Court first struck down the Board’s interpretation of the “demand deposit” prong under the “bank” definition. Although it acknowledged that NOW accounts function similarly to traditional checking accounts, the Court did not look beyond the language of the Act. Because NOW account holders do not possess a “legal right” to withdraw funds on demand, the Court ruled that the Board could not bring NOW accounts within the demand deposit prong of the “bank” definition. Arguing that it “must give effect to the unambiguously expressed intent of Congress,” the Court stated that

no amount of agency expertise—however sound may be the result—can make the words “legal right” mean a right to do something “as a matter of practice.” A legal right to withdraw means just that: a right to withdraw deposits without prior notice or limitation. Institutions offering NOW accounts do not give the depositor a legal right to withdraw on demand.

The Court then turned to the Board’s “commercial loan” definition. The Court held that money market transactions, including commercial paper, do not fall within the commonly accepted definition of “commercial loan”—a “direct loan from a bank to a business customer for the

Reserve Bd., to A. Willis Robertson, Chairman, Senate Comm. on Banking and Currency, reprinted in 1966 Hearings, supra note 49, at 447).

127. Id. at 684-85 (citation omitted).
128. Id. at 685 (quoting S. REP. 1084, supra note 61, at 24).
129. Id. at 685.
130. Id. at 685-86 (emphasis in original).
purpose of providing funds needed by the customer in its business."131 The Court cited earlier Board orders and letters that excluded money market transactions from the commercial loan prong. As late as 1981, the Board specifically excluded federal funds and other money market instruments from the commercial loan prong, although the instruments were considered commercial loans for other regulatory purposes.132

The Court rejected the Board’s argument that the commercial loan prong was intended to benefit only Boston Safe and Trust Company or a few banks like it,133 for two reasons. First, the statute by its terms, as well as the Senate Report, exempts all institutions not engaged in commercial lending; neither the statute nor the Report refer to Boston Safe. Second, Boston Safe itself was engaging in money market transactions in 1970. Thus, even assuming that the amendment was intended to benefit only Boston Safe, Congress could not have intended the commercial loan prong to include money market transactions. Otherwise, Boston Safe would not have been exempted.134

(2) Board Power to Administer the BHCA

In addition to narrowing the BHCA “bank” definition, the Dimension holding appears to restrict the Board’s power to implement the Act. The Court held that the BHCA “vests broad regulatory authority in the Board over bank holding companies” to carry out the Act’s purposes, but that “[t]he breadth of that regulatory power rests on the Act’s definition of the word ‘bank.’”135 In determining the Board’s authority to interpret the “bank” definition, the Court concluded: “If the statute is clear and unambiguous ‘that is the end of the matter . . . .’”136

The Court also held that the Board lacked the power to regulate nonbank banks based on the “plain purpose” doctrine, which states that a court should go beyond literal statutory language if reliance on that language would defeat the statute’s plain purpose.137 The Court stated that the “plain purpose” of legislation is first determined by the plain language of the statute itself: “Congress defined with specificity certain transactions that constitute banking subject to regulation. The [BHCA] may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer.”138

131. Id.
132. Id. at 687; see supra notes 78-85 and accompanying text.
133. See supra notes 57-63 and accompanying text.
134. Dimension, 106 S. Ct. at 687-88.
135. Id. at 684.
137. Id. at 688-89; see Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983); United States v. American Trucking Ass'ns, 310 U.S. 534, 542-43 (1940).
The Court concluded by stating that bank regulatory reform must be accomplished by Congress, and not by the Board or the courts:
Without doubt there is much to be said for regulating financial institutions that are the functional equivalent of banks. . . . If the Bank Holding Company [Act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.139

B. Analysis of the Supreme Court's Decision in Dimension

In Dimension, the Supreme Court construed the BHCA “bank” definition literally. The Court reasoned that the clear language of the statute plainly embodied the congressional intent behind the Act and made judicial interpretation unnecessary. The Court correctly applied this rationale in rejecting the Board’s interpretation of the “commercial loan” prong, because the statute and its legislative history clearly show that Congress intended to exclude “money market” transactions from the Act. The Court’s literal interpretation of the “demand deposit” prong, in contrast, encourages the absurd result of allowing any bank to escape regulation under the Act simply by inserting a “prior notice” clause in all its checking account contracts. The Court’s decision also leaves open the question of the Board’s future authority to interpret the BHCA. Clearly, Dimension dealt the Board a severe blow in its efforts to regulate non-bank banks. However, the decision could have far greater effects.

