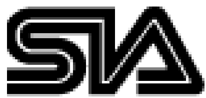

Securities Industry Association

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May 19, 1997

Office of the Comptroller of the Currency
Department of the Treasury
Communications Division
250 E Street, S.W.
Washington, D.C. 20219

Attention: Docket No. 97-10
Application Control Number 97-WO-08-0003

RE: Release by the Office of the Comptroller of the Currency Entitled Operating Subsidiary Notice, 62 Fed. Reg. 19171 (April 18, 1997)

Ladies and Gentlemen:

I. INTRODUCTION AND STATEMENT OF POSITION

The Securities Industry Association ("SIA")[1] appreciates the opportunity to comment on the above release (the "Release") of the Office of the Comptroller of the Currency (the "OCC" or the "Comptroller"), in which the OCC requests comments on whether it should grant the application (the "Application") of Zions First National Bank ("Zions") to underwrite and deal in municipal revenue bonds through an operating subsidiary of that bank. In the Release, the OCC stated that it:

"reviews operating subsidiary applications to determine whether the proposed activities are legally permissible for an operating subsidiary and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety and soundness of the parent national bank. In publishing notice of the application, the OCC does not take a position on issues raised by the proposal. Notice is published solely to seek the views of interested persons on the issues presented and does not represent a determination by the OCC that the proposal meets, or is likely to meet, the criteria outlined above .[2]"

SIA appreciates and strongly supports the OCC's decision not to have in effect "pre-approved" the Application. As the OCC is undoubtedly aware, the Application presents a number of significant policy and legal issues. The fundamental issue raised by the Application, however, is whether the OCC can or should permit a national bank to own a securities underwriting and dealing firm as a subsidiary. It is irrelevant that Zions seeks in its Application to underwrite municipal revenue bonds rather than, say, corporate equity or debt securities. A national bank is

equally prohibited from underwriting and dealing in each of these types of securities, and the question of whether a national bank can own a securities firm that underwrites and deals in any of these securities presents precisely the same legal and policy issues.

In SIA's view, such ownership is indisputably contrary to the spirit of the Glass-Steagall Act. Bank ownership of a securities firm also is plainly prohibited by Sections 16 and 21 of the Glass-Steagall Act, as well as a number of other provisions of law. The legislative history of the Glass-Steagall Act clearly demonstrates that banks owning securities firms, and securities firms owning banks, were precisely the types of affiliations that the Glass-Steagall Act was intended to prohibit.

In this regard, it is highly instructive that, following the enactment of the Glass-Steagall Act, banks did not spin off their securities operations into a separate operating subsidiary. Such corporate shenanigans clearly would have been deemed to be inconsistent with the then recently enacted Glass-Steagall Act. Notably, there have been no relevant changes to the statutory provisions of the Glass-Steagall Act since it was enacted in 1933. While SIA understands that the financial services markets have changed dramatically since that time, the Glass-Steagall Act has unfortunately remained largely intact, and that law prevents the OCC from granting Zions' request to own a securities firm.

Even if the OCC had the discretion to interpret the Glass-Steagall Act in such a way as to permit it to grant the Application (which it does not), strong policy considerations should compel the OCC not to adopt such an interpretation. Among other things, such an interpretation could significantly interfere with the ability of Congress to enact legislation comprehensively modernizing the regulation of the financial services industry in the United States. Such an interpretation also would provide banks with a truly unfair competitive advantage over securities firms, by permitting banks to own securities firms, while securities firms still would be prohibited from owning banks.

As a result, SIA respectfully submits that the OCC should not grant the Application.

Moreover, even if the OCC is inclined to grant the Application, we respectfully submit, and hereby request pursuant to 12 C.F.R. 5.11,[3] that the OCC first conduct a public hearing on the Application, in order to permit members of the public to respond to any legal, factual, or policy arguments the OCC might advance in support of granting the Application, and to permit the OCC to develop a more complete record before taking an action that would dramatically alter the landscape of the financial services industry in the United States. We note that this is the process followed by the Board of Governors of the Federal Reserve System (the "Board") when it first permitted non-bank affiliates of banks to underwrite and deal in bank-ineligible securities pursuant to Section 4(c)(8) of the Bank Holding Company Act.

SIA is aware that requests for a hearing often are little more than a delaying tactic. This request is not a delaying tactic. The Release itself takes up less than one page in the Federal Register, and gives no indication of any legal, factual, or policy basis on which the OCC might consider granting the Application. Similarly, in its 1996 release adopting current Section 5.34(d) of its rules[4] the Section pursuant to which the OCC ostensibly has the authority to grant an application permitting an operating subsidiary of a national bank to engage in activities in which the bank itself cannot the OCC rejected the argument that the Glass-Steagall Act prohibited the

OCC from adopting that rule, and indicated that it would determine on a case-by-case basis whether a particular application raised Glass-Steagall Act or other legal issues.

As a result, commenters such as SIA, which believe that granting the Application would violate the Glass-Steagall Act, have no basis for determining on what grounds the OCC might conclude that it has the authority to grant the Application, and thus cannot meaningfully comment on the OCC's analysis. The OCC simply has not engaged in, or provided a mechanism for, an industry-wide debate on the legal, factual, and policy issues involved in permitting national banks to own securities firms as subsidiaries. These issues, however, are quite significant, and deserve a full public hearing.

II. LEGAL ISSUES

In SIA's letter to the OCC concerning the Release proposing current 5.34,[5] we discussed generally why we believe that the OCC lacks the legal authority to grant an application, such as the Application submitted by Zions, that would permit a national bank to own a securities underwriting and dealing firm as an operating subsidiary. As discussed above, because we are not aware of what basis, if any, the OCC might advance to support its authority to grant such the Application, we cannot meaningfully respond to those arguments. As a result, we will briefly summarize the legal arguments made in the SIA's Op. Sub. Comment Letter, and refer the OCC to that letter for a fuller discussion of our positions.

A. 93a of the National Bank Act Prohibits the OCC From Granting an Application Under 5.34 Authorizing an Operating Subsidiary of a National Bank to Underwrite and Deal in Municipal Revenue Bonds

Under 93a of the National Bank Act,[6] the OCC lacks the authority to grant an application under 5.34 (or any other OCC rule) that would permit an operating subsidiary of a national bank to underwrite and deal in bank-ineligible securities. Section 93a provides that:

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title [i.e. the McFadden Act] or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act." (Emphasis and bracketed language added).

Initially, 93a arguably prohibits the OCC from adopting 5.34. 93a grants the Comptroller the authority to prescribe rules and regulations "to carry out the responsibilities of the office . . . ." However, 93a does not permit the OCC to adopt regulations that would confer on national banks powers which they do not have under existing substantive law. In this regard, Senator Proxmire, the floor manager of the bill that added 93a to the National Bank Act, stated that:

Since the rulemaking authority [under 93a] is only available to carry out the responsibilities of the [Comptroller] it carries with it no new authority to confer on national banks powers which they do not have under existing substantive law. To give national banks authority under this rulemaking provision which they otherwise do not possess under existing substantive law would not be carrying out the responsibilities of the Comptroller since only Congress can define those responsibilities so as to confer powers on national banks.[7]

Moreover, subsequent legislative history confirms that Congress as a whole shared Senator Proxmire's view as to the scope of 93a. For example, the House Conference Report stated that 93a "makes clear that the rule-making provision carries no authority to permit otherwise impermissible activities of national banks with specific references to the provisions of the McFadden Act and the Glass-Steagall Act."**8**

By permitting an operating subsidiary to engage in an activity in which a national bank may not engage, the OCC indirectly would be conferring on a national bank a power which the bank did not have under existing substantive law. Conferring such power on a national bank, directly or indirectly through an operating subsidiary, is a violation of 93a. In this regard, Congress would not have intended to permit the OCC to exceed the scope of its authority under 93a by the simple mechanism of permitting an operating subsidiary of a national bank to engage in certain activities, when the OCC lacks the authority to permit the parent bank to engage in those activities. Otherwise, the Comptroller would be usurping the authority of Congress to "confer powers on national banks."

