

THE BANK HOLDING COMPANY ACT OF 1956

THE Bank Holding Company Act of 1956,¹ designed principally to regulate the expansion of bank holding companies and to insure the separation of banking and nonbanking enterprises,² is perhaps the most important banking legislation of the past two decades. The immediate economic consequences of the act are themselves deserving of comment,³ but, even more significantly, the act represents the first comprehensive congressional action with regard to multiple banking through the use of the holding company. Though of comparatively recent origin,⁴ the bank holding company device has become as prominent as both the other forms of multiple banking, chains⁵ and branches,⁶ largely because of the economic inadequacies of the former⁷ and the legal restrictions imposed upon the latter.⁸ A brief historical survey of bank holding company development will serve to highlight an analysis of the act itself.

Historically, the independent, unit bank, with its welfare dependent upon the economic health of the small area it serves, has too frequently been unable to withstand the adverse affect of even brief, localized economic depression.⁹ Particularly in the small towns of the agrarian West and South during the 1920's and 1930's, bank suspensions occurred at an astonishing rate.¹⁰ Some form of multiple banking which could

¹ 70 STAT. 133, 12 U.S.C.A. §§ 1841-48 (Supp. 1956).

² S. REP. NO. 1095, 84th Cong., 1st Sess. 2 (1955).

³ See note 131 *infra*.

⁴ The first independently capitalized bank holding company was the Marine Bancorporation organized in Seattle, Washington in 1927. CARTINHOOR, *BRANCH, GROUP AND CHAIN BANKING* 96 (1931).

⁵ Chain banking is the term employed to describe the control by an individual or group of individuals of two or more banks. *Hearings Before the House Committee on Banking and Currency*, 71st Cong., 2d Sess., pt. 1, at 26.

⁶ A branch bank is a single corporate entity although having numerous offices or branches performing the usual banking functions. WILLIT, *CHAIN, GROUP AND BRANCH BANKING* 15 (1930).

⁷ See note 12 *infra* and text thereto.

⁸ See notes 13, 14 *infra*.

⁹ For general discussion of the plight of the unit bank, see OSTROLENK, *THE ECONOMICS OF BRANCH BANKING*, 27-49 (1930); CARTINHOOR, *op. cit. supra* note 4, at 18-33.

¹⁰ The ten states suffering the most bank suspensions in the period 1921-29 and the number of banks suspended in each state were: Iowa (528), North Dakota (429), Min-

afford greater opportunity for diversification of lending risks, as well as a reservoir of assistance in times of economic crisis, was deemed indispensable if banking facilities were to continue in many areas. Bankers were, thus, faced with a choice of three forms of multiple banking: chain, branch, and group or holding company banking. Chain banking was not an attractive choice, partially because of the public disfavor engendered by the collapse of some of the early chains,¹¹ but principally because of the limited emergency assistance which could be anticipated from even the wealthiest individuals.¹² Branch banking, though concededly more efficient in operation than the holding company device,¹³ was either prohibited or severely restricted in many states¹⁴ and could not serve as the basis for interstate operations.¹⁵ As a result, group banking emerged as a significant form of multiple banking in the late 1920's.¹⁶ Its development has prompted extended consideration of its economic utility by economists as well as the banking profession, thus facilitating a summary of the contentions of both those favoring and

nesota (411), South Dakota (394), Nebraska (339), Georgia (319), Texas (299), Missouri (296), Oklahoma (267) and South Carolina (227). These ten states suffered 62% of the bank suspensions in the United States during this period. *Hearings, supra* note 5, pt. 4 at 418.

¹¹ *Hearings, supra* note 5, pt. 1, at 26; See CARTINHOOR, *op. cit. supra* note 4, at 58-59, 82-89; HOGENSON, *THE ECONOMICS OF GROUP BANKING* 2-3, 36 (1955).

¹² Cf. CHAPMAN AND WESTERFIELD, *BRANCH BANKING* 321 (1942).

¹³ *Hearings, supra* note 5, pt. 9, at 1238; pt. 11, at 1464. OSTROLENK, *op. cit. supra* note 9, at 56-57. While conceding that a holding company system with its individually incorporated affiliates is less efficient than branch banking, proponents of group banking contend that this very fact renders group banking less susceptible to the charge of "absentee banking," a criticism often made of both branch and group operation. HOGENSON, *op. cit. supra* note 11, at 178. See note 23 *infra*.

¹⁴ In 1930, only nine states permitted statewide branch banking; ten others restricted branching to a limited area, usually the town or county in which the main office was located; twenty-two states expressly prohibited branch banking, and the remaining seven states had no applicable provision. *Hearings, supra* note 5, pt. 4, at 463.

¹⁵ The McFadden Act permitted branching by national banks only to the extent permitted by state law. 44 STAT. 1228 (1927), 12 U.S.C. § 36(c) (1952).

¹⁶ HOGENSON, *op. cit. supra* note 11, at 15. See note 4 *supra*. The subsequent growth of bank holding companies, however, has not been as substantial as the vehemence of the criticism directed at them would seem to indicate. In fact, the number of banking offices controlled by major holding companies actually declined 1933-54. *Hearings Before the House Committee on Banking and Currency*, 84th Cong., 1st Sess. 91 (1955). Similarly, 1946-54, the amount of deposits held by holding company affiliates declined. *Id.* at 92. It should be noted, however, that both these figures would have increased had not Transamerica relinquished its holdings in Bank of America N.T. & S.A., a branch with 492 branches and over \$5 billion of deposits at December 31, 1946. *Id.* at 346.

those opposed to the use of the holding company device in the field of banking.¹⁷

Undoubtedly, a well-managed bank holding company system offers certain distinct advantages to its banking subsidiary and to the latter's depositors and borrowers. The holding company typically affords its affiliate investment and management counsel of a quality and scope normally unavailable to the independent banker.¹⁸ Moreover, the affiliate is enabled effectively to extend its line of credit beyond statutory limitations through its "quasi-correspondent" relationship with the other banks of the group.¹⁹ Through quantity purchases, the parent company is often able to effect substantial reductions in the overhead and administrative expenses of its subsidiaries.²⁰ Finally, in time of crisis, the holding company stands ready to lend financial assistance to any of its threatened affiliates.²¹

Notwithstanding their certain economic utility, bank holding companies have been vehemently denounced from their inception, principally by the opponents of multiple banking in any form, who apprehend a nation-wide monopoly of credit facilities in the uncontrolled expansion of bank holding companies.²² Moreover, it is urged that bank holding companies unfamiliar with local conditions and unsolicitous of local needs²³ foster an undesirable "absentee" banking. Despite the severity and scope of such criticism, no important effort to check the expansion of group banking was made on the federal level until 1938,²⁴ when the

¹⁷ See generally, HOGENSON, *op. cit. supra* note 11 at 136-50; CHAPMAN AND WESTERFIELD, *op. cit. supra* note 12, at 329-32; CARTINHOOR, *op. cit. supra* note 4, at 216-55.

¹⁸ CARTINHOOR, *op. cit. supra* note 4, at 216-18, 221-22. *Hearings, supra* note 16, at 460, 634; *Hearings, supra* note 5, pt. 9, at 1178.

¹⁹ HOGENSON, *op. cit. supra* note 11, at 141-42.

²⁰ CARTINHOOR, *op. cit. supra* note 4, at 229-31.

²¹ *Id.* at 232-38.