(1) Demand Deposit

In Dimension, the Supreme Court concluded that the “demand deposit” prong of the “bank” test was not intended to include NOW accounts because NOW account holders do not possess a “legal right” to withdraw funds on demand, as required by the statute.140 The Court’s decision is flawed for two reasons. First, the Court misread the legislative history of the 1966 amendment to the “bank” definition and then incorrectly concluded that industrial banks, which were exempted from the Act, offered checking accounts. Second, the decision leads to absurd results. This decision defeats the Act’s purposes by exempting any institution that offers checking accounts that function identically to traditional checking accounts but that have meaningless “prior notice” clauses.

In addressing the legislative history of the 1966 “bank” definition, the Court noted that, prior to 1966, “industrial banks offer[ed] limited checking account services to their customers [that were] . . . ‘in actual practice, repaid on demand.’ ”141 In support of this assertion, the Court

139. Id. at 689.
140. Id. at 686.
141. Id. at 684 (quoting letter from J.L. Robertson, Governor, Fed. Reserve Bd., to A.
partially quoted a letter to the Senate Banking Committee from Governor J.L. Robertson of the Federal Reserve Board. The Court relied on this letter to conclude that Congress intended to exempt banks which offer checking accounts that are, in practice, repaid on demand, but do not give the depositor a legal right to withdraw funds on demand. Thus, the argument goes, Congress clearly did not intend NOW accounts to fall within the "demand deposit" definition.

The Supreme Court's analysis of the legislative history is erroneous for two reasons. First, Governor Robertson did not state that industrial banks offered "limited checking account services." Indeed, the letter states that the 1966 amendment was intended to limit coverage to "commercial banks (i.e. banks that offer checking accounts), and exclude not only industrial banks but other savings banks that accept funds from the public that are repaid on demand." Thus, Congress intended to regulate all institutions that offered checking accounts.

Second, industrial banks were not even empowered to offer checking accounts in 1966. A few industrial banks offered nontransaction savings accounts that, as a matter of practice, were payable on demand to the depositor, but were not subject to check. Thus, the legislative history clearly shows that the "legal right" language was used to distinguish checking accounts from savings accounts. Congress intended that banks offering checking accounts were to be subject to the Act.

The Supreme Court's misinterpretation of the "demand deposit" prong also leads to absurd results that defeat the plain purpose of the Act. Although the Court acknowledged that judicial interpretation should go beyond the literal language of a statute if literalism would lead to an "absurd result" or would defeat the "plain purpose" of the statute, the decision in Dimension prevents neither of these evils.

First, the decision leads to an absurd result. Under the Court's ruling, a bank may avoid BHCA regulation by offering only NOW accounts and not offering any traditional checking accounts that give the depositor a "legal right" to withdraw funds on demand. Alternatively, a bank may simply add a never-exercised "prior notice" clause to all its traditional checking account agreements. The result is absurd in either event. A bank may escape regulation under the BHCA without sacrificing any

Willis Robertson, Chairman, Senate Comm. on Banking and Currency); see supra note 51 and accompanying text.
143. See supra text accompanying notes 49-54.
144. See supra notes 46-50 and accompanying text.
146. It is unclear whether a bank may evade the demand deposit prong by inserting a prior notice clause in its checking account contracts, in defiance of the Third Circuit's earlier hold-
services that a BHCA-regulated bank may offer. The Court’s ruling allows the Act to be so easily evaded that it may eventually only regulate those institutions that would not benefit from avoiding its coverage.

