



Administrative Conference of the United States

**Administration of the Securities Exchange Act of 1974 [sic]
By the Federal Bank Regulatory Agencies**

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(April, 1992)

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Administrative Conference of the United States

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Special Committee on Financial Services Regulation

**Proposed Recommendation
June 18-19, 1992**

Regulation of Depository Institutions Under the Securities Exchange Act of 1934

Since 1934 the Securities and Exchange Commission has been responsible for regulation of companies whose securities are publicly traded. Those depository institutions that are not owned by holding companies [some 545 in number] are treated differently to some extent under this regulatory regimen.¹ Since 1964, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Fed), and the Federal Deposit Insurance Corporation (FDIC) have had authority under Section 12(i) of the Securities Exchange Act of 1934 (Act) to administer certain provisions of the 1934 Act with regard to the independent banks.² Since 1974, the Federal Home Loan Bank Board (and since 1989 its successor, the Office of Thrift Supervision (OTS)), has exercised the same authority over independent savings associations.

The role of each of the bank regulatory agencies is limited to administering and enforcing specified provisions of the 1934 Act with respect to the depository institutions it regulates and that are not owned by holding companies. This is a jurisdictional limitation, in that the OCC's authority extends only to

¹ The term "depository institution" refers to commercial banks, savings and loan associations and savings banks (now collectively known as "savings associations"), and credit unions. See, for example, 12 U.S.C. §461(b)(1)(A) (1988) (definition of "depository institution" for purposes of the Federal Reserve Act).

² Section 12(i) (15 U.S.C.A. §78(i) (West Supp. 1991)) provides that these agencies—
"shall issue substantially similar regulations" to those issued by the SEC, "unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors, and publish such findings and the detailed reasons therefor, in the Federal Register. Such regulations of the above-named agencies, or the reasons for failure to publish such substantially similar regulations to those of the Commission, shall be published in the Federal Register within 120 days of October 28, 1974, and, thereafter, within 60 days of any changes made by the Commission in the relevant regulations and rules."

independent, national banks; the Fed's authority to independent, state-chartered Fed-member banks; the FDIC's authority to independent, state-chartered, nonmember insured banks; and the OTS' authority to independent, insured savings institutions. The enforcement authority granted to the banking agencies by Section 12(i) is limited to the sections of the Securities Exchange Act of 1934 specified by Section 12 (i).³ Thus, the general antifraud provisions of the 1934 Act are not explicitly included in the delegation of authority to the agencies, and the enforcement of those provisions remains with the SEC in situations involving depository institutions.⁴

Section 12(i) provides that bank regulatory agencies must publish "substantially similar" regulations to those issued by the SEC within 60 days of any new rules or rule amendments made by the SEC.⁵ Although the agencies are making significant efforts to comply, primarily by incorporating SEC rules or amendments by cross-reference, historically, this time limit has not been met by the agencies in some instances. In one case, final action by the regulator in promulgating "substantially similar" rules took over 5 years after pertinent SEC amendments had been issued.

While the apparent difficulties with regard to timeliness are of concern to the Conference, more fundamental reasons suggest that Section 12(i) be repealed. Under the current regulatory system, jurisdiction with respect to financial institutions and their holding companies is bifurcated. The Securities and Exchange Commission regulates bank and thrift holding company disclosure, while the federal banking and thrift regulators administer the financial disclosure system for individual banks and thrifts that are directly owned by the public (rather than owned by a holding company). The anomalous result of this splintered authority is that, while approximately 11,000 public companies, including some 1,280

³ Section 12(i) provides, in pertinent part, that "the powers, function and duties vested in the Commission to administer and enforce [specified sections of the Securities Exchange Act of 1934 with respect to depository institutions regulated by the federal bank regulatory agencies]. . . are vested in [the appropriate federal bank regulatory agencies]."

⁴ However, the bank regulatory agencies have used other enforcement authorities, such as under 12 U.S. C. §1818, to enforce antifraud provisions.

⁵ The "substantially similar" promulgation requirement does not apply if the bank regulatory agencies instead publish in the Federal Register findings and reasons, to the effect that implementation of such regulations is not necessary or appropriate in the public interest or for the protection of investors. Like the implementing regulations, such requisite findings and reasons are required to be published within 60 days of any changes made in SEC regulations and rules.

publicly-owned bank and thrift holding companies, are subject to SEC review, some 545 publicly-owned banks and thrifts that are not part of holding companies are not subject to SEC oversight.