²² "Through the holding company device most of the safeguards erected since the bank difficulties of the early 1930's may be easily evaded by men who think primarily of monopoly power and large profits." *Hearings, supra* note 16, at 227. "(T)he holding company is a diabolical instrument destructive of our old system of banking, directly and indirectly, and the father of a movement that, if unchecked may unduly concentrate the credit machinery of the country." *Id.* at 202.

²³ *Hearings, supra* note 5, pt. 14, at 1796. See note 13 *supra*.

²⁴ President Franklin Roosevelt, in a special message to Congress, urged that: "Congress enact . . . legislation that will effectively control the operation of bankholding companies; prevent holding companies from acquiring control of any more banks, directly or indirectly; prevent banks controlled by holding companies from establishing any more branches; and make it illegal for a holding company, or any corporation or enterprise in which it is financially interested, to borrow from or sell securities to a bank

nation-wide banking crisis had passed. In the states, bank holding companies were met with attempts to subject them to antibranch-banking laws and a few statutes inhibiting or regulating concentrated control of financial institutions. An examination of these initial attempts to check the rise of group banking appears warranted, for the ineffectiveness of existing law was an important factor prompting the passage of the Bank Holding Company Act.²⁵ Of greater contemporary interest are statutes specifically directed at group bank activity recently enacted in Georgia and Illinois and the prospect of similar legislation in New York.

In a few states having antibranch-banking laws, it was early contended that the holding company system is, in effect, a prohibited branch operation.²⁶ If this conclusion were accepted, of course, group banking would be barred completely in many states. In virtually every state in which this question has been raised, however, the antibranch-banking laws have been held to be inapplicable to bank holding companies.²⁷ Moreover, the number of states permitting at least a limited form of branch banking having steadily increased, the applicability of antibranch statutes to group banking could serve only as partial check on its expansion.²⁸

A number of other state statutes, passed at any early date, would also seem to have some impact on bank holding company operations. A Vermont provision, for example, bars the formation of any type of holding company,²⁹ and Mississippi prohibits the operation of any bank which

in which it holds stock." S. DOC. NO. 173, 75th Cong., 3d Sess. 8-9 (1938). S. 3573, introduced to implement the President's recommendations, was never acted upon by the Congress. S. REP. NO. 1095, 84th Cong., 1st Sess. 3 (1955).

²⁵ See notes 28, 35, 40, 55, and 60 *infra*.

²⁶ The centralized control of numerous banking offices is the obvious similarity of these two forms of multiple banking. That group banking was adopted to circumvent restrictions upon branch banking seems clearly indicated by the absence of intrastate group banking in those states permitting state-wide branch banking. The holding company is still necessary to secure control over a multi-state region, even though all the states within the region permit statewide branch banking. For example, each state in which Transamerica Corporation controls banks allows branches to be operated throughout the state. See HOGENSON, *op. cit. supra* note 11, at 38-46. CHAPMAN AND WESTERFIELD, *op. cit. supra* note 12, at 128.

²⁷ 1953 ILL. ATT'Y. GEN. OPS. NO. 27, p. 88; *cf.* 18 WIS. ATT'Y. GEN. OPS. 30 (1929); REP. MINN. ATT'Y. GEN., p. 292 (1930).

²⁸ In 1929, 9 states permitted state-wide branch operations and 10 others allowed less extensive branching. *Hearings, supra* note 5, pt. 4, at 463. By 1939, the number of states permitting state-wide branching had increased to 19, and 17 more imposed only limited restrictions. CHAPMAN AND WESTERFIELD, *op. cit. supra* note 12, at 128.

²⁹ VT. STAT. § 5791 (1947).

is a member of a group or chain banking system.³⁰ In Washington, no domestic corporation or licensed foreign corporation may acquire more than twenty-five per cent of the stock of any bank,³¹ and any company controlling a majority of the shares of a Wisconsin state bank is subjected to regulation as if it were a bank.³² Kentucky allows no person to hold more than fifty percent of a bank's capital stock,³³ a restriction which would tend to inhibit group banking since holding companies typically seek to acquire a much higher percentage of the stock of their banking subsidiaries.³⁴ While state legislation can adequately prohibit or regulate domestic bank holding corporations, apparently the limited power of the states over stock acquisitions by out-of-state holding companies has rendered state legislation ineffective as a means of curbing group banking operations.³⁵

However, two states, Georgia and Illinois, have enacted similar legislation that virtually prohibits any future bank holding company expansion in these two states.³⁶ Any company having fifteen per cent or more of the voting shares of two or more banks is denominated a bank holding company by both statutes, and future acquisitions of the stock of any bank in excess of that amount are prohibited, although, a company may continue to hold and vote those shares which it held on the effective date of the legislation.³⁷ In addition, both statutes inhibit the acquisition of over fifteen per cent of the voting stock of any bank holding company,³⁸ but Georgia (not Illinois), permits the retention of existing control of bank holding companies in excess of the fifteen per cent limitation.³⁹ Finally, in both states, a foreign company having the

³⁰ MISS. CODE ANN. § 5235 (1942).

³¹ WASH. REV. CODE § 30.04.230 (1955). This provision apparently is not invoked against out-of-state holding companies, thus explaining Transamerica's holdings in this state. See Opinion of the Washington Attorney General, April 19, 1949, *Hearings*, *supra* note 16, at 333.

³² WIS. STAT. § 221.56 (1955).

³³ KY. REV. STAT. ANN. § 287.030(3) (1955).

³⁴ See *Hearings*, *supra* note 16, at 135-43.

³⁵ HOGENSON, *op. cit. supra* note 11, at 156. See note 31 *supra*.

³⁶ GA. CODE ANN. §§ 13-2058 to 13-2065 (Supp. 1956); ILL. STAT. ANN. §§ 10.180(1)-10.180(6) (Supp. 1955).

³⁷ GA. CODE ANN. § 13-2060 (Supp. 1956); ILL. STAT. ANN. § 10.180(3) (Supp. 1955).

³⁸ GA. CODE ANN. § 13-2061 (Supp. 1956); ILL. STAT. ANN. § 10.180(3) (Supp. 1955).

³⁹ GA. CODE ANN. § 13-2061 (Supp. 1956). Georgia also has a provision similar to that provided in § 3(a) of the Federal Bank Holding Company Act permitting a

specified stock holdings in two or more banks is not permitted to vote more than fifteen per cent of the stock of more than one such bank in any one year, although it may continue to vote those shares which it holds on the effective date of the legislation.⁴⁰ The effect of this legislation is to "freeze" the status quo in both Georgia and Illinois, and, in view of section seven of the Federal Bank Holding Company Act, this seems clearly permissible.

Of special note is the most recent development of state bank holding company legislation, for it appears to presage the first judicial construction of the Federal Bank Holding Company Act. Pursuant to the federal act, the First National City Bank of New York has requested Federal Reserve Board approval of a proposed holding company which is to hold the stock of County Trust Company, City Bank Farmers Trust Company, and First National City Bank.⁴¹ Approval of the proposal was requested and obtained from the Comptroller of the Currency, but state banking officials objected to the proposed arrangement.⁴² As a result, the Federal Reserve Board opened hearings on the application on January 24, 1957.⁴³ On January 29, however, the New York legislature, admittedly in an effort to forestall immediate federal action,⁴⁴ banned, until May 1, 1957, all bank holding company acquisitions, except those effected within a single branch banking district.⁴⁵ In the interim, it was

bank holding company to acquire additional stock of banks in which it already has a majority interest. GA. CODE ANN. § 13-2062 (Supp. 1956). See note 83 *infra*.