Second, the decision defeats the plain purpose of the “demand deposit” prong: to regulate banks that offer checking accounts. The decision ignores the practical similarities between NOW accounts and traditional demand deposit accounts. Both types of accounts allow the holder to withdraw funds by means of a demand draft payable to third parties; both must meet the same reserve requirements. Further, the BHCA “demand deposit” test was enacted before any domestic bank offered NOW accounts. Although NOW account holders do not actually possess a “legal right” to withdraw funds on demand, many NOW account holders consider such accounts to be the functional equivalent of conventional demand deposits and have replaced their non-interest-bearing checking accounts with NOW accounts. Thus, by offering NOW accounts and making commercial loans, nonbank banks may be the functional equivalent of commercial banks, yet escape the BHCA regulation which conventional banks must face.

(2) Commercial Loans

The Supreme Court also struck down the Board’s broad interpretation of the “commercial loan” prong of the “bank” definition. The Court properly rejected the Board’s commercial loan interpretation because the Board defied both the legislative history of the prong and the purpose behind its enactment.

The BHCA’s legislative history clearly shows that Congress did not intend to include money market transactions within the “commercial loan” prong. First, had Congress wished to include extensions of credit other than traditional commercial loans within this prong, it probably would have included such transactions in the language of the statute, or at least indicated in its committee report that it intended to include all types of commercial credit within the definition. Because Congress gave no indication that it intended anything other than the traditional notion of commercial loans—that is, loans involving a direct lender-borrower

147. See supra notes 69-71 and accompanying text.
148. See supra notes 52 & 74 and accompanying text. The Court’s refusal to include NOW accounts in the earlier adopted “demand deposit” test contradicts the premise that courts should emphasize congressional objectives when overlapping legislation is enacted piecemeal, rather than emphasizing the individual steps themselves. See Otero Sav. & Loan Ass’n v. Federal Home Loan Bank Bd., 665 F.2d 279, 289-90 (10th Cir. 1981) (McKay, J., concurring).
149. See supra notes 70-71 and accompanying text.
150. Dimension, 106 S. Ct. at 688.
relationship—a court is safe to assume that the language may be interpreted literally. Moreover, prior to 1980 the Board itself interpreted this prong according to its ordinarily accepted meaning.

Second, even if the 1970 amendment resulted from the Boston Company's efforts to exempt its subsidiary, Boston Safe, from the BHCA, as the record suggests,¹⁵¹ the prong would still have to be interpreted to exclude money market transactions. In 1970, Boston Safe engaged in money market transactions but did not engage in traditional lending. Thus, if Senator Brooke introduced the amendment with the intent to exclude his constituent, Boston Safe, he clearly intended to exclude money market transactions from the "commercial loan" prong.

The Court also properly set aside the Board's interpretation of the "commercial loan" prong because the interpretation defied the policy behind the 1970 amendment. One of Congress' primary purposes in passing the BHCA was to prevent commercial banks from making unsound loans to commercial affiliates.¹⁵² The Board's sweeping "commercial loan" interpretation included many types of "money market" transactions, such as broker call loans, certificates of deposit, and commercial paper.¹⁵³ Such transactions are normally conducted through a secondary market and are merely passive investments for idle funds.¹⁵⁴ Because these transactions occur in the open market and are short-term in nature, they pose less of a risk that a bank would make an unsound decision jeopardizing the safety and soundness of the banking system. Further, "consumer banks" that only accept demand deposits, make noncommercial loans, and engage in passive secondary investments are less likely than traditional commercial banks to grow to a size that would create anticompetitive conditions. Thus, such institutions do not threaten the procompetitive purpose of the BHCA and should not be subject to BHCA regulation.