In any event, 93a clearly prohibits the Comptroller from applying 5.34 in such a way as to permit an operating subsidiary of a national bank to underwrite and deal in bank-ineligible securities. As previously discussed, 93a provides the Comptroller with certain rulemaking authority, but expressly provides "that the authority conferred by this section does not apply to . . . securities activities of National Banks under the Act commonly known as the `Glass-Steagall Act.`" Permitting operating subsidiaries to underwrite and deal in bank-ineligible securities necessarily applies to the securities activities of the national bank under the Glass-Steagall Act, because such a subsidiary at the very least would be subject to the restrictions on the ineligible-securities activities of affiliates of national banks imposed by Section 20 of the Glass-Steagall Act, and the prohibitions on interlocking officers, directors and employees imposed by Section 32 of the Glass-Steagall Act. In addition, as discussed below, we submit that permitting a national bank to engage in ineligible-securities activities through an operating subsidiary would flatly violate Section 16 of the Glass-Steagall Act, which prevents a banking institution from engaging in ineligible-securities activities, and Section 21 of the Glass-Steagall Act, which prohibits a firm engaged in ineligible-securities activities from accepting deposits.

The legislative history to 93a further demonstrates that 93a would prohibit the OCC from granting an application under proposed 5.34(d)(3) that would permit a national bank to engage in ineligible-securities activities through an operating subsidiary. Section 93a was added to the National Bank Act by the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA").**9** In a Report accompanying DIDMCA, the Senate stated that: "This rulemaking authority is limited to unsafe and unsound banking practices. The Comptroller shall not use formal rulemaking authority, as opposed to interpretive rulings which are requested from time to time, to decide issues relating to the Glass-Steagall Act." **10** Were the OCC to grant an application under 5.34 that would permit a national bank to engage in ineligible-securities activities, the OCC would have used its formal rulemaking authority to decide issues relating to the Glass-Steagall Act.

In this regard, it is significant that under the prior version of 5.34, the OCC could not have permitted a national bank to engage in ineligible-securities activities, because such activities could not have been performed by a national bank, and former 5.34 prohibited an operating

subsidiary from engaging in activities in which the bank could not engage (unless otherwise provided by statute or regulation). If the OCC were to decide that current 5.34 is broad enough to permit it to allow a national bank to engage in ineligible-securities activities through an operating subsidiary, then by definition, the OCC would have used its "formal rulemaking authority . . . to decide issues relating to the Glass-Steagall Act."

Finally, the Supreme Court expressly has stated that 93a withholds "from the Comptroller the authority to issue regulations concerning securities activities of National Banks under the [Glass-Steagall Act]."**11** The OCC cannot contravene this restriction by rulemaking. And, it cannot create the authority to issue such regulations by drafting 5.34 so broadly and ambiguously that its application to the Glass-Steagall Act is difficult to discern.

B. 12 U.S.C. 24(Seventh) Prohibits the OCC From Granting an Application Under 5.34 Authorizing an Operating Subsidiary to Underwrite and Deal in Municipal Revenue Bonds

1. Introduction

Under 12 U.S.C. 24(Seventh), the OCC also lacks the authority grant an application under 5.34 (or any other OCC rule) that would authorize an operating subsidiary to engage in activities in which its parent bank may not engage, such as municipal revenue bond underwriting and dealing activities. Section 24(Seventh), in pertinent part, provides that: "[e]xcept as herein after provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the [national bank] for its own account of any shares of stock of any corporation." Congress expressly has provided in 24(Seventh) a number of exceptions to this restriction. Significantly, however, none of these exceptions permit a national bank to own shares of an operating subsidiary, and Congress has not authorized the Comptroller to adopt further rules or regulations concerning this restriction.**12**

Notwithstanding this restriction in 24(Seventh), and the Comptroller's lack of rulemaking authority with respect to this restriction, the Comptroller has permitted national banks to purchase or otherwise acquire shares of an "operating subsidiary." The justification for permitting national banks to own shares of operating subsidiaries, and the limitations of the activities in which such operating subsidiaries may engage, was explained by the OCC's Senior Deputy Comptroller for Policy and Planning in an interpretive letter dated April 18, 1984 (notwithstanding certain statements to the contrary in the OCC's release adopting current 5.34):

National banks are generally prohibited by 12 U.S.C. 24(Seventh) from acquiring corporate stock. However, this Office has interpreted this prohibition as being inapplicable to a bank's ownership of the stock of an operating subsidiary. This interpretation is based on the fact that a bank's operating subsidiaries are merely separately incorporated departments of the bank. This being the case, the ownership of the stock of such corporation does not involve the bank in speculation in securities that section 24(Seventh) is intended to prevent. Rather, it represents a bank's legitimate adoption of a particular organizational structure.**13**

As discussed below, the language of 24(Seventh), the relevant legislative history, the prior justification under which the OCC has permitted national banks to own stock of an operating subsidiary, and an unbroken line of interpretive precedent, all support the position that the OCC lacks the authority to permit an operating subsidiary to engage in activities other than those in which a national bank may engage. Thus, the OCC lacks the authority, which is purportedly

granted by 5.34, to determine in writing that an operating subsidiary may engage in activities that are not permissible for a national bank.

2. Under 24(Seventh), the OCC Lacks the Authority to Permit an Operating Subsidiary to Engage in Activities Other Than Those in Which a National Bank May Engage

As discussed above, 24(Seventh) prohibits a national bank from purchasing shares of stock of any corporation for its own account. Also, as indicated above, the OCC has taken the position that this provision does not prohibit a national bank from acquiring the shares of an operating subsidiary that engages in activities in which a national bank may engage. Even assuming that the OCC's position in this regard is correct, 24(Seventh) still necessarily would prohibit a national bank from acquiring the stock of a corporation that engages in activities in which the bank itself may not engage. Otherwise, 24(Seventh) would be meaningless, in that a national bank could acquire stock in any corporation, regardless of whether the bank itself could engage in those activities.**14**

3. The Relevant Legislative History Supports the Position That the OCC Lacks the Authority to Permit an Operating Subsidiary to Engage in Activities Other Than Those in Which a National Bank May Engage

The portion of 24(Seventh) prohibiting a national bank from purchasing shares of a corporation for its own account was added to the National Bank Act by Section 16 of the Glass-Steagall Act. The legislative history of the Glass-Steagall Act demonstrates that Congress, by enacting this provision, intended to prevent the practice of national banks conducting securities underwriting and dealing activities through subsidiaries.