⁴⁰ GA. CODE ANN. § 13-2064 (Supp. 1956); ILL. STAT. ANN. § 10.180(4) (Supp. 1955). This provision is apparently designed to control an out-of-state bank holding company. Its effectiveness in this regard would seem doubtful. Cf. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333 (1925).

⁴¹ N.Y. Times, Jan. 25, 1957, p. 33, col. 4. The combined assets of the three banks total \$7,483,000,000.

⁴² The objection of the state authorities compelled the Board to conduct hearings. Bank Holding Company Act of 1956, § 3(b).

⁴³ N.Y. Times, Jan. 25, 1957, p. 29, col. 6.

⁴⁴ See the special message to the Legislature in regard to this bill by Governor Harriman, MCKINNEY, *Sess. Law. News of New York*, Feb. 10, 1957, No. 1, at A-141 to A-142. See also Memorandum of Joint Legislative Committee to Study the Revision of the Banking Law, *Id.* at A-157.

⁴⁵ *Id.* at 28-30. This legislation amends the N.Y. Banking Law by adding a new article, article 3-A, §§ 140-45.

New York is divided into nine banking districts. N.Y. Banking Law § 3. Branch banking is permitted on an intra-district basis, although banks in cities having a population of 30,000 or more may branch within the city whether or not it is located entirely within one district. N.Y. Banking Law § 105.

The apparent dismay of both the legislature and the administration at the possibility of interdistrict operations through the use of the holding company device is surprising in

anticipated that the state would enact bank holding company legislation.⁴⁶ Apparently, no agreement could be reached, however, and on April 23, the ban on holding company activity was extended until May 1, 1958.⁴⁷ In the meantime, the hearings on First National City's application had been discontinued.⁴⁸ The outcome of this affair is at best conjectural,⁴⁹ but if First National City secures federal approval of its proposal and acts thereon before May 1, 1958, judicial resolution of this federal-state controversy seems certain. On the other hand, a rearrangement of the New York branch banking districts so as to permit Manhattan banks to branch in the surrounding suburbs might well induce First National City to withdraw its application before the Federal Reserve Board and thus eliminate the present controversy. In any event, the outcome should provide some indication of the Board's policy under the Bank Holding Company Act and the permissible limits of state action in derogation of the act. Events thus far in New York suggest a perhaps unanticipated effect of the federal legislation—that of compelling antibranch and restrictive branch banking states to reexamine their limitations on multiple banking with the view toward liberalization so as to eliminate the need for group banking as a branch banking substitute.⁵⁰

At the federal level, no check on bank holding company expansion was available until the adoption of the act under discussion. However, the Banking Act of 1933 conditioned the right of certain bank holding companies to vote shares of their banking subsidiaries upon disclosure of the financial condition of their entire organization.⁵¹ Although some bank holding companies satisfied the Board's requirements and secured

view of the existence of Marine Midland Corporation of Buffalo, N.Y., which for some time has controlled banks on an interdistrict scale. See HOGENSON, *op. cit. supra* note 11, at 39.

⁴⁶ MCKINNEY, *op. cit. supra* note 44 at A-141 to A-142, A-157.

⁴⁷ N.Y. Times, April 24, 1957, p. 47, col. 3.

⁴⁸ N.Y. Times, March 26, 1957, p. 47, col. 2.

⁴⁹ Another interesting aspect of the present situation is the apparent concern of the United States Department of Justice with antitrust implications of the proposal. See N.Y. Times, Feb. 1, 1957, p. 31, col. 2. Congressman Cellar of New York, Chairman of the Antitrust Subcommittee of the House Committee on the Judiciary, urged the Board to discontinue its consideration of First National City's application until the Justice Department had completed its investigation. Board approval of the application, Cellar fears, "might well immunize" the holding company from future antitrust action.

⁵⁰ See note 26 *supra*.

⁵¹ 48 STAT. 186 (1933), 12 U.S.C. § 61 (1952) (governing holding company affiliates of national banks); 48 STAT. 166 (1933), 12 U.S.C. § 337 (1952) (governing holding company affiliates of state banks in the Federal Reserve System).

voting permits,⁵² this law was virtually ineffective. A holding company could avoid having to secure a permit either by informally exercising its control⁵³ or by removing its banking subsidiary from the Federal Reserve System.⁵⁴ The obvious inadequacy of this law to control effectively the operation of bank holding companies clearly suggested the need for additional federal legislation.⁵⁵

One final phase in the course of federal action dealing with bank holding companies is significant, for it appears to have precipitated the passage of the 1956 act.⁵⁶ In 1948, the Federal Reserve Board proceeded against Transamerica Corporation under section seven of the Clayton Act and determined that its stock acquisitions of banks in California, Oregon, Washington, Nevada, and Arizona had resulted in a substantial lessening of competition and a tendency toward monopoly in banking in this five-state area.⁵⁷ The Board ordered Transamerica to divest itself of all of its banking interests except Bank of America National Trust and Savings Association,⁵⁸ but the Court of Appeals for the Third Circuit set aside this order, concluding that the Board's findings of fact failed to indicate a section seven violation.⁵⁹ Whether

⁵² See *Hearings, supra* note 16, at 432.

⁵³ *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess. 56 (1955).

⁵⁴ *Hearings, supra* note 16, at 226.

⁵⁵ Even if all bank holding companies had been subject to this legislation, there would still have been no supervision of their expansion nor of their control of non-banking enterprises. *Hearings, supra* note 16, at 13-14.

⁵⁶ "During all the years that the Board was working with bank holding-company legislation, and all the years they were working with bank holding companies, we also had it on our minds that in the Clayton Antitrust Act we had some powers that could compel these people to observe the rules and regulations of the administrative body. It was only after we tried the case and submitted it to the courts, and the courts turned it down, that the question became really urgent, because as of today there is no . . . regulating power available to the Board of Governors to stop the increase in bank holding company acquisitions of independent banks." Statement of R. N. Evans, a former Governor of the Federal Reserve System who served as hearing officer in the *Transamerica* case. *Hearings, supra* note 16, at 507. See *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, 81st Cong., 2d Sess. 26 (1950).

⁵⁷ See the record in the Matter of Transamerica Corporation, *Hearings, op. cit. supra* note 16, at 47-76. (Governors Powell and Vardaman dissenting.)

⁵⁸ *Id.* at 72.

⁵⁹ *Transamerica Corp. v. Board of Governors of the Federal Reserve System*, 206 F.2d 163, *cert. denied*, 346 U.S. 901 (1953). The Court of Appeals regarded the "Board's conclusion of a tendency to monopoly in the five-state area" as basically inconsistent with "its (the Board's) own finding that the local community is the true competitive banking area." *Id.* at 169.

the *Transamerica* case reflects an intrinsic inadequacy of the Clayton Act in preserving banking competition⁶⁰ or merely represents an ineffective attempt to apply section seven to Transamerica's operations is open to question. Nevertheless, the difficulty of utilizing the antitrust laws to check undesirable banking concentration resulting from group banking was clearly demonstrated. The proponents of bank holding company legislation then turned with renewed vigor to Congress in an effort to obtain some check on bank holding company expansion. The relative speed with which Congress acted suggests the importance which it attached to the Government's failure in the *Transamerica* case.

Although bills to regulate bank holding companies had been introduced in Congress as early as 1938,⁶¹ it was not until 1955 that the provisions of the Bank Holding Company Act of 1956 began to assume their present dimensions. To a great extent, these provisions are a compromise of the divergent views submitted during this seventeen-year interval by the proponents of such legislation, and, in this regard, those which define bank holding companies, delimit their expansion, require the separation of banking and nonbanking activities, and regulate "upstream" and "horizontal" loans are perhaps the most significant.