(3) Board Authority Under the BHCA

The Supreme Court's decision in *Dimension* substantially reduced the extent to which the Board may interpret the BHCA "bank" definition to carry out congressional intent. The Court held that the BHCA "vests broad regulatory authority in the Board over bank holding companies" to carry out the purposes of the Act, but that "[t]he breadth of that regulatory power rests on the Act's definition of the word 'bank.'"¹⁵⁵ Clearly this decision substantially restricts the scope of the Board's authority to interpret the "bank" definition. It is less clear, however,

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¹⁵¹. *See supra* notes 57-60 and accompanying text.

¹⁵². *See supra* note 37 and accompanying text.

¹⁵³. *See supra* note 87 and accompanying text.


whether this decision could restrict the Board's authority to interpret other sections of the Act.

Prior to Dimension, most federal courts held that the Federal Reserve Board has broad authority to interpret the BHCA. In Securities Industry Association v. Board of Governors of the Federal Reserve System \(^{156}\) and Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., \(^{157}\) the Supreme Court held that federal courts must defer to Board interpretations of the BHCA that arguably promote its congressional purposes, particularly when Congress has remained silent in the face of Board decisions.

In Securities Industry, the petitioners challenged a Board order allowing a bank holding company to sell retail securities, arguing that the Board did not have the authority under the BHCA to permit this activity. The case involved section 4(c)(8) of the Act, which states that a bank holding company may acquire the shares of a nonbank company the activities of which the Board has determined to be "closely related to banking."\(^{158}\) The Court affirmed the Board's order, holding that the Board has broad power under the Act to determine what activities are "closely related to banking."\(^{159}\) Noting that "Congress has committed to the Board the primary responsibility for administering the [BHCA]," the Court held that Board decisions are "'entitled to the greatest deference.'"\(^{160}\)

In First Lincolnwood, the petitioners protested a Board order that withheld approval to form a bank holding company because it was undercapitalized.\(^{161}\) The Supreme Court held that the Board's interpretations of the Act are "entitled to great respect, 'especially where Congress has refused to alter its administrative construction.'"\(^{162}\)

Given these prior decisions, Dimension may be interpreted in two ways regarding the extent of the Board's authority to interpret the Act. Because Securities Industry and First Lincolnwood involved sections of the Act that delegate policy-making authority to the Board, the decision in Dimension may only restrict the Board's interpretations of the "bank"

\(^{159}\) Securities Indus., 468 U.S. at 215.
\(^{160}\) Id. at 215-16 (quoting Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 56 (1981)).
\(^{161}\) First Lincolnwood, 439 U.S. at 241. Under § 3(c) of the Act, the Board may disapprove any proposed acquisition, merger, or consolidation of a bank or bank holding company if the transaction would result in a monopoly, lessen competition, or restrain trade. 12 U.S.C. § 1842(c) (1982). The Board may "take into consideration the financial and managerial resources and future prospects of the [bank holding] company or companies and the banks concerned, and the convenience and needs of the community to be served." Id.
\(^{162}\) First Lincolnwood, 439 U.S. at 248 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969)).
definition. The Board may still have broad authority to interpret other sections of the Act, particularly when Congress expressly delegates to the Board the authority to make policy, as it did under section 4(c)(8). Thus, *Dimension* would not narrow the earlier interpretations of the Board’s policy-making authority.

On the other hand, the Court’s decision may have more far-reaching consequences. *Dimension* represents the first case in recent years in which the Supreme Court questioned the Board’s expertise regarding a BHCA issue. In the future, the Court may grant less deference to all Board interpretations of the Act, including interpretations of sections in which the language is ambiguous or general. However, because the Court constrained its holding to the “bank” definition, the decision does not appear to compel a narrower circumscription of Board authority.

C. Consequences of *Dimension*

The Supreme Court’s decision in *Dimension* could have important consequences in the banking industry. The decision severely restricts the Board’s efforts to halt the increasing number of nonbank banks. Thus, so long as Congress does not change the “bank” definition, more bank holding companies will use the loophole to expand across state lines, and more nonbank parent companies will acquire nonbank banks to compete in the financial services sector. The increased competition may benefit consumers; however, the current regulatory system is arbitrary and unfair because it gives substantially similar financial institutions disparate treatment. The stability of the banking system also could suffer if nonbank parent companies fail and drag down their nonbank bank subsidiaries with them.