In 1897, over three decades before the Glass-Steagall Act was enacted, the Supreme Court had held that a national bank did not have the power to deal in stock.**15** The legislative history to the Glass-Steagall Act discusses in detail the various efforts of banks to nonetheless engage in securities activities through securities affiliates -- which often were subsidiaries of the banks. **16** Indeed, a Congressional study of the banking industry that served as the basis for the Glass-Steagall Act noted that "[t]he first security affiliate on record was organized in 1908 by the First National Bank of New York City," and that affiliate was created through a series of transactions which resulted in the bank acquiring 100% of the stock of the affiliate. **17**

It was precisely these types of securities affiliates that the Glass-Steagall Act in general, and the prohibition on purchases of stock by national banks in particular, were intended to ban. In this regard, a 1933 Senate report on a bill that became the Glass-Steagall Act stated:

There seems to be no doubt anywhere that a large factor in the overdevelopment of security loans, and in the dangerous use of the resources of bank depositors for the purposes of making speculative profits and incurring the danger of hazardous losses, has been furnished by perversions of the national banking and State banking laws, and that, as a result, machinery has been created which tends toward danger in several directions. . . The greatest of such dangers is seen in the growth of "bank affiliates" which devote themselves in many cases to perilous underwriting operations, stock speculation, and maintaining a market for the banks' own stock often largely with the resources of the parent bank. This situation was never contemplated by the National Banking Act, and it would, therefore, appear that the affiliate system calls for the establishment of some legislative provisions designed to deal with the

situation. . . The Committee has, therefore, determined to present proposed legislation aimed at the following objects:
(1) To separate as far as possible national and member banks from affiliates of all kinds. . . .**18**

Accordingly, we respectfully submit that, under 24(Seventh), the OCC lacks the authority to permit a national bank to engage in securities activities through an operating subsidiary because the legislative history of the Glass-Steagall Act demonstrates that this was precisely the type of activity that the prohibition on national bank ownership of stock in 24(Seventh) was intended to address.

4. The OCC's Prior Justification to Permit National Banks to Own Shares of Operating Subsidiaries Supports the Position That the OCC Lacks the Authority to Permit an Operating Subsidiary to Engage in Activities Other Than Those in Which a National Bank May Engage

The prior justification of the OCC to permit national banks to own stock of an operating subsidiary also supports the position that the OCC lacks the authority to permit an operating subsidiary to engage in activities other than those in which a national bank may engage. As previously discussed, the OCC has permitted a national bank to own shares of an operating subsidiary, notwithstanding the prohibition of 24(Seventh), because it views operating subsidiaries as merely separately incorporated departments of a bank, which does not involve the bank in speculation in securities that 24 (Seventh) is intended to prevent. As a "department" of a bank, all of the banking laws generally applicable to the bank are applicable to the operating subsidiary. For example, the April 18, 1984 letter from the OCC's Senior Deputy Comptroller for Policy and Planning, quoted above, explained that: "[b]ecause operating subsidiaries are viewed as merely separately incorporated departments of their parent national bank, they may engage in only those activities that could be performed by the parent national bank. . . ."**19**

Similarly, in a 1990 release amending 5.34, the OCC stated that:

A national bank's decision to carry on activities in an operating subsidiary as opposed to the bank itself is a business decision.National bank operating subsidiaries are treated under the National Bank Act . . . as part of the bank itself. The subsidiaries' activities are limited to activities permissible for the parent bank. . . Thus, to determine whether a national bank operating subsidiary legally may conduct a particular activity, the OCC is governed by the rules applicable to national banks themselves. **20**

Moreover, former 5.34 expressly provided, and former 7.7376 -- the predecessor to 5.34 -- expressly provided in almost identical language, that except as otherwise permitted by statute or regulation, all provisions of Federal banking laws and regulations applicable to the operations of a parent bank shall be equally applicable to the operations of its operating subsidiaries.**21**

Also, we note that the District Court for the Southern District of New York has expressly stated that: "[n]ational banks are permitted to engage in their authorized activities through operating subsidiaries, and the provisions of the Federal banking laws are applicable to those operating subsidiaries."**22**

Since the OCC lacks the authority under 24(Seventh) to permit an unincorporated department of a bank to engage in activities in which the bank itself cannot engage, we believe that it is unreasonable and not in accordance with law for the OCC to abandon its traditional view that an incorporated department of a national bank is similarly limited in the activities in which it may engage.

5. Staff Interpretive Letters Support the Position That the OCC Lacks the Authority to Permit an Operating Subsidiary to Engage in Activities Other Than Those in Which a National Bank May Engage

Staff interpretive letters further support the position that the OCC lacks the authority to permit an operating subsidiary to engage in activities other than those in which a national bank may engage. At least since 1963, the staff has permitted national banks to own shares of operating subsidiaries.[23] Uniformly, in deciding whether an operating subsidiary could engage in a particular activity, the staff has focussed on whether the parent national bank itself had the explicit or incidental power to conduct the particular activity that was proposed to be conducted through the operating subsidiary.

For example, in the April 18, 1984 interpretive letter quoted above, the OCC's Senior Deputy Comptroller for Policy and Planning concluded that an operating subsidiary of a national bank, which was located in a different state from the national bank, could not engage in certain credit card activities, because such activities, if performed by a branch of the parent bank, would violate the McFadden Act.[24]

Until recently, the staff's consistent and unbroken view had been that an operating subsidiary may engage solely in activities in which a national bank may engage. This view is reasonable, and it would be unreasonable and not in accordance with law for the OCC to abandon this position.

C. Sections 16 and 21 of the Glass-Steagall Act Prohibit Operating Subsidiaries From Engaging in Municipal Revenue Bond Underwriting and Dealing Activities

1. Introduction

Even if the OCC were to conclude that, under 5.34, it could authorize an operating subsidiary of a national bank to engage in activities that are broader than the activities permissible for the bank, an operating subsidiary still could not engage in ineligible-securities activities (such as municipal bond underwriting and dealing activities), by virtue of Sections 16 and 21 of the Glass-Steagall Act. This result is supported by the language of Sections 16 and 21, the purposes of those provisions as set forth in the legislative history of the Glass-Steagall Act, Supreme Court decisions and applicable case law, as well as various policy considerations.

2. The Language of Sections 16 and 21 Prohibit an Operating Subsidiary From Engaging in Ineligible-Securities Activities

The Supreme Court has held that: "[t]hrough flat prohibitions, the [Glass-Steagall] Act sought to separate as completely as possible commercial from investment banking."[25] The Supreme Court also has held that: "Sections 16 and 21 of the [Glass-Steagall] Act are the principal provisions that demarcate the line separating commercial and investment banking,"[26] and those

provisions "seek to draw the same line."[27]

Section 16 provides, in pertinent part, that:

The business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account; and the [national bank] shall not underwrite any issue of securities or stock.[28]

Section 21, in pertinent part, makes it unlawful:

For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor.[29]

Sections 16 and 21 prohibit the OCC from applying 5.34 (or any other provision) so as to permit a national bank to engage in ineligible-securities activities through an operating subsidiary. Permitting a national bank to engage in ineligible-securities activities through an operating subsidiary would violate the restriction in Section 16 limiting the business of dealing in securities and stock by a national bank to purchasing and selling such securities and stock solely for the account of customers, and in no case for its own account. It also would violate the prohibition in Section 16 preventing a national bank from underwriting any issue of securities or stock.