DEFINITION

Sec. 2(a) 'Bank Holding Company' means any company (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this Act, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees. . . .

The percentage which the act adopts as indicative of control represents a compromise of the various proposals with respect to this aspect of the definition. The Banking Act of 1933 characterized as holding company affiliates those companies holding at least fifty per cent of the stock of a Federal Reserve System bank.⁶² Proponents of bank holding

⁶⁰ Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 218 (1953).

⁶¹ See note 24, *supra*.

⁶² 48 STAT. 162 (1933), 12 U.S.C. § 221 a(c)(1) (1952).

company legislation, however, recognized that even with a minority holding, a parent company could often effectively control its subsidiaries, especially if the voting shares of the latter were widely dispersed.⁶³ This possibility clearly justifies the twenty-five per cent requirement, although the major bank holding companies existing today would be fully covered by a higher figure.⁶⁴ On the other hand, the adoption of a lesser percentage would unnecessarily extend the coverage of the act and concomitantly increase the burden of the administering agency.⁶⁵

Significantly, those companies controlling only one bank are not covered by the act. The purposes for which many of these banks were formed and are operated is noted in support of this limitation,⁶⁶ and it is obvious, of course, that the one-bank holding company poses no multiple banking threat. Yet, regulation of bank holding company expansion is only one objective of the act. It is also designed to compel the separation of banking from nonbanking enterprises and this goal is at least partially defeated by excluding controllers of a single bank from the scope of the act.⁶⁷ However, the political obstacles to their inclusion,⁶⁸ coupled with their limited impact on the national banking community,⁶⁹ serve as explanation and, perhaps, justification for the exemption of one-bank holding companies.

A conspicuous omission in the definition section is the provision, appearing in a number of earlier proposals, authorizing the administering agency to designate as a bank holding company any company exercising a "controlling influence over two or more banks."⁷⁰ Significantly, the

⁶³ Bills previously introduced to regulate bank holding companies had included even a smaller figure. *E.g.*, S. 829, 80th Cong., 1st Sess. § 3(a)(1) (1947) (10%), *Hearings Before the Senate Committee on Banking and Currency*, 80th Cong., 1st Sess. 1 (1947); H.R. 6504, 82d Cong., 2d Sess. § 3(a)(1) (1952) (15%), *Hearings Before the House Committee on Banking and Currency*, 82d Cong., 2d Sess. 1 (1952).

⁶⁴ See, *Hearings*, *supra* note 16, at 135-43.

⁶⁵ Cf. *Hearings*, *supra* note 16, at 15.

⁶⁶ See *Hearings*, *supra* note 16, at 569.

⁶⁷ *Id.* at 15.

⁶⁸ At least 116 additional companies would be affected by defining a bank holding company as the controller of a single bank. 102 CONG. REC. 6219 (daily ed. April 25, 1956). Senator Morse of Oregon remarked in debate on the Senate floor: "There is a feeling that we will not get any legislation at all if we have the one-bank definition which the Federal Reserve Board recommends. I will not say more. I do not think I need to say more." *Id.* at 6218.

⁶⁹ Since the relationship of a single bank with its nonbanking controller can be closely scrutinized by the authorities of the state in which the bank operates, there is not here needed the federal regulation which interstate group banking demands.

⁷⁰ *E.g.* S. 880, 84th Cong., 1st Sess. § 3(a) (1955), *Hearings Before a Subcom-*

agencies charged by these prior bills with the responsibility of administering bank holding company legislation consistently opposed this vague grant of administrative discretion,⁷¹ and the express definition enacted seems far more desirable.

EXEMPTIONS

A number of companies are exempted by the act either because they perform legitimate business functions or are already subject to similar regulation, or because their very nature obviates the need for administrative supervision. A bank owning bank stock in a fiduciary capacity, unless holding for the benefit of its own shareholders, is exempted, lest the act interfere with normal fiduciary services.⁷² Underwriters of securities issues, who might otherwise be encompassed by the definition, are exempt if they dispose of securities obtained in the underwriting operation within a reasonable time.⁷³ Similarly, no company formed solely to solicit proxies is to be regarded as a bank holding company, despite its temporary control of the voting rights of shares acquired in the course of the solicitation.⁷⁴ A limited exemption is also afforded companies already subject to regulation under the Investment Company Act of 1940.⁷⁵ A curious exemption is given to companies if at least eighty per cent of their assets are agricultural holdings.⁷⁶ Also

mittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. 39 (1955); H.R. 6504, 82d Cong., 2d Sess. § 3(a) (1952), Hearing Before the House Committee on Banking and Currency, 82d Cong., 2d Sess. 1 (1952).

⁷¹ *Hearings, supra* note 16, at 15.

⁷² Bank Holding Company Act of 1956 § 2(a) (A). See S. REP. NO. 1095, 84th Cong., 1st Sess. 5 (1955).

⁷³ Banking Holding Company Act of 1956 § 2(a) (C). See S. REP. NO. 1095, *op. cit. supra* note 71 at 6.

⁷⁴ Bank Holding Company Act of 1956 § 2(a) (B). See S. REP. NO. 1095, *op. cit. supra* note 71 at 6.

⁷⁵ Bank Holding Company Act of 1956 § 2(a) (B). "(N)o company shall be a bank holding company which is registered under the Investment Company Act of 1940, and was so registered prior to May 15, 1955 (or which is affiliated with any such company in such manner as to constitute an affiliated company within the meaning of such Act), unless such company (or such affiliated company), as the case may be, *directly* owns 25 per centum or more of the voting shares of each of two or more banks. . . ." (Emphasis added.) This is one of a number of carefully tailored provisions in the Act, this one exempting the Equity Corporation which, *indirectly*, through its subsidiary, The Morris Plan Corporation of America, controls ten banks. Other Equity subsidiaries are engaged in extensive nonbanking activities. See *Hearings Before the Senate Committee on Banking and Currency, 83d Cong., 1st Sess., pt. 3, at 524, 537 (1953).*

⁷⁶ Bank Holding Company Act of 1956 § 2(a) (E). This amendment was offered during Senate debate by Senator Holland of Florida who frankly admitted that it is

exempted are corporations the majority of whose shares are owned by a state or the federal government and nonprofit organizations operated exclusively for religious, charitable, or educational purposes.⁷⁷

EXPANSION

Implementing the regulatory objectives of the act, is section three, which provides for administrative control of future expansion of bank holding companies. Prior approval of the Federal Reserve Board is now required:⁷⁸

(1) for any action which results in a company becoming a bank holding company under section 2(a) of the Act; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than five per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company.

Subsection (1), thus, provides for regulated entry of new holding companies into the banking field. Substantially identical sections have appeared in early proposed legislation dealing with bank holding companies.⁷⁹ Subsection (2), in effect, controls the future expansion of existing holding companies. Significantly, however, approval is required of an acquisition resulting in five per cent control despite the twenty-five per cent control figure adopted in the definition section. The adoption of this lower figure is designed to insure adequate control over the future expansion of existing bank holding companies, while eliminating the necessity for approval of bank stock acquisitions effected solely for investment purposes.⁸⁰ Regulation of the acquisition of banks through the purchase of assets is provided by subsection (3) when the acquiring

designed to exempt Consolidated Naval Stores Company, a Florida corporation less than 20% of whose assets are in bank stock. 102 CONG. REC. 6191 (daily ed. April 24, 1956).