Another likely consequence of *Dimension* is more litigation over the “bank” definition. Although the Supreme Court struck down the Board’s interpretation, it did not set clear boundaries between what is a “bank” and what is a “nonbank bank.” Thus, institutions will probably continue to test the boundaries of the definition by offering more types of financial services while attempting to maintain “nonbank” status.

One such issue regarding the “bank” definition is whether traditional checking accounts that contain a “prior notice” clause qualify as “demand deposits” under the current definition. *Dimension* did not face

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164. Some studies indicate that diversification into nonbanking activities decreases bank holding company stability. See, e.g., Holland, *Bank Holding Companies and Financial Stability*, 10 J. FIN. & QUANTITATIVE ANALYSIS 577, 579-80 (1975); Karna, *Bank Holding Company Profitability: Nonbanking Subsidiaries and Financial Leverage*, 1979 J. BANK RES. 28, 30-31 (90 of 109 bank holding companies surveyed had better profitability from their bank subsidiaries than from their nonbank subsidiaries).
the issue of whether a depositor's "legal right" to withdraw funds may be withheld either by statutory restriction or contractual right. In *Wilshire Oil Co. v. Board of Governors of the Federal Reserve System*, the Third Circuit held that a deposit agreement that reserved to the bank the right to require advance notice from account holders prior to withdrawal from checking accounts did not bring the checking accounts outside the "demand deposit" prong of the BHCA "bank" test. In *First Bancorporation v. Board of Governors of the Federal Reserve System*, however, the Tenth Circuit held that NOW accounts were not "demand deposits" even though such accounts function similarly to traditional checking accounts. The court distinguished its holding from *Wilshire* because the bank in that case was compelled by statute to reserve the right to require advance notice prior to withdrawal; unlike *Wilshire*, the depositor's "legal right" was not determined by a contract the sole purpose of which was to take the financial institution outside the "bank" definition.

This distinction between statutory and contractual rights became blurred in *Oklahoma Bankers Association v. Federal Reserve Board*. In that case, the Tenth Circuit held that a contract between a nonbank bank and its depositors reserving to the bank the right to require advance notice prior to withdrawal was sufficient to bring a deposit account outside the "demand deposit" prong. The account in question was a "thrift deposit" account that did not function as a checking account and was not regulated by Oklahoma law. Nevertheless, the court held that the source of the restriction, whether state regulation or private contract, did not matter in determining the depositor's "legal right" under the "demand deposit" prong and that actual banking practices were irrelevant. In apparent contradiction to this statement, however, the court cited *Wilshire* and added that "should the . . . nonbank [bank] alter its deposit-taking practices so as to violate the Act the Board may order that institution to cease and desist from such practices."

The confusing decision in *Oklahoma Bankers Association* may be interpreted in two ways. On one hand, the holding appears to have nullified the *Wilshire* rule, which looked to the depositor's ability "in practice" to withdraw funds on demand. If this interpretation is correct, parent companies would be able to evade BHCA coverage while acquiring nonbank banks that offer full banking services simply by inserting a meaningless "prior notice" requirement in their customers' demand deposit

165. 668 F.2d 732 (3d Cir. 1981), cert. denied, 457 U.S. 1132 (1982); see supra notes 91-97 and accompanying text.
166. *Wilshire*, 668 F.2d at 739-40.
167. 728 F.2d 434 (10th Cir. 1984); see supra notes 107-13 and accompanying text.
168. *First Bancorporation*, 728 F.2d at 436.
169. 766 F.2d 1446 (10th Cir. 1985).
170. Id. at 1449-50.
171. Id. at 1450.
agreements. The Oklahoma Bankers decision would thus extend the First Bancorporation holding by excluding not only NOW accounts from the demand deposit prong, but also any deposit account, regardless of its transactional capabilities, so long as the depositor does not have a contractual or other legal right to withdraw funds on demand.