The fact that an operating subsidiary of a national bank technically is a distinct corporate entity from the national bank is irrelevant for purposes of Sections 16 and 21. Congress could not have intended that a bank could circumvent the strict demarcation of investment and commercial banking established by those provisions simply by establishing a subsidiary, and conducting ineligible-securities activities in that subsidiary. Any other conclusion would render the prohibitions of Sections 16 and 21 meaningless. The largest U.S. commercial bank could engage in ineligible securities activities through an operating subsidiary, and the largest U.S. investment bank could accept deposits through a subsidiary. These types of affiliations were precisely those that Congress intended to and did prohibit in Sections 16 and 21.

The conclusion that Sections 16 and 21 prohibit the OCC from authorizing a national bank to engage in ineligible-securities activities through an operating subsidiary is further supported by the OCC's traditional justification for permitting national banks to own operating subsidiaries. As previously discussed, the OCC regards an operating subsidiary "as merely an incorporated department of the parent bank," and regards the ownership of the stock of an operating subsidiary by a national bank as a method of organizing the bank's internal structure in corporate rather than departmental or divisional form. Indeed, the OCC itself has stated that: "[n]ational bank operating subsidiaries are treated under the National Bank Act . . . as part of the bank itself."[30] Thus, from the perspective of substance over form, permitting an operating subsidiary of a national bank to engage in ineligible-securities activities is precisely the same as permitting a department or division of a national bank to engage in those activities, a result clearly prohibited under Sections 16 and 21. [31]

3. The Purposes of Sections 16 and 21, as Expressed by Congress in the Legislative History to the Glass-Steagall Act and by the Supreme Court, Prohibit an Operating Subsidiary From Engaging in Ineligible-Securities Activities

We respectfully submit that permitting a national bank to engage in ineligible-securities activities through an operating subsidiary would pose precisely the dangers that the Glass-Steagall Act in general, and Sections 16 and 21 in particular, were intended to prevent.

The Supreme Court has identified two general concerns that gave rise to the enactment of the Glass-Steagall Act:

The first was the inherent risks of the securities business. Speculation in securities by banks and their affiliates during the speculative fever of the 1920's produced tremendous bank losses when the securities markets went sour. In addition to the palpable effect that such losses had on the assets of affected banks, they also eroded the confidence of depositors in the safety of banks as depository institutions. This crisis of confidence contributed to the runs on the banks that proved so devastating to the solvency of many commercial banks.**32**

Both of these concerns would be present if the OCC were to permit a national bank to engage in ineligible-securities activities through an operating subsidiary. First, such a bank would be directly exposed to the inherent risks of the securities business, because the bank would directly own stock of the operating subsidiary. Accordingly, any losses of the subsidiary would result in a decrease in the value of the stock held by the parent bank (if the financial statements of the bank and the operating subsidiary are not consolidated), or would result in the losses being directly incurred by the parent bank (if the financial statements of the bank and the operating subsidiary are consolidated). Second, a national bank that incurred losses as a result of the ineligible-securities activities of an operating subsidiary could erode the confidence of depositors in the safety of banks as depository institutions, potentially leading to a "crisis of confidence" that could contribute to runs on banks.

The Supreme Court has stated that, in enacting the Glass-Steagall Act, Congress also focused on "the more subtle hazards that arise when a commercial bank goes beyond the business of acting as a fiduciary or managing agent and enters the investment banking business either directly or by establishing an affiliate to hold and sell particular investments."**33** Among these "subtle hazards" were concerns that a single institution involved in both investment and commercial banking would be subject to various conflicts of interest that could affect its ability to give impartial financial advice to customers, and compromise the objectivity of the bank's lending operations. **34**

The subtle hazards identified by the Court would be present if the OCC were to authorize a national bank to engage in ineligible-securities activities through an operating subsidiary, to the same extent as if the bank were to engage in the ineligible-securities activities through an unincorporated department or division. As discussed above, the bank has a direct interest in the financial condition of an operating subsidiary engaged in ineligible-securities activities. This direct financial interest would subject the bank to conflicts of interest that could affect its ability to give impartial financial advice, such as by giving the bank an incentive to provide favorable advice to trust customers regarding securities that are dealt in or underwritten by the operating subsidiary. This direct financial interest also would subject the bank to conflicts of interest that

could compromise the objectivity of the bank's lending operations, such as by giving the bank an incentive to make loans to a troubled company whose securities are dealt in or underwritten by the operating subsidiary.

4. Relevant Judicial Decisions Support the Position That Sections 16 and 21 Prohibit an Operating Subsidiary From Engaging in Ineligible-Securities Activities

We are unaware of any judicial decisions directly addressing the authority of the OCC to permit a national bank to engage in ineligible-securities activities through an operating subsidiary. However, in Securities Industry Association v. Board of Governors of the Federal Reserve System,**35** the Supreme Court rejected an analytically similar attempt to convert "a portion of the [Glass-Steagall] Act's broad prohibition into a system of administrative regulation."**36** In that case, the Court rejected an attempt by the Board to define the term "security" so narrowly as to exclude commercial paper from the prohibitions of Sections 16 and 21.**37** In this regard, the Court noted that the Glass-Steagall Act's "design reflects the Congressional perception that certain investment-banking activities are fundamentally incompatible with commercial banking." **38** The Court also noted that Congress rejected the approach of simply regulating the underwriting activities of commercial banks. Rather, "Congress chose instead a broad structural approach that would `surround the banking business with sound rules which recognize the imperfections of human nature that our bankers may not be led into temptation, the evil effect of which is sometimes so subtle as not to be easily recognized by the most honorable man.'" **39**

If the OCC were to interpret 5.34 as authorizing it to permit a national bank to engage in ineligible-securities activities through an operating subsidiary, the OCC similarly would be attempting to convert a portion of the Glass-Steagall Act's broad prohibition into a system of administrative regulation. Section 16 flatly prohibits a national bank from engaging in ineligible-securities activities, and Section 21 flatly prohibits a firm engaged in ineligible-securities activities from accepting deposits. Neither Section contains an exception permitting these activities to be conducted through a subsidiary. Neither permits the OCC to override their broad prohibitions and, by administrative regulation, decide that certain national banks nonetheless may engage in ineligible-securities activities, whether through operating subsidiaries or otherwise.

We are aware that footnote 24 of the Supreme Court's decision in Board of Governors of the Federal Reserve System v. Investment Company Institute**40** sometimes is quoted for the proposition that: ". . . the language of 21 cannot be read to include within its prohibition separate organizations related by ownership with a bank, which does receive deposits." However, the complete quote specifically refers only to bank holding companies, not to operating subsidiaries of national banks. Similarly, in that case the Court also stated that "bank affiliates may be authorized to engage in certain activities that are prohibited to banks themselves." **41** This quote too, when read in context, applies solely to bank holding companies, and not to operating subsidiaries of national banks. Indeed, the case itself held that a bank holding company could, directly or through a non-bank subsidiary, serve as investment adviser to a closed-end investment company. The Court had no occasion in that case to consider whether Section 21 reached an operating subsidiary of a national bank, and thus that case does not support the authority of the OCC under Section 21 to permit national banks to engage in ineligible securities activities through operating subsidiaries.