⁷⁷ Bank Holding Company Act of 1956 § 2(b).

⁷⁸ Bank Holding Company Act of 1956 § 3(a).

⁷⁹ See e.g., S. 880, 84th Cong., 1st Sess. § 5 (1955), *Hearings, op. cit. supra* note 69 at 39; H.R. 6504, 82d Cong., 2d Sess. § 5(a) (1952), *Hearings, op. cit. supra* note 69 at 2 (1952).

⁸⁰ *Hearings, supra* note 16, at 16.

entity is the holding company or a nonbanking subsidiary. Asset acquisitions by affiliate banks are excluded from the scope of the act, since such transactions typically result in the formation of branches which is now sufficiently subjected to either state or federal regulation.⁸¹ Although holding company expansion typically is effected by the exchange or purchase of stock, the possibility of expansion through asset acquisition clearly justifies this provision.⁸² A number of transactions which would otherwise require prior approval of the Board are expressly exempted in order to avoid interference with legitimate banking functions and to preclude unnecessary regulation.⁸³

In considering any requested acquisition or merger or consolidation, the Board is required to consider not only the prospective stability and value of the organizations involved with respect to the communities to be served, but also the probable impact of the requested expansion on the banking community at large, particularly its effect upon bank competition.⁸⁴ While a number of earlier proposals for bank holding company regulation contained no express standards governing the administering agency's action concerning a requested acquisition,⁸⁵ the inclusion of this provision in the act seems to be desirable as a guide to administrative action.⁸⁶

The final subsection of section three, adopted as a late amendment to the act, raises one of the most important and controversial questions with respect to bank holding company expansion.⁸⁷ Effectively, this

⁸¹ *Hearings Before the House Committee on Banking and Currency*, 82d Cong., 2d Sess. 24 (1952).

⁸² S. REP. NO. 1095, 84th Cong., 1st Sess., pt. 1, at 8 (1955).

⁸³ A bank may continue to acquire and hold bank stock in a fiduciary capacity and may retain any such stock received in the course of securing or collecting a debt previously contracted in good faith. Moreover, a bank holding company may acquire additional shares of a bank in which it has the majority of the voting shares prior to such acquisition. Bank Holding Company Act of 1956 § 3(a) (A) (B).

⁸⁴ Bank Holding Company Act of 1956 § 3(c).

⁸⁵ See, e.g., S. 880, 84th Cong., 1st Sess. (1955), *Hearings, op. cit. supra* note 69 at 40; S. 118, 83d Cong., 1st Sess. (1953), *Hearings Before the Senate Committee on Banking and Currency*, 83d Cong., 1st Sess., pt. 3, at 261-67 (1953).

⁸⁶ Federal Reserve Board spokesmen had repeatedly urged that such standards be expressed in the act. See, *Hearings Before the Senate Committee on Banking and Currency*, 83d Cong., 1st Sess., pt. 1, at 16 (1953).

⁸⁷ "Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal place of business or in which it conducts its principal operations unless the acquisition . . . is specifically authorized

subsection precludes interstate expansion of bank holding companies. While holding company banks in states permitting some form of branch banking may "branch" to the extent permitted by state law, even though outside the state in which the holding company principally operates, all other interstate expansion is effectively "frozen."⁸⁸ Thus, in states other than that of the holding company's principal operations, no additional banks can be now acquired. This provision, while somewhat less restrictive, is suggestive of earlier proposals designed to tie holding company expansion to state branch banking laws.⁸⁹

Alarm at the possibility of banking concentration on a national scale through the holding company device has prompted numerous attempts to include a categorical limitation as to bank holding company expansion in proposed bills dealing with this problem.⁹⁰ Just as consistently, the federal administrative agencies primarily concerned with banking have opposed any arbitrary restriction of group banking to the intrastate level.⁹¹ Even if the fear of administrative acquiescence in the development of a nation-wide bank holding company were justified, the effect of the present limitation on group banking expansion is no less undesirable. The regional scope of a number of existing bank holding companies emphasizes that the flow of commerce and the resulting demand for banking services take little heed of political boundaries.⁹² The stability and improved service which group banking has afforded certain areas of the nation⁹³ may, at some future time, be needed in greater and in

by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." Bank Holding Company Act of 1956 § 3(d).

⁸⁸ It is conceivable, of course, that a state would enact legislation specifically authorizing bank holding company expansion within its borders, but the immediate and perhaps the permanent effect of the amendment is to freeze interstate expansion by bank holding companies. See 102 CONG. REC. 6138-39 (daily ed. April 24, 1956).

⁸⁹ A number of the earlier proposals were doubly limiting, not only restricting absolutely expansion without the state in which the holding company maintained its principal office, but also precluding additional intrastate acquisitions in antibranch banking states. See e.g. S. 1118, 83d Cong., 1st Sess. § 5(d) (1953). *Hearings, op. cit. supra* note 85, at 6; H.R. 6504, 82d Cong., 2d Sess. § 5(d) (1952), *Hearings, op. cit. supra* note 69, at 3 (1952).

⁹⁰ *Ibid.*

⁹¹ *Hearings, supra* note 16, at 17 (Federal Reserve Board). *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess. 82 (1955) (Comptroller of the Currency).

⁹² Transamerica Corporation, Northwest Bancorporation, and First Bank Stock Corporations afford the best examples of multistate bank holding company operations. HOGENSON, *op. cit. supra* note 11, at 42-46.

⁹³ See CARTINHOOR, *op. cit. supra* note 4, at 130.

other areas. Regulated expansion to meet their needs would seem unobjectionable, but this is impossible, absent amendment of the Bank Holding Company Act. An alternative solution, perhaps, would be to limit group banking expansion to designated "trade areas,"⁹⁴ but either congressional or administrative demarcation of such areas would prove to be extremely difficult. Conceivably regional, but not national, development could have been fostered by altering the standards governing the Board's consideration of requested acquisitions. Even if this were not possible, totally committing the scope of bank holding company expansion to administrative discretion would seem more to be desired than the categorical limitation imposed by the present provision.

ADMINISTRATION

The act centralizes administrative regulation of bank holding companies in the Federal Reserve Board.⁹⁵ Section five of the act requires each bank holding company to submit, *inter alia*, information concerning the financial history and condition, operation, and management of both it and its banking subsidiaries and to disclose the relationship of all of its nonbanking organizations with the company's affiliated banks.⁹⁶ To ascertain further the nature of these intersystem activities, the Board is empowered to conduct, at any time, a full examination of both the company and its subsidiaries.⁹⁷ In substance, section five appears to

⁹⁴ See *Hearings, supra* note 5, pt. 1, at 23.

⁹⁵ The Bank Holding Company Act of 1956, in denominating the Board as the sole administering agency with respect to the registration, examination, and regulation of bank holding companies, followed such preceding proposals as: S. 829, 80th Cong., 1st Sess., 1 (1947); S. 76, 83d. Cong. 1st Sess., pt. 1, at 1 (1953); H.R. 6227, 84th Cong., 1st Sess., 23 (1955).

⁹⁶ In substance, § 5(a) requires a bank holding company to register with the Board within 180 days after becoming a bank holding company and to provide therewith whatever information the Board may deem appropriate with regard to the financial history and condition of the registering bank holding company and its subsidiary banks, the operation of the company and such banks, the relationships of the company with banks and other organizations, and such matters "appropriate to carry out the purposes of this act." This section appears to be directly in accord with H.R. 6227 § 4(a), note 95 *supra*, but seems to lack the specificity of S. 829 § 4(a), note 95 *supra*.