This extension is important, because NOW accounts are not available to commercial account holders.\textsuperscript{172} Thus, prior to Oklahoma Bankers, nonbank banks could not offer full banking services to commercial customers, which had to forego either demand deposits or commercial loans. Now it appears that commercial customers may enjoy full service banking on a nationwide basis simply by signing a contract that reserves to the nonbank bank a never-exercised right to require advance notice prior to withdrawal.

On the other hand, the Oklahoma Bankers decision may be construed as upholding the Wilshire test of the depositor's "ability in practice" to withdraw on demand in determining whether checking accounts that are not NOW accounts qualify as demand deposits under the "bank" definition. This interpretation contradicts the court's earlier conclusion that a depositor's legal right, and not actual banking practices, determines whether a deposit account falls within the "demand deposit" prong and is therefore less likely to be adopted in subsequent cases. The Supreme Court in Dimension did not address the statutory/contractual right distinction. Thus, it is still unclear whether banking practice, statutory rights, contractual rights, or all three determine whether an account falls within the "demand deposit" prong of the BHCA "bank" test.

The scope of the "commercial loan" prong also remains in question. The Supreme Court defined a "commercial loan" as a "direct loan from a bank to a business customer for the purpose of providing funds needed by the customer in its business."\textsuperscript{173} This definition clearly does not include all loans from a bank to a commercial entity, however. For instance, the Court held that the purchase of commercial paper, which itself is an extension of commercial credit, was not within the "commercial loan" prong.\textsuperscript{174} While it is clear that traditional commercial loans, those that "entail the face-to-face negotiation of credit between borrower and lender," fall within the prong, and the traditional notion of money market instruments, which "do not appear to have the close borrower-lender relationship . . . of commercial loans,"\textsuperscript{175} fall outside the prong, there remains a gray area between the two types of transactions. Thus, nonbank banks may soon attempt to broaden the traditional notion of

\textsuperscript{172} 12 U.S.C. § 1832(b) (1982).
\textsuperscript{173} Dimension, 106 S. Ct. at 686.
\textsuperscript{174} Id. at 687-88.
\textsuperscript{175} Id. (quoting letter from Baldwin P. Tuttle, Deputy General Counsel, Federal Reserve Board, to Michael A. Greenspan, Assistant Secretary, Federal Reserve Board, at 2-3 (January 26, 1976)).
money market transactions to expand their commercial lending business while retaining "nonbank" status.

In sum, the current "bank" definition after Dimension allows banks to evade the BHCA easily. Although the Supreme Court struck down the Board's interpretation, the "bank" definition remains far from clear. Unless the law is changed, litigation between the Board and nonbank banks could continue. Even if the Court had upheld the Board's definition, however, institutions could still have easily avoided BHCA regulation while defying the Act's purposes. Moreover, the system inequitably and arbitrarily subjects financial institutions to BHCA regulation. Thus, Congress should redefine "bank" under the Act to end the judicial confusion and to create a more equitable and secure regulatory system.

V. Proposal for Congressional Action

Congress should amend the BHCA "bank" definition to close the nonbank bank loophole and end further court battles over the proper interpretation of this definition. Under current law, nonbank bank loopholes continue to allow holding companies to violate the BHCA's purposes. A commercial entity may acquire a nonbank bank capable of making commercial loans, and nonbank banks may be acquired by out-of-state holding companies without state authorization. Thus, Congress should define "bank" broadly enough to cover most types of financial institutions that could defeat the purposes of the Act.

This Note proposes to achieve this goal by amending section 2(c) of the BHCA to read:

"Bank" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, American Samoa, or the Virgin Islands, except an institution chartered by the Federal Home Loan Bank Board, the accounts of which are insured by the Federal Deposit Insurance Corporation.