Further, if anything, footnote 24 stands for the proposition that Section 21 would be applicable to an operating subsidiary of a national bank. The language in footnote quoted above states that Section 21 cannot be read to include within its prohibitions "separate organizations" related by ownership with a bank. As discussed above, an operating subsidiary is not a "separate organization" from its parent bank for purposes of the Glass-Steagall Act (or else Section 16 of the Glass-Steagall Act would prohibit the national bank from owning the shares of the operating subsidiary).

We also are aware that certain lower court cases have relied on the language quoted above. For example, in Investment Company Institute v. Federal Deposit Insurance Corporation ("ICI v. FDIC"),**42** the Court of Appeals for the District of Columbia Circuit held, under Section 21, that the FDIC had acted properly in permitting state nonmember banks to engage through "bona fide" subsidiaries in securities underwriting and dealing, as well as other activities not permissible for banks. However, in ICI v. FDIC, the court focused on the fact that Congress, when it enacted the Glass-Steagall Act, intended not to significantly restrict the activities of affiliates of state non-member banks.**43** The full restrictions imposed by the Glass-Steagall Act -- including the restrictions of Sections 16, 20 and 32, which are not applicable to state, non-member banks -- apply to affiliates of national banks. Moreover, we note that the court in ICI v. FDIC did not address the fact that the above-quoted language in Board of Governors of the Federal Reserve System v. Investment Company Institute related only to bank holding companies, and not to bank subsidiaries.

Similarly, in Securities Industry Association v. Federal Home Loan Bank Board ("SIA v. FHLBB"),**44** the District Court for the District of Columbia held, under Section 21, that the Federal Home Loan Bank Board properly approved applications of three savings and loan associations to engage in brokerage and investment advisory services through service corporation subsidiaries. This case, however, involved subsidiaries that were not engaged in ineligible-securities activities. Moreover, this case involved financial institutions that were subject only to Section 21 of the Glass-Steagall Act, and not to Sections 16, 20, and 32. Finally, the court in SIA v. FHLBB, like the court in ICI v. FDIC, did not address the fact that Board of Governors of the Federal Reserve System v. Investment Company Institute related only to bank holding companies, and not to bank subsidiaries.

5. Policy Considerations Support the Position That Sections 16 and 21 Prohibit an Operating Subsidiary From Engaging in Ineligible-Securities Activities

Policy arguments support the SIA's position that, by virtue of Sections 16 and 21, the OCC lacks the authority to permit national banks to engage in ineligible-securities activities through operating subsidiaries. First, as previously discussed, Congress could not have intended that the strict restrictions on a national bank's ineligible-securities activities imposed by Sections 16 and 21 could be avoided by the simple mechanism of establishing a subsidiary, and conducting the activities through the subsidiary. Such a result would elevate the form in which the ineligible-securities activities were conducted over the economic substance.

Second, also as previously discussed, permitting an operating subsidiary of a national bank to engage in ineligible-securities activities poses all of the financial and capital risks to the bank that would be posed if the bank conducted the activities directly. In this regard, any losses of the subsidiary would result in a decrease in the value of the stock held by the parent bank (if the

financial statements of the bank and the operating subsidiary are not consolidated), or would result in the losses being directly incurred by the parent bank (if the financial statements of the bank and the operating subsidiary are consolidated). The bank also could be subject to controlling person liability under the federal securities laws. It is worth noting, by contrast, that any ineligible-securities activities conducted by a bank affiliate currently are conducted by a so-called Section 20 subsidiary -- i.e., a non-bank subsidiary of a bank holding company. This structure provides significant financial and other safeguards to the bank. Because the bank has no direct or indirect ownership interest in the affiliated entity engaging in the ineligible securities activities, the bank's capital and assets are not at risk from those activities.

Third, we note that the pertinent provisions of Sections 16 and 21 date back to 1933, when the Glass-Steagall Act was enacted. To our knowledge, in the more than 60 years since those provisions were enacted, this is the first time that any federal banking agency even has hinted that a bank could circumvent the restrictions of Sections 16 and 21 by engaging in ineligible-securities activities through an operating subsidiary. And, unlike the case in which a statute must be applied to circumstances that did not exist at the time of the statute's enactment, ineligible-securities activities not only existed in 1933, they were precisely the activities addressed by Sections 16 and 21. Accordingly, we respectfully submit that, even if Sections 16 and 21 could have been subject to a different interpretation in 1933 (which we doubt), it is now unreasonable and not in accordance with law to reverse the consistent interpretation those provisions have received by the federal banking agencies for over 60 years.

D. Under the Bank Holding Company Act, the OCC Lacks the Authority to Permit National Banks to Engage in Ineligible-Securities Activities Through Operating Subsidiaries

1. The Bank Holding Company Act Requires That Any Bank Affiliate Which Engages in Ineligible-Securities Activities Must be a "Section 20 Subsidiary"

a. Introduction

The Bank Holding Company Act (the "BHCA"), which permits bank holding companies to engage in ineligible-securities activities through non-bank (i.e., Section 20) subsidiaries, provides the exclusive method by which Congress intended to permit bank affiliates to engage in activities other than those in which a bank could engage directly, such as ineligible-securities activities. Accordingly, by virtue of the BHCA, the OCC lacks the authority to permit an operating subsidiary of a national bank to engage in ineligible-securities activities.

Among the purposes of the BHCA was to promote "the general purposes of the Glass-Steagall Act - to prevent unduly extensive connections between banking and other businesses."[45] Indeed, the legislative history of the BHCA reveals that one of the motivating factors behind that legislation was the fact that many bank holding companies had been able to avoid the restrictions of Section 19(e) of the Glass-Steagall Act (now repealed), which prohibited a bank holding company from voting its shares of a bank subsidiary unless it agreed to divest itself within five years of any interest in a company formed for the purpose of, or engaged principally in, the issuance or underwriting of securities. As a result of this provision, many bank holding companies simply did not vote the shares of their bank subsidiaries, and thus were able to maintain their securities subsidiaries. [46]

As a result, Section 4 of the BHCA generally prohibits bank holding companies from holding

shares of non-bank subsidiaries, subject to certain exemptions. As originally enacted in 1956, Section 4(c)(6) of the BHCA provided an exemption from this general rule, and permitted a bank holding company to own the "shares of any company all the activities of which are of a financial, fiduciary, or insurance nature and which the Board . . . by order has determined to be so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto . . . ."**47** That exemption, which has been amended several times, now appears as Section 4(c)(8) of the BHCA, and states in pertinent part that a bank holding company may own the "shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto . . . ." **48**

b. Only Section 20 Subsidiaries May Engage in Activities That Are Closely Related to Banking, Such as Ineligible-Securities Activities

By permitting a non-bank subsidiary to engage in activities that are "closely related to banking," Section 4(c)(8) of the BHCA reflects a Congressional determination that a bank holding company may own shares in a company that engages in some activities other than those in which a bank may engage. For example, pursuant to Section 4(c)(8), the Board has permitted bank holding companies to hold non-bank subsidiaries that engage in limited ineligible-securities activities, subject to numerous conditions and safeguards intended to, among other things, insulate the affiliated bank from any financial impact of those ineligible-securities activities.**49**