⁹⁷ In addition to authorizing the Board to promulgate such orders and regulations as may be necessary to enable it to administer the act, § 5 provides that: "The Board . . . may require reports under oath to keep it informed as to whether the provisions of this Act and . . . regulations issued thereunder have been complied with; and the Board may make examinations of each bank holding company and each subsidiary thereof, the cost of which shall be assessed against, and paid by, such holding company." There is some indication that this provision, while substantially in accord with those formerly proposed, is too broad in its scope. As one federal agency has stated, although the Board should be permitted to supervise bank holding companies them-

equate the registration and examination of bank holding companies with that imposed upon national banks, federal reserve system member banks, and those insured by the FDIC.⁹⁸ Although the Board has complete autonomy in the administration of section five, it is required to utilize the reports of similar examinations by the appropriate federal and state banking authorities in order to avoid unnecessary duplication.⁹⁹

The deference accorded other banking authorities by section five has received stronger emphasis in other provisions of the act, particularly section three, which governs the expansion of bank holding companies. For example, section 3(b) provides that in disposing of applications for the acquisition of bank assets or voting stock, or for the formation, merger, or consolidation of bank holding companies, the Board, in reaching its decision, must consider the views and recommendations of the Comptroller of the Currency, where an application involves a national bank, and the appropriate state authorities, in the case of a state bank. In the event that either authority formally disapproves a particular acquisition, the Board is required, upon proper notification to the interested parties, to conduct a hearing,¹⁰⁰ after which it may grant or deny the application.¹⁰¹

selves, it "should not have the power to examine subsidiaries of bank holding companies except member banks which they may examine under present law." *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess., 84 (1955).

⁹⁸ See e.g., Statement of W. M. Martin, Jr., Chairman, Board of Governors of the Federal Reserve System, *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess., 44 (1955). Cf. S. REP. NO. 300, 80th Cong., 1st Sess., 1-3 (1947); *American Bankers Association Journal*, June 1950, p. 44-45.

⁹⁹ Bank Holding Company Act of 1956 § 5(c).

¹⁰⁰ Section 3(b) provides that once the Comptroller of the Currency or the appropriate state supervisory authority has received notification from the Board, thirty days are allowed for such authority to submit recommendations to the Board. If, within that period, the latter disapproves the application, the Board must notify the applicant and, at the same time, give notice to all interested parties of the date fixed for the commencement of a hearing on the application. The hearing must begin from ten to thirty days after the applicant has received written notice of the supervisory authority's disapproval and its duration rests with the Board's discretion. However, it must last at least long enough to give all interested parties a reasonable opportunity to testify. On the other hand, if the appropriate bank supervisory authority expresses no written disapproval of the application, no hearing is required in which case the Board is free to proceed in a more informal manner. This latter procedure was vehemently attacked in the Senate by Sen. Morse of Oregon who unsuccessfully attempted to amend § 3(b) to read: "Provided, that the Board shall not deny any application for exemption under this subsection except after due notice to the applicant and an opportunity for hearing thereon." 102 CONG. REC. 6232 (daily ed. April 25, 1956).

¹⁰¹ Section 3(c) contains certain standards which the Board must utilize in reaching

This administrative procedure, a significant departure from that formerly proposed which effectively permitted such other state and federal agencies to veto a proposed acquisition,¹⁰² has received severe criticism in some quarters on the ground that there is an inherent danger in the commitment of bank holding company expansion to the admin-

a decision and which § 3(b) indicates must be supported by substantial evidence in the record.

Section 9 provides that "any party aggrieved by an order of the Board . . . may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by fixing in the court, within sixty days after the entry of the Board's order, a petition praying that the order . . . be set aside." A certified transcript of the record is then forwarded by the Board to the court which "shall have jurisdiction to affirm, set aside, or modify the order of the Board to take such action . . . as the court deems proper." This method of judicial review differs somewhat from previous proposals which generally provided that any person "directly affected" by any order, rule, regulation or determination made by the Board could seek judicial review pursuant to the provisions of the Administrative Procedure Act. The reviewing court is empowered to correct the Board's action if unwarranted by its findings of fact, or based on considerations inconsistent with the policies underlying bank holding company regulation, or unlawful within § 10(e) of the Administrative Procedure Act. See, e.g., S. 880 § 9, H.R. 6227 § 9, 84th Cong., 1st Sess., 4, 28 (1955) and compare with H.R. 6504 § 8, 82nd Cong., 2d Sess. (1952), and S. 829 § 11, 80th Cong., 1st Sess., 4-5 (1947).

Illustrative of the criticism of the broad review granted by these proposals is the statement submitted by W. M. Martin, Jr., Chairman of the Board of Governors of the Federal Reserve System to the Senate Committee on Banking and Currency. "It is believed that no specific provisions for judicial review are necessary, since, even without such provisions, any arbitrary, capricious, or unlawful action on the part of the administering agency would be, and should be, subject to review by the courts. However, if any provisions . . . are included . . . a provision for trial of facts de novo would be at variance with the spirit and intent of the Administrative Procedure Act. (A)lso . . . instead of the vague provision for review at the instance of any person affected, the right to review should be limited to the principals in the proceeding involved." *Hearings before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess., 78-79 (1955). See also 9 STAN. L. REV. 333 (1957) for a criticism of a possible defect in obtaining review.

¹⁰²The varied means by which a "veto" power can be given were indicated by two proposals: S. 829 § 6, 80th Cong., 1st Sess., 3-4 (1947). Banking subsidiaries of a bank holding company can acquire the assets of (1) national banks or district banks if approved by the Comptroller of the Currency, (2) state member banks, if approved by the Board, and (3) other banks, if approved by the FDIC. S. 880 § 5, 84th Cong., 1st Sess., 2-3 (1955). (A bank holding company can not be formed, or a bank holding company or subsidiary thereof cannot acquire voting shares of a bank, or a bank holding company or nonbanking subsidiary cannot acquire substantially all of a bank's assets without the approval of the Comptroller of the Currency, in the case of a national bank or district bank, or the state supervisory authority, in the case of a state bank.)

istrative discretion of a single agency.¹⁰³ Nevertheless, the provisions of section 3(b) seem clearly to be justified in at least two respects: First, because final determination is left to one agency, the administrative difficulties which invariably attend a diffusion of authority may be substantially averted.¹⁰⁴ Secondly, the Board's power to regulate bank holding company expansion in contravention of state banking policies is somewhat restricted by section 3(d), which prohibits a bank holding company from acquiring the assets or shares of stock of a bank located in a state other than that in which the bank holding company maintains its principal place of business unless the acquisition is "specifically authorized by the statute laws of the State in which such bank is located."¹⁰⁵ Moreover, since section seven of the act authorizes the states to enact legislation codifying their policies with regard to the expansion and regulation of bank holding companies, the states are enabled further to delimit the Board's seemingly broad discretion in this area.¹⁰⁶

DIVESTMENT

Throughout the history of group banking, it has often been contended that the nonbanking activities of bank holding companies threaten the maintenance of sound banking practices by their subsidiary banks.¹⁰⁷ There was the obvious possibility that the funds placed on deposit with the holding company's banking subsidiaries might be employed by the company to gain advantages in the operation of nonbanking interests.¹⁰⁸

¹⁰³ See, e.g., Statement, G. R. Bayles, Chairman, Committee on Federal Legislation, American Bankers Association, *Hearings Before the Senate Committee on Banking and Currency*, 83rd Cong., 1st Sess., 114, 123 (1953).