Repeal of the special provisions relating to securities of banks and thrifts would improve the ability of investors to compare securities disclosure by depository institutions, holding companies of depository institutions and their institutions, and other public companies. Repeal of Section 12(i) would also eliminate the potential for inconsistencies in disclosure among those different types of public companies. Repeal also would make bank and thrift disclosure reports more accessible to investors by ensuring that those reports reside in a single depository, the Securities and Exchange Commission, and by bringing those reports within EDGAR, the SEC's electronic access system.

Repeal would improve regulatory efficiency by eliminating duplication of regulatory personnel and agency resources. Repeal also would reduce the likelihood that the disclosure laws will be inconsistently interpreted by multiple regulators. Finally, repeal would promote functional regulation, by permitting the bank regulatory agencies to concentrate on their responsibilities for the safety and soundness of the banking system, while giving the SEC the full authority it needs to fulfill its responsibilities to protect investors.

Experience since the adoption in 1964 of Section 12(i) has not shown any particular advantage from the bifurcation of disclosure authority and suggests that some advantage might be gained by consolidation of such authority.

RECOMMENDATION

Congress should repeal Section 12(i) of the Securities Exchange Act of 1934, 15 U.S.C.A. 78l (i) (West Supp. 1991).

I. INTRODUCTION

Since 1934, the Securities and Exchange Commission (SEC)¹ has administered the scheme of federal statutes concerned with the regulation of the issuance of and trading in securities.² One particular class of issuers of securities that has received relatively favored treatment under this regulatory scheme has been the depository institutions.³ However, since 1964, the Comptroller of the Currency and that official's office (OCC),⁴ the Board of Governors of the Federal and Reserve System (Fed),⁵ and the Federal Deposit Insurance Corporation (FDIC),⁶ have had authority under section 12(i) of the Securities Exchange Act of 1934 (1934 Act)⁷ to administer certain provisions of

¹See, e.g., Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 885 (codified at 15 U.S.C. §78d(a) (1988)) (establishing the SEC). [All subsequent citations to the United States Code are to the current text, as supplemented, unless otherwise indicated.] On the statutory authority of the SEC, see 1 L. Loss & J. Seligman, *Securities Regulation* 285-307 (3d ed. 1989) [hereinafter Loss & Seligman]. See also L. Loss, *Fundamentals of Securities Regulation* 35-38 (2d ed. 1988) [hereinafter Fundamentals] (giving brief description of statutes administered by the SEC).

²These statutes include: (i) the Securities Act of 1933, 15 U.S.C.A. §§77a-77aa (West 1981 & Supp. 1990); (ii) the Securities Exchange Act of 1934, *id.* §§78a-78j; (iii) the Public Utility Holding Company Act of 1935, *id.* §§79a-79z-6; (iv) the Trust Indenture Act of 1939, *id.* §§77aaa-77bbb; (v) the Investment Company Act of 1940, *id.* §§80a-1 to 80a-64; and, (vi) the Investment Advisers Act of 1940, *id.* §§80b-1 to 80b-21. On the scope and purposes of these statutes, see 1 Loss & Seligman at 227-270. See also Fundamentals at 36-38. On the two 1940 acts in particular, the definitive work is T. Frankel, *Regulation of Money Managers* (4 vols. 1978-80 & Cum. Supp.).

³On the favored treatment of depository institutions under the 1933 Act and 1934 Act, see *infra* notes 40-42 and accompanying text. For purposes of this study, the term "depository institution" is taken to mean commercial banks, and savings and loan associations and savings banks (now collectively known in federal law as "savings associations"). In some contexts, the term "depository institution" is taken to refer to a broader classification of financial intermediaries consisting of commercial banks, savings and loan associations (S&Ls) and savings banks, and credit unions. See, e.g., 12 U.S.C. §461(b)(1) (1988) (definition of "depository institution" for purposes of the Federal Reserve Act (FRA)). See generally 1 M.P. Malloy, *The Corporate Law of Banks* 5-8 (1988 & Cum. Supp.) (discussing "depository institution" as a technical term of art). Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at scattered sections of 12 and 15 U.S.C., *inter alia*), the term has been given a narrower meaning, to include only commercial banks and S&Ls and savings banks. See FIRREA §204(c)(1), 103 Stat. at 191 (codified at 12 U.S.C. §1813(c)) (definition of "depository institution" for purposes of Federal Deposit Insurance Act (FDIA)). See also 1 Malloy, *supra* at 7-8 (Cum. Supp.) (discussing meaning and statutory scope of term "depository institution" under FIRREA). For purposes of federal bank regulatory law, S&Ls and savings banks are now generically referred to as "savings associations." See FIRREA §204(b), 103 Stat. at 190-191 (codified at 12 U.S.C. §1813(b)) (definition of "savings association" for purposes of FDIA); FIRREA §301, 103 Stat. at 277 (codified at 12 U.S.C. §1461(4)) (definition of "savings association" for purposes of Home Owners Loan Act (HOLA)). See also 1 Malloy *supra* at 8 (Cum. Supp.) (discussing meaning and statutory scope of term "savings association" under FDIA and HOLA).