Section 4(c)(8) also reflects a Congressional determination that the BHCA and Section 4(c)(8) reflect the exclusive method by which an affiliate of a bank may engage in activities -- such as limited ineligible-securities activities -- that are "closely related to banking," but in which the bank itself may not engage. Any other result would render Section 4(c)(8) wholly ineffective, and would be entirely inconsistent with the purposes and the structure of the BHCA. For example, Congress could not have intended that a national bank which is owned by a bank holding company could avoid the express requirements of Section 4(c)(8) by the simple mechanism of creating an operating subsidiary, and engaging in activities that are closely related to banking through that subsidiary. **50** Similarly, Congress could not have intended to permit a bank to avoid the restrictions of the BHCA altogether by simply not being a subsidiary of a bank holding company, and engaging in activities that are closely related to banking through one or more operating subsidiaries. **51**

As a practical matter, Congress has never had any reason to believe that banks could circumvent the restrictions of the BHCA through such mechanisms, and therefore never had any reason to expressly address such mechanisms in the BHCA. At the time the BHCA was enacted in 1956, banks generally did not own operating subsidiaries. For example, as previously mentioned, the OCC did not authorize the first national bank operating subsidiary until 1963. Moreover, to our knowledge, the release proposing current 5.34 represents the first time that any federal banking agency even has hinted that it could authorize an operating subsidiary of a bank to engage in activities in which the bank itself was not permitted to engage, such as limited ineligible-securities activities and other activities that are closely related to banking.

Accordingly, by virtue of the BHCA, the OCC lacks the authority to permit an operating

subsidiary of a national bank to engage in ineligible-securities activities. Rather, any such activities would have to be performed in a separate Section 20 Subsidiary owned by a bank holding company that also owned the bank, and any such activities would be subject to Section 4(c)(8) of the BHCA.

2. The OCC May Not Adopt Regulations, Such as 5.34, That Are Inconsistent With the Regulations Adopted by the Board to Implement the Glass-Steagall Act

The OCC also lacks the authority to interpret the Glass-Steagall Act in such a way as to authorize it to permit an operating subsidiary of a national bank to engage in ineligible-securities activities, because such an interpretation would be inconsistent with interpretations of the Glass-Steagall Act by the Board. In this regard, the Supreme Court has held that the Board "has primary responsibility for implementing the Glass-Steagall Act . . . ."**52** Accordingly, we respectfully submit that the OCC may not interpret the Glass-Steagall Act in a manner which would be inconsistent with the interpretations of the Board, which has "primary responsibility" for implementing that Act.

In this regard, were the OCC to interpret proposed 5.34(d)(3) as being broad enough to permit it to authorize a national bank to engage in ineligible-securities activities, this interpretation would be inconsistent with Glass-Steagall Act interpretations of the Board. Specifically, the Board's Regulation Y, and its interpretations thereunder, require that any ineligible-securities activities performed by an affiliate of a bank must be performed by a Section 20 Subsidiary, as opposed to a subsidiary of the bank.

Moreover, were the OCC to interpret proposed 5.34(d)(3) as being broad enough to permit it to authorize a national bank to engage in ineligible-securities activities, it would substantially undermine Congress' intention that the Board have primary responsibility for the interpretation of the Glass-Steagall Act. We note that the Board generally lacks authority over operating subsidiaries of national banks. Thus, to the extent that such subsidiaries were engaged in ineligible-securities activities, the Glass-Steagall Act issues associated with those activities necessarily would be interpreted by the OCC, rather than the Board. Congress could not have intended such a result when it gave the Board the primary responsibility for interpreting the Glass-Steagall Act.

E. If the OCC Were to Authorize an Operating Subsidiary of a National Bank to Engage in Ineligible-Securities Activities, That Action Would be Arbitrary, and the OCC Should Not be Entitled to Substantial Judicial Deference

Notwithstanding the Supreme Court's decision in Nationsbank v. Variable Annuity Life Insurance Co. ("VALIC"),**53** the OCC should not be entitled to substantial judicial deference with respect to any Glass-Steagall Act implications of 5.34, and any applications granted thereunder. In VALIC, the Court deferred to the OCC's determinations that a national bank's sale of annuities was incidental to the "business of banking," and therefore permissible under 24 (Seventh), and that annuities are not "insurance" for purposes of 12 U.S.C. 92, which provides that banks in towns with a population under 5,000 may sell insurance. In deferring to the OCC's determinations in this regard, the Court stated that: "[i]t is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with enforcement of that statute."**54** The Court therefore concluded that: "[a]s the administrator

charged with supervision of the National Bank Act . . . the Comptroller bears primary responsibility for surveillance of the `business of banking` authorized by 24 Seventh." **55**

However, the OCC is not the administrator charged with supervision of the Glass-Steagall Act. As previously discussed, in both Schwab and Becker, the Supreme Court held that: "the Board has primary responsibility for implementing the Glass-Steagall Act . . . ."**56** Accordingly, in those cases, the Court stated that it would "accord substantial deference to the Board's interpretation of [the Glass-Steagall] Act whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent."**57** Thus, unlike the OCC's interpretations of the National Bank Act which were at issue in VALIC, the OCC's interpretations of the Glass-Steagall Act should not be accorded substantial deference by a court.

Moreover, even if a court were to provide substantial deference to the OCC's Glass-Steagall Act determinations, the court nonetheless should be compelled to reject any interpretation of that Act by the OCC which would permit the OCC to authorize an operating subsidiary of a national bank to engage in ineligible-securities activities. The VALIC Court relied on the test set forth in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.**58** for reviewing "an expert administrator's statutory exposition." The VALIC Court stated that, under the Chevron test:

[W]e inquire first whether "the intent of Congress is clear" as to "the precise question at issue." If so, "that is the end of the matter." But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight." (Internal citations to Chevron omitted).**59**

As discussed above, the intent of Congress under Sections 16 and 21 of the Glass-Steagall Act is clear as to the precise question of whether a national bank may engage in ineligible-securities activities -- it may not. This result is not altered merely because the bank proposes to engage in such activities through an operating subsidiary, particularly in light of the fact that an operating subsidiary is merely an incorporated division of the bank.

Further, even if a court were to determine that Sections 16 and 21 are silent or ambiguous with respect to the application of those provisions to an operating subsidiary of a national bank, the reasonable construction of the Glass-Steagall Act is to conclude that those provisions do apply to such operating subsidiaries. As previously discussed, any other conclusion would permit a national bank to engage in ineligible-securities activities indirectly, even though it cannot engage in such activities directly. Also, permitting an operating subsidiary of a national bank to engage in ineligible-securities activities would exalt form over substance, because such a national bank would be exposed to all of the risks and hazards that Congress intended to prevent when it enacted Sections 16 and 21 of the Glass-Steagall Act.

Thus, to the extent that Sections 16 and 21 of the Glass-Steagall Act leave a regulatory "gap" by failing to expressly address their application to operating subsidiaries of national banks, the reasonable reading of the Glass-Steagall Act would be to conclude that Sections 16 and 21 do apply to such an operating subsidiary. In this regard, we note that any such regulatory gap is

entirely reasonable, in that national banks were not authorized to even own shares of operating subsidiaries until 30 years after the enactment of the Glass-Steagall Act. And, for the reasons discussed above, had national banks been authorized to own shares of operating subsidiaries at the time the Glass-Steagall Act was enacted in 1933, Congress would have intended the restrictions in Sections 16 and 21 of the Glass-Steagall Act to also apply to such subsidiaries.