¹⁰⁴ See, e.g., Testimony of J. L. Robertson, Board of Governors Federal Reserve System, *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess., 48 (1955); Statement by W. C. Martin, Chairman, Board of Governors of the Federal Reserve System, *Hearings Before the House Committee on Banking and Currency*, 82d Cong., 2d Sess., 10, 14 (1952).

¹⁰⁵ Thus, it is certain that the Board is without power to permit interstate expansion of the bank holding company device and that, at best, the Board may be able to circumvent state policies only with regard to intrastate growth of such companies. At present, however, this conflict would probably arise only in those states which have demonstrated a policy against multiple banking by inhibiting state-wide branches since, in those that have not, bank holding companies operating solely within their territorial limits are nonexistent. Moreover, as to the former states, § 7 of the Act gives them the power to extend their antimultiple banking policies to include bank holding companies. See, e.g., the Illinois and Georgia statutes, note 36 *supra*.

¹⁰⁶ See note 88 *supra*.

¹⁰⁷ For a discussion of these contentions, see WILLIT, *op. cit. supra* note 6, at 1-59.

¹⁰⁸ *Ibid.*

Also, it was feared that the extension of credit could be conditioned upon the borrower's patronization of these nonbanking subsidiaries.¹⁰⁹

Since it was believed that legislation on the state level could not effectively deal with these problems, because many of the banks controlled by bank holding companies were either national banks or state banks without a particular state's jurisdiction,¹¹⁰ congressional action was needed. The solution sought by the Bank Holding Company Act of 1956 was the separation of the banking and nonbanking interests of bank holding companies. Essentially, the act offers the companies two alternatives: the divestment of all banking interests, in which case, of course, the company is not subjected to the further prohibitions of the act;¹¹¹ or, the relinquishment of all nonbanking interests, save those which are either excepted specifically by the act or which are determined by the Federal Reserve Board to be so closely related to the management and control of banks that their divestment is unwarranted. If a company chooses to retain its bank holdings, section 4(a) provides that it shall not:

(1) acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or (2) retain direct or indirect ownership of any voting shares of any company which is not a bank or a bank holding company or engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank of which it owns or controls 25 per centum or more of the voting shares.¹¹²

¹⁰⁹ S. REP. NO. 1095, 84th Cong., 1st Sess. 5 (1955) states: "The committee was informed of the danger to a bank within a bank holding company controlling nonbanking assets, where the company unduly favors its nonbanking operations by requiring the bank's customers to make use of such nonbanking enterprises as a condition to doing business with the bank." Cf. Statement of Harry D. Harding, President, Independent Bankers Association of the 12th District, *Hearings Before the Senate Committee on Banking and Currency*, 83rd Cong., 1st Sess., 132-33 (1953).

¹¹⁰ HOGENSON, *op. cit. supra* note 11, at 156.

¹¹¹ S. REP. NO. 1095, 84th Cong., 1st Sess., 16-18 (1955). Cf. 102 CONG. REC. 6232 (daily ed. April 25, 1955). Section 10 of the Act contains amendments to the Internal Revenue Code of 1954 §§ 1101, 1102, and 1103 which affords tax relief to distributions made pursuant to the divestiture provisions of § 4 of the Act. The intricacies of these amendments, however, will not be discussed here.

¹¹² Actually, bank holding companies are allowed to retain their nonbanking assets for a two year period which commences as of the effective date of the act or the date as of which it becomes a bank holding company, whichever is later. Furthermore, § 4(a) authorizes the Board to extend this period "for not more than one year at a time if, in its judgment, such extension would not be detrimental to the public interest, but

Several types of nonbanking subsidiaries are expressly saved from this divestment requirement.¹¹³ Bank holding companies may continue to control subsidiaries which own bank premises,¹¹⁴ perform safe-deposit services, collect debts,¹¹⁵ hold securities in a fiduciary capacity, or trade in high grade investments.¹¹⁶

A bank holding company may also hold investments in a company which do not represent more than five per cent of the latter's outstanding voting securities and the value of which does not exceed five per cent of the holding company's total assets.¹¹⁷ Similarly permissible is the ownership of an investment company which is not a bank holding company and which is not engaged in any business other than investing in securities, if its portfolio does not include more than five per cent of the

no such extensions shall extend beyond a date five years after the date of enactment of this act or five years after the date as of which a company becomes a bank holding company, whichever is later." This provision is substantially the same as those previously proposed.

¹¹³ It should be observed that although a bank holding company's activities may fall within one of the eight exemptions of § 4, it is still subject to the remaining provisions of the act.

¹¹⁴ Bank Holding Company Act of 1956 § 4(c) (1). In addition to holding bank properties, a bank holding company subsidiary may provide services such as auditing, appraisal and investment counsel.

¹¹⁵ *Ibid.* This section also exempts shares of stock owned or acquired in a company engaged solely in liquidating assets acquired from a bank holding company or its controlled banks. Section 4(c) (2) exempts, for a two year period, shares acquired by a bank holding company which is a bank, in satisfaction of a debt previously contracted. Exempted for a similar period are shares acquired by a bank holding company from a subsidiary which is requested to relinquish them by a federal or state examining authority.

¹¹⁶ *Id.* at § 4(c) (4). Also exempt under this section are "shares lawfully acquired and owned prior to the date of enactment of this act by a bank which is a bank holding company, or by and of its wholly owned subsidiaries." This provision, rejected by the Senate Committee on Banking and Currency and strongly denounced in the Senate on the ground that it is special legislation, was finally added by amendment in order to exempt the Trust Company of Georgia. 102 CONG. REC. 6134 (daily ed. April 24, 1956). This institution is a bank which by local law is permitted to be a bank holding company. In addition to owning the entire stock of a bank holding company which in turn controls six national banks, the Trust Company of Georgia possesses substantial nonbanking interests. 102 CONG. REC. 6230 (daily ed. April 25, 1956). As Senator George of Georgia stated, to require the trust company to dispose of \$9 million worth of nonbank securities would have a deleterious effect on the market and "weaken the banking institutions which they support and which they have supported through the years." And, "[i]t would work a very great hardship upon one of the important banking institutions in Georgia . . ." 102 CONG. REC. 6134 (daily ed. April 24, 1956).

¹¹⁷ Bank Holding Company Act of 1956 § 4(c) (5).

total assets of the bank holding company.¹¹⁸ Although this latter provision was designed to exempt a specific bank holding company,¹¹⁹ it is consistent with its companion exemption. Clearly, the acquisition of no more than five per cent of the voting stock of a company is inadequate for effective control of that company. As the Federal Reserve Board commented, this exception¹²⁰

. . . is a justifiable one because it permits a bank holding company to continue to have diversified investments where the amount of each investment is so small that it does not contravene the basic objective of the bill. In this connection it should be noted that under the provisions of existing law . . . a holding company is required to build up certain reserves of readily marketable stocks, as well as bonds, and there appears to be no sound reason why this should not continue to be permitted.

Doubtless the amendment with regard to investment companies is consistent with this intent. For, it

. . . simply provides that a bank holding company can invest in the securities of other companies through the agency of an investment company to the same degree as, but no greater than, the bill now provides a bank holding company may do directly.

A sixth exemption grants the Federal Reserve Board discretion to authorize bank holding companies to retain certain financial, fiduciary, or insurance interests which are so closely related to banking as to require no divestment by a bank holding company.¹²¹ Since it may be difficult, however, to determine in a particular case whether or not an activity can be so characterized, a hearing on the merits must be held by the Board before such retention may be authorized.