⁴The Comptroller of the Currency is the federal official with chartering, examination, and supervisory authority over national banks and banks operating in the District of Columbia. See 12 U.S.C. §§1, 37 (authority of Comptroller under National Bank Act (NBA); applicability of NBA); *id.* §1813(q)(1) (FDIA; authority of Comptroller). See also *infra* note 19 and accompanying text (discussing 1934 Act authority of the Comptroller). See generally 1 Malloy, *supra* note 3 at 28-40 (1988 & Cum. Supp.) (discussing role and authority of Comptroller).

⁵The Fed has examination and supervisory authority primarily over state-chartered member banks. See 12 U.S.C. §483 (authority of Fed under the FRA); *id.* §1813(q)(2) (FDIA; authority of Fed). See also *infra* note 20 and accompanying text (discussing 1934 Act authority of the Fed). See generally 1 Malloy, *supra* note 3 at 40-47 (1988 & Cum. Supp.) (discussing role and authority of Fed). The Fed also has approval, examination and supervisory authority over bank holding companies (BHCs). See 12 U.S.C. §§1841-1850 (authority of Fed under Bank Holding Company Act (BHCA)). However, the SEC, and not the Fed, exercises 1934 Act authority with respect to BHCs. See Fundamentals at 417.

⁶The FDIC has examination and supervisory authority primarily over state-chartered nonmember banks the deposits of which it insures. See 12 U.S.C. §§1811, 1814, 1821 (authority of FDIC under FDIA; applicability of FDIA); *id.* §1813(q)(3) (FDIA; authority of FDIC). See also *infra* note 21 and accompanying text (discussing 1934 Act authority of the FDIC). See generally 1 Malloy, *supra* note 3 at 47-52 (1988 & Cum. Supp.) (discussing role and authority of FDIC). The FDIC also insures the deposits of savings associations, and exercises some regulatory authority over them, in addition to that exercised by the Office of Thrift Supervision (OTS). See 12 U.S.C. §1814(a)(2) (insurance of savings association deposits). On the role of the OTS, see *infra* notes 10-11 and accompanying text.

⁷15 U.S.C.A. §78j(i) (West Supp. 1991), which currently provides as follows:

the limitations.⁸ Since 1974,⁹ the Federal Home Loan Bank Board (FHLBB)¹⁰ (and since 1989 its successor, the Office of Thrift Supervision¹¹) as exercised identical 1934 Act authority over savings associations.

In light of current and past practices of these federal bank and thrift regulatory agencies (the agencies) under their section 12(i) authority, there is serious concern whether they are adequately fulfilling their responsibilities under the section. There is also a related concern whether the regulatory scheme established by the section is still relevant in light of current market conditions. This study attempts to assess these concerns and to make appropriate recommendations.

This study includes three segments: (i) a review and textual analysis of the background and provisions of the statutory authority of section 12(i) of the 1934 Act and the implementing regulations of the bank regulatory agencies;¹² (ii) an empirical analysis of the implementation of section 12(i) by these agencies;¹³ and, (iii) an assessment of the performance of the regulatory agencies under the section and of the need for changes at the statutory or administrative level, as appropriate.¹⁴ The study reaches the conclusion¹⁵ that the section 12(i) delegation of authority to these agencies has not fulfilled in practice the expectations evident in the language of the section and its legislative history, and that the repeal of the section 12(i) delegation approach is accordingly warranted.