III. POLICY ISSUES

Even if the OCC were to determine that it had the legal authority to grant the Application (which it does not), the OCC should exercise its discretion and not grant that Application for various policy reasons. Most significantly in the regard is the fact that, were the OCC to permit national banks to underwrite and deal in securities through operating subsidiaries, national banks would be far less likely to work with Congress, the Administration, regulators, and other members of the financial services community to enact legislation comprehensively modernizing the regulation of the financial services industry. While SIA is aware that some have attempted to argue that permitting such activities would not cause national banks to seek such legislation, that argument simply is unrealistic. If national banks can own securities firms, but securities firms still could not own banks, there realistically is very little additional benefit that a national bank would derive from any of the principal legislative proposals to modernize the regulation of the financial services industry. At a minimum, national banks would be quite unlikely to support any bill that they did not view to be practically ideal, while securities firms and other financial services institutions would be in far greater need of a bill.

SIA believes that the OCC's willingness to consider granting the Application is premised largely on its frustration with Congressional inaction on modernizing our antiquated financial services laws. SIA shares the OCC's frustration, and is working diligently with Congress and others to enact modernization legislation. Such legislation would benefit financial services consumers by providing greater competition on a level playing field, subject to appropriate Congressionally mandated safeguards. These results, however, cannot be achieved by the OCC (or any other banking regulator) attempting to override portions of the Glass-Steagall Act on a piecemeal basis. Granting the Zions' Application would be precisely such a piecemeal attempt at overriding the Glass-Steagall Act, and as discussed below, would provide banks with an unfair competitive advantage over securities firms. Because of this unfair competitive advantage, it is not at all clear that consumers would ultimately be benefitted by the OCC's actions, and there is a very real chance that they ultimately could be hurt by the inability of securities firms to fairly compete with banks.

As a result, SIA urges the OCC to defer to Congress in its efforts although slow to reform the Glass-Steagall Act.

Moreover, we note that the OCC would, if it granted the Application, tilt the current competitive balance between banks and securities firms significantly in favor of banks. That is, granting the Application would have the effect of permitting banks to directly own securities firms, even though securities firms still would be prohibited from owning banks. This result would be so bizarre, so illogical, and so fundamentally unfair to the securities industry that a government agency such as the OCC should refrain from adopting a new interpretation of a 64 year old statute such as the Glass-Steagall Act, when that interpretation would for the first time lead to such a result.

If you have any questions, or if we can provide any additional information, please feel free to contact the undersigned.

Very truly yours,

Marc E. Lackritz
President

Steve Judge
Senior Vice President, Government Affairs

cc: Zions First National Bank
Office of the Comptroller of the Currency, San Francisco District Office

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Footnotes

1 The Securities Industry Association brings together the shared interests of more than 760 securities firms throughout North America to accomplish common goals. SIA members -- including investment banks, broker-dealers, specialists, and mutual fund companies -- are active in all markets and in all phases of corporate and public finance. In the U.S., SIA members collectively account for approximately 90 percent, or $100 billion, of securities firms' revenues and employ about 350,000 individuals. They manage the accounts of more than 50 million investors directly and tens of millions of investors indirectly through corporate, thrift and pension plans.

2 62 Fed. Reg. at 19172 (emphasis added).

3 In accordance with ' 5.11(a), a copy of this comment letter is being sent to Zions. ' 5.11(a) also requires a request for a hearing to be submitted "to the appropriate district office." Accordingly, we are submitting a copy of this comment letter to the OCC's San Francisco District Office. As also required by ' 5.11(a), this comment letter describes the nature of the issues or facts to be presented (that is, any legal, factual, and policy reasons supporting the OCC's decision (if it makes such a decision) to grant the Application), and the reasons why written submissions are insufficient to make an adequate presentation of those issues or facts to the OCC (that is, because commenters have no basis for determining during the comment letter process what novel basis the OCC might rely on to grant the Application).

4 See Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60342, 60351-55 (Nov. 27, 1996).

5 See SIA Letter of Comment, dated January 30, 1995, on the Release entitled "Rules, Policies, and Procedures for Corporate Activities," 59 Fed. Reg. 61034 (November 29, 1994), Docket No. 94-18 (the "SIA's Op. Sub. Comment Letter"). SIA's Op. Sub. Comment Letter is incorporated in this letter by reference.

6 12 U.S.C. ' 93a.

7 See 126 Cong.Rec. 6902 (March 27, 1980) (emphasis added). See also Conference of State Bank Supervisors v. Conover, 710 F.2d 878, 885 (D.C. Cir. 1983) (Quoting from a portion of Senator Proxmire's statement, but noting that this did not prevent the OCC from adopting regulations preempting state laws that otherwise would have prohibited national banks from issuing adjustable rate mortgages ("ARMs"), because the regulations "did not confer any new powers on national banks, since the [National Bank] Act imposed no restrictions on ARMs." (Italics in original)).

8 H. Conf. Rep. No. 842, 96th Cong., 2d Sess. 83 (1980), reprinted in 1980 U.S.C.C.A.N. 298, 313 (emphasis added).

9 See ' 708 of DIDMCA, Pub. L. No. 96-221, 94 Stat. 132, 188 (1980).

10 S. Rep. No. 368, 96th Cong., 2d Sess. 13 (1979), reprinted in 1980 U.S.C.C.A.N. 236, 249.

11 See Securities Industry Association v. Board of Governors of the Federal Reserve System, 468 U.S. 137, 154 (1984) ("Becker"). See also Conference of State Bank Supervisors v. Conover, 710 F.2d 878, 885 (D.C. Cir. 1983) (Under ' 93a, the Comptroller is not empowered to permit activities that are impermissible under the Glass-Steagall Act).

12 By comparison, a separate provision of ' 24(Seventh) permits a national bank to invest in certain types of debt securities -- referred to as "investment securities" -- as long as that investment does not exceed 10 percent of its capital stock and 10 percent of its unimpaired surplus. The Comptroller expressly is authorized to "further" define the term investment securities, and to adopt other "limitations and restrictions" on the investment by a national bank in investment securities.

13 See Letter from Doyle L. Arnold, Senior Deputy Comptroller for Policy and Planning, OCC, dated April 18, 1984 (emphasis added). See also Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division, OCC, to Mr. James A. Peden, Jr., Stennet, Wilkenson & Ward, dated July 2, 1981 ("An operating subsidiary is, in effect, an incorporated department of the bank and may perform any business function which the parent bank is permitted to perform.").

14 In this regard, in the Supreme Court's recent decision in Nationsbank v. Variable Annuity Life Insurance Co., 63 U.S.L.W. 4076 (U.S. Jan. 17, 1995), the Court stated that, while the "business of banking" is not limited to the enumerated powers in ' 24(Seventh), "[t]he exercise of the Comptroller's discretion . . . must be kept within reasonable bounds. Ventures distant from dealing in financial investment instruments -- for example, operating a general travel agency -- may exceed those bounds." Id. at 4078 n.2. We note that there is no federal statute expressly prohibiting a bank from operating a travel agency, whereas the Glass-Steagall Act expressly does prohibit a bank from engaging in ineligible-securities activities.