This proposal changes the present definition by bringing under the Act any institution that insures its deposits through the FDIC. Because most financial institutions need federal deposit insurance to compete effectively, this definition will bring most banking institutions and their holding companies under the Act, largely closing the "nonbank bank"

176. For example, in Florida Dep't of Banking and Fin. v. Board of Governors of the Fed. Reserve Sys., 760 F.2d 1135 (11th Cir. 1985), vacated sub nom. U.S. Trust Corp. v. Board of Governors of the Fed. Reserve Sys., 106 S. Ct. 875 (1986), U.S. Trust, a New York bank holding company, acquired a Florida nonbank bank subsidiary that did not meet even the Board's expanded interpretation of the "bank" definition. The Florida Department of Banking argued that the subsidiary defeated the purposes of the Douglas Amendment, which forbids bank holding companies from acquiring out-of-state banks without approval from the state of the acquired bank. See supra text accompanying notes 98-106 & 125.
In the past, Congress amended the "bank" definition to exclude certain institutions that, because of their very limited powers, could not threaten the purposes of the BHCA. The assumptions behind these amendments are no longer valid. For instance, in 1966, industrial banks could not insure their deposits through the FDIC, offer checking accounts, or make commercial loans. Today they are empowered to engage in all three activities. In 1970, Congress excluded from the Act a small number of banks that accepted demand deposits but did not make commercial loans. Congress intended for the Board to construe this exception narrowly; it is doubtful that Congress intended to enact a broad-based exclusion for limited-service banks. Thus, unless Congress wishes to abandon the purposes of the Act and maintain a system of regulatory inequality, it should amend the "bank" definition to include all types of banks that could threaten the Act.

This proposed definition is an improvement over the current definition for two reasons. First, by defining "bank" according to whether an institution's accounts are insured by the FDIC, the Act would cover substantially all institutions chartered as banks. Almost any financial institution that wishes to compete for consumer and commercial deposits must have FDIC insurance to assure customers that their deposits will be secure. The incentive to avoid BHCA regulation would be far outweighed by the disincentive to forego FDIC insurance. Thus, this proposed definition ensures broad-based and equitable coverage. Second, the definition is easy to administer. It draws a bright line between those institutions that are subject to the Act and those that are not. It would not require Board discretion to prevent evasions of the Act's coverage.

The current transaction-based definition no longer works because of the ease with which banks may evade BHCA regulation. Some commentators have argued for a loosening of the nonbank and interstate banking restrictions that exist under current federal law, including the BHCA. While such reforms may be useful, it is also clear that banks should compete on an even playing field. Thus, regardless of the level of regulation Congress wishes to retain, it should apply this regulation uniformly to all banks. This redefinition of "bank" partially achieves this goal.

177. The definition retains the current exemption for institutions chartered by the Federal Home Loan Bank Board ("FHLBB"), however, because holding companies of these institutions are regulated by the Savings and Loan Holding Company Act ("SLHCA"), 12 U.S.C. § 1730a (1982 & Supp. III 1984). See supra note 5. New FHLBB-chartered savings banks are insured by the FDIC. Such institutions would remain subject to the SLHCA and not the BHCA.

178. See supra note 20 and accompanying text.

Conclusion

The present definition of "bank" under the Bank Holding Company Act of 1956 has created confusion and inconsistent case law. The definition has created a loophole leading to the proliferation of "nonbank banks," institutions that perform most bank functions but are not regulated as banks. Nonbank banks are often at odds with congressional purposes under the BHCA, because they promote the concentration of banking resources, the mix of commerce and banking, and interstate banking without state authorization. The Federal Reserve Board of Governors tried to curb the growth of nonbank banks through orders and regulations liberally interpreting the BHCA "bank" definition. The Supreme Court has disapproved this use of broad authority and, as a result, nonbank banks continue to undermine congressional purposes in enacting the BHCA. Moreover, many legal issues surrounding the "bank" definition remain unresolved. Thus, Congress should redefine "bank" under the BHCA to end confusion and to further the original purposes of the BHCA.

Joseph P. Savage*
This issue is respectfully dedicated
to the memory of
Arthur H. Sherry