Although it is clear that the divestiture requirements of section four should practically eliminate the possibility that a bank holding company

¹¹⁸ *Ibid.*

¹¹⁹ The purposes of the amendment were to relieve the First National Bank Trustees of Louisville, Ky., the smallest of the bank holding companies, of the necessity of divesting themselves of the First Kentucky Co., a wholly owned investment company. However, a fire insurance company owned by the trust had to be relinquished. 102 CONG. REC. 6128 (daily ed. April 24, 1956); *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess., 201-17 (1955).

¹²⁰ Comment by Federal Reserve Board, *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess. (1955).

¹²¹ Senator Barkley of Kentucky, sponsor of the amendment in the Senate, 102 CONG. REC. 6128 (daily ed. April 24, 1956).

may injure its banking subsidiaries and their depositors by applying their funds to speculative nonbanking activities, Congress apparently recognized that additional provisions were necessary to insure the safety of deposits in holding company controlled banks against the injury that might arise through the use of "upstream" and "horizontal" loans.¹²² Accordingly, section six prohibits a bank which is a subsidiary of a bank holding company from (1) investing its funds in the securities¹²³ of its parent bank holding company system;¹²⁴ (2) accepting such securities as collateral for advances made to any person or company;¹²⁵ (3) purchasing any of such securities under a repurchase agreement;¹²⁶ or (4) making a loan, discount, or extension of credit to its parent bank holding company or any of its other subsidiaries.¹²⁷ These provisions,¹²⁸ far more restrictive than those of the prior proposals, received sharp criticism

¹²² Bank Holding Company Act of 1956 § 6. Activities which apparently would fall within the exemptions of the operations of credit life insurance programs in connections with bank loans and plans under which the insurance proceeds retire the outstanding balance of bank held mortgages upon the death of the mortgagor. S. REP. NO. 1095, 84th Cong., 1st Sess., 13 (1955). The act also provides two further exemptions. Section 7 relieves labor, agricultural and horticultural organizations from the divestiture requirements of the act on a basis similar to that which justifies the income tax exemption similarly accorded by the Internal Revenue Code—*i.e.*, that the income derived by any such organization inures not to the benefit of any individual but to the group as a whole. This type of bank holding company seems to be justifiably exempted for, unlike normal bank holding company systems, their members represent essentially the same interest groups. The final exemption, § 8, permits bank holding companies to acquire shares "in any company which is organized under the laws of a foreign country and which is engaged principally in the banking business outside the United States."

¹²³ On the other hand, the act does not prohibit "downstream" loans—*i.e.*, loans from the parent bank holding company to its subsidiary banks—for such financing has long been recognized as one of the advantages of the bank holding company technique. Downstream financing enables the latter to draw on the equity capital of its shareholders and its own operating funds in order to strengthen the financial condition of any one or more of its subsidiaries. Moreover, past practices have demonstrated that this operation has benefited not only the bank holding company system itself, but also the shareholders and depositors of the assisted subsidiary bank and the public it serves. S. REP. NO. 1095, 84th Cong., 1st Sess., 13 (1955).

¹²⁴ Securities include capital stock, bonds, debentures, or any other obligations.

¹²⁵ Bank Holding Company Act § 6(a) (1).

¹²⁶ *Id.* at § 6(a) (2). Excepted from the prohibitions of this section, however, are such securities given as "security for debts previously contracted, but such collateral shall not be held for a period of over two years. . . ."

¹²⁷ *Id.* at § 6(a) (3).

¹²⁸ *Id.* at § 6(a) (4). It should be noted that the provisions of § 6(a) do not prohibit noninterest bearing deposits to be made to the credit of a bank, nor do they prohibit giving immediate credit to a bank on uncollected items received in the ordinary course of business.

from those who contended that the scope of the existing law, section 23A of the Federal Reserve Act,¹²⁹ needed only to be broadened in order to solve the bank holding company problem.¹³⁰

The apparent purpose of section six is to prevent the possibility that, because of overinvestment by the subsidiary banks in the securities of each other, the collapse of one or more large subsidiaries might cause a chain reaction resulting in the ultimate failure of the entire system. At first glance, it would appear that the short remedy would be merely to prohibit intrabank holding company investments. Since the companies exert substantial control over their banking subsidiaries, however, such a restriction could be circumvented easily through use of the repurchase device or through loans guaranteed by the prohibited securities. The prophylactic nature of these section six provisions thus appears justified. Moreover, in the long run, the individual bank holding company should be strengthened. For, to safeguard against possible financial crises, the company must now maintain a backlog of reserves sufficient to meet emergency needs of its subsidiary banks; whereas formerly, this practice was relatively unnecessary, since such subsidiaries could adequately be assisted through loans from the unaffected banks within the bank holding company system.

Despite the absence of present dangers, the possibility of excessive concentration of banking power through bank holding company expansion clearly justifies the enactment of the Bank Holding Company Act of 1956. In light of the demonstrated economic advantages inuring to the public from regional bank holding company operations, however, it is at least questionable whether group banking expansion, which at present is practically restricted to acquisitions on an intrastate level, should be dependent upon the fortuity of express state legislation. Per-

¹²⁹ 48 STAT. 183 (1933), 12 U.S.C. § 371(c) (Supp. 1956). In substance, this section permits a member bank (1) to make loans, extend credit, or purchase securities from any of its affiliates, or (2) to invest in the securities of such affiliate, or (3) accept the securities of such affiliate as collateral for advances made to any person provided that in the case of such affiliate, the loans, extensions of credit, investments, or advances against such collateral do not exceed 10 per cent of the capital stock or surplus of the member bank and, in the case of all affiliates, 20 per cent of such capital stock and surplus. Section 371(c) also provides that the collateral security of such an affiliate must, in market value, exceed the amount of the credit extension by the member bank.

This provision has not been totally superseded by the Bank Holding Company Act of 1956 since it applies to situations where a member bank is affiliated with one bank.

¹³⁰ See, e.g., *Hearings, supra* note 16, at 18; *Hearings Before the Senate Committee on Banking and Currency*, 83d Cong., 1st Sess. pt. 1, at 51 (1953).

mitting the Board to authorize limited interstate growth within the less restrictive limitations prescribed by section 3(c) of the act would appear to be a far more desirable alternative.

While the objectives sought by the divestiture requirements of section four also appear to be consistent with sound banking, the "special" exemptions added to that section by amendments cannot be justified. When these exemptions are considered with those afforded by the definition section, it appears that Transamerica is the only bank holding company which is required to relinquish its nonbanking assets.¹⁸¹ It is unfortunate that this well-considered, well-drafted legislation, filling an obvious gap in federal banking legislation, also appears effectively to substitute for an abortive antitrust prosecution.

¹⁸¹ A few of the nonbank subsidiaries which Transamerica will be required to relinquish are Occidental Life Ins. Co. of California, Columbia River Packers Association, Inc., General Metals Corp., Pacific National Fire Ins. Co., Manufacturers' Casualty Ins. Co., Capital Co., and Inter-American Corp. *Hearings Before the House Committee on Banking and Currency*, 84th Cong., 1st Sess. 318 (1955).

The obvious discriminatory features of the Act prompted Senator Capehart of Indiana, while the act was under consideration in the Senate, to suggest an amendment which would permit all bank holding companies to retain all nonbank enterprises which were owned prior to the effective date of the act. 102 CONG. REC. 6129-33 (daily ed. April 24, 1956).