15 See California National Bank v. Kennedy, 167 U.S. 362, 366 (1897). According to the Court: "[t]he prohibition was implied from the failure to grant the power." Id.

16 See, e.g., Hearings before a Subcommittee of the Committee on Banking and Currency of the United States Senate Pursuant to S. Res. 71, 71st Cong., 3d Sess., Part VII (Appendix), at 1052-68 (1931).

17 Id. at 1052.

18 See Operation of the National and Federal Reserve Banking Systems, S. Rep. No. 77, 73d Cong., 1st Sess. 8-9 (1933).

19 Letter from Doyle L. Arnold, Senior Deputy Comptroller for Policy and Planning, OCC, dated April 18, 1984. See also Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division, OCC, to Mr. Eugene E. Henn, Vice President and Senior Counsel, American Fletcher National Bank, dated March 15, 1983 ("Conceptually, the OCC regards operating subsidiaries as integral departments of the parent bank. All of the banking laws generally applicable to the parent bank also apply to its subsidiaries.").

20 See Operating Subsidiaries, Other Equity Investments, Conversions, Changes in Equity Capital, Subordinated Debt, 55 Fed. Reg. 996 (Jan. 11, 1990) (emphasis added). See also Rules, Policies and Procedures for Corporate Activities; Operating Subsidiaries, 48 Fed. Reg. 48452 (Oct. 19, 1983) (Adopting revisions to current ' 5.34) ("The Office's concern with regard to operating subsidiaries is that the activities in which they propose to engage be considered part of the business of banking or incidental thereto."); Corporate Applications; Operating Subsidiaries, 48 Fed. Reg. 1732 (Jan. 14, 1983) (Proposing revisions to current ' 5.34) ("An operating subsidiary of a national bank may perform only activities that can be performed within the corporate structure of its parent bank.").

21 Former ' 7.7376 was an OCC interpretive ruling that subsequently was incorporated into ' 5.34.

22 See American Land Title Association v. Clarke, 772 F. Supp. 1353, 1355 (S.D.N.Y. 1991), rev'd on other grounds, 968 F.2d 150 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993).

23 See Glidden, The Regulation of National Banks' Subsidiaries, 40 Bus. Law. 1299, 1300 n.5 (1985), citing Current Legal and Regulatory Developments, National Banking Review, at 261, 264 (Dec. 1963).

24 Letter from Doyle L. Arnold, Senior Deputy Comptroller for Policy and Planning, dated April 18, 1984.

25 Becker, 468 U.S. at 145 (Internal quotation marks and brackets omitted), quoting Board of Governors of the Federal Reserve System v. Investment Company Institute, 450 U.S. 46, 70 (1981) ("FRB v. ICI").

26 Becker, 468 U.S. at 148.

27 Id. at 149.

28 Section 16 is codified in 12 U.S.C. ' 24(Seventh).

29 Section 21 of the Glass-Steagall Act is codified in 12 U.S.C. ' 378(a)(1). The Supreme Court has noted that, like Section 16, "Section 21 also separates investment and commercial banks, but does so from the perspective of investment banks. Congress designed ' 21 to prevent persons engaged in specified investment-banking activities from entering the commercial-banking business." Becker, 468 U.S. at 148.

30 See Operating Subsidiaries, Other Equity Investments, Conversions, Changes in Equity Capital, Subordinated Debt, 55 Fed. Reg. 996 (Jan. 11, 1990).

31 We note that the Supreme Court has held that other entities that technically are distinct from a bank nonetheless are part of a bank for purposes of the Glass-Steagall Act. For example, in footnote 12 of the Supreme Court's decision in Investment Company Institute v. Camp, the Court noted that the Board previously had concluded that Section 32 of the Glass-Steagall Act, which prohibits a bank and a securities firm from having interlocking officers, directors, and employees, did not prevent the officers of a bank's trust department from serving at the same time as officers and directors of an investment fund operated by the bank, because the investment fund and the bank "constitute a single entity." The Court stated that it had "no doubt that the Board's construction and application of ' 32 is both reasonable and rational." See 401 U.S. 617, 625-25 n.12 (1970).

32 Becker, 468 U.S. at 145 (footnote omitted).

33 Camp, 401 U.S. at 630 (emphasis added). Accord Becker, 468 U.S. at 145.

34 Becker, 468 U.S. at 145-47; Camp, 401 U.S. at 630-38.

35 468 U.S. 137 (1984).

36 Id. at 153.

37 Id. at 149-60.

38 Id. at 147.

39 Id., quoting 75 Cong.Rec. 9912 (1932) (Remarks of Sen. Buckley).

40 450 U.S. 46, 59 n.24 (1981).

41 Id. at 60 (footnote omitted).

42 815 F.2d 1540 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987).

43 See, e.g., id. at 1546-49.

44 588 F. Supp. 749 (D.D.C. 1984).

45 See S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.A.A.N. 2385, 2386 (Report accompanying the 1966 amendments to the BHCA).

46 See S. Rep. No. 1095, 84th Cong., 2d Sess. (1955), reprinted in 1956 U.S.C.A.A.N. 2482, 2483. See also FRB v. ICI, 450 U.S. at 69-71.

47 See Bank Holding Company Act of 1956, Pub. L. No. 511, ' 4(c)(6) (1956), reprinted in 1956 U.S.C.A.A.N. 169, 173.

48 See 12 U.S.C. ' 1843(c)(8). Among other things, Section 4(c)(8) also specifies the factors the Board must consider in determining whether a particular activity is a proper incident to banking or managing and controlling banks. Id.

49 As previously mentioned, such non-bank subsidiaries often are referred to as "Section 20 Subsidiaries," because their ineligible-securities activities are subject to the restrictions of Section 20 of the Glass-Steagall Act.

50 In this regard, at least one court has held that the BHCA does not apply to subsidiaries of a bank, even if the bank is owned by a bank holding company. See Citicorp v. Board of Governors of the Federal Reserve System, 936 F.2d 66 (2d Cir. 1991), cert. denied, 112 S. Ct. 869 (1992).

51 Typically, the restrictions of Section 4 of the BHCA do not apply to a bank, regardless of whether the bank is owned by a bank holding company. See, e.g., Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System, 890 F.2d 1275 (2d Cir. 1989), cert. denied, 498 U.S. 810 (1990).

52 SIA v. Board of Governors of the Federal Reserve System, 468 U.S. 207, 217 (1984) (Permitting a bank holding company to acquire a brokerage subsidiary) ("Schwab"); Becker, 468 U.S. at 143 (Holding that commercial paper is a security for purposes of the Glass-Steagall Act).

53 63 U.S.L.W. 4076 (U.S. Jan. 17, 1995).

54 63 U.S.L.W. at 4077. The VALIC Court quoted this passage from Clarke v. Securities Industry Association, 479 U.S. 388, 403-04 (1987), which, in turn, had quoted from Camp, 401 U.S. at 626-27.

55 63 U.S.L.W. at 4077.

56 Schwab, 468 U.S. at 217; Becker, 468 U.S. at 143.

57 Schwab, 468 U.S. at 217; Becker, 468 U.S. at 143. (Emphasis added).

58 467 U.S. 837, 842 (1984).

59 63 U.S.L.W. at 4077.