(i) In respect of any securities issued by banks and savings associations the deposits of which are insured in accordance with the Federal Deposit Insurance Act, the powers, functions, and 1934 Act, subject to certain statutorily specified duties vested in the Commission to administer and enforce sections 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p [sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the 1934 Act], (1) with respect to national banks and banks operating under the Code of Law of the District of Columbia are vested in the Comptroller of the Currency, (2) with respect to all other member banks of the Federal Reserve System are vested in the Board of Governors of the Federal Reserve System, (3) with respect to all other insured banks are vested in the Federal Deposit Insurance Corporation, and (4) with respect to savings associations the accounts of which are insured by the Federal Deposit Insurance Corporation are vested in the Office of Thrift Supervision. The Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision shall have the power to make such rules and regulations as may be necessary for the execution of the functions vested in them as provided in this subsection. In carrying out their responsibilities under this subsection, the agencies named in the first sentence of this subsection shall issue substantially similar regulations to regulations and rules issued by the Commission under sections 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors, and publish such findings, and the detailed reasons therefor, in the Federal Register. Such regulations of the abovenamed agencies, or the reasons for failure to publish such substantially similar regulations to those of the Commission, shall be published in the Federal Register within 120 days of the date of enactment of this subsection, and, thereafter, within 60 days of any changes made by the Commission in its relevant regulations and rules.

⁸See *infra* notes 18-32 and accompanying text (discussion of limitations on section 12(i) authority).

⁹Act of Oct. 28, 1974, Pub. L. No. 93-495, §105(b), 88 Stat. 1500, 1503 (current version at 15 U.S.C.A. §78l(i) (West Supp. 1991)).

¹⁰The FHLBB was the chartering, examination and supervisory authority of federal savings associations prior to its termination in 1989. See 12 U.S.C. §1464(a) (1988). It was abolished by the FIRREA and replaced, for all purposes pertinent to this study, by the OTS. See FIRREA §§301, 401(a)(2), 103 Stat. at 278-279, 354 (codified at 12 U.S.C. §1462a) (establishment of OTS; FHLBB abolished). See also *infra* note 22 and accompanying text (discussing 1934 Act authority of the FHLBB/OTS). Its deposit insurance affiliate, the Federal Savings and Loan Insurance Corporation (FSLIC), was the primary federal regulator of state-chartered S&Ls. 12 U.S.C. §1726 (1988). The FSLIC also exercised approval, examination, and supervisory authority over S&L holding companies (SLHCs) (see *id.* §1730a (S&L Holding Company Act)), but neither the FHLBB nor the FSLIC had 1934 Act authority over SLHCs. Cf. Fundamentals at 417 (discussing SEC 1934 Act authority over BHCs).

¹¹The OTS was created by section 301 of the FIRREA, 103 Stat. at 278-279 (codified at 12 U.S.C. §1462a). The Director of the OTS (DOTS) is the primary federal regulator of savings associations and SLHCs. See 12 U.S.C. §§1462a(e), 1467a, 1813(q)(4) (authority of DOTs under HOLA and FDIA). For all pertinent purposes of this study, its authority is practically identical to that of the FHLBB.

¹²See *infra* notes 40-89 and accompanying text.

¹³See *infra* notes 90-116 and accompanying text.

¹⁴See *infra* notes 117-203 and accompanying text.

¹⁵See *infra* notes 204-207 and accompanying text.

A. Limitations on Authority

1. Authority under the 1934 Act

While the agencies have longstanding, substantive concerns over what might be broadly described as "securities regulation,"¹⁶ in the narrow sense of the term as usually understood in federal regulatory law, the role of the agencies is limited to administering certain specified provisions of the 1934 Act with respect to the respective depository institutions for which each is the "appropriate Federal banking agency."¹⁷ Hence, the direct experience of the agencies with respect to securities regulation is limited to administering the 1934 Act provisions, generally governing regulation of securities of publicly traded issuers already in the secondary market. In addition, their involvement in administering the 1934 Act is itself limited in three ways by the terms of the delegation in section 12(i) itself.

2. Jurisdictional limitations

The most obvious limitation on the scope of the agencies' authority under the 1934 Act is with respect to specified classes of issuers, unlike the SEC which otherwise has plenary authority under the 1934 Act with respect to all classes of issuers covered by the act.¹⁸ In contrast, in the case of the Comptroller, authority extends only to national banks;¹⁹ in the case of the Fed, state-chartered Fed-

¹⁶See, e.g., 1 Malloy, *supra* note 3 at 408-466 (1988 & Cum. Supp.) (reviewing varied regulatory concerns of agencies with respect to securities of depository institutions).

¹⁷The term "appropriate Federal banking agency" is a technical term of art within federal bank regulatory law, defined to mean:

- (1) the Comptroller of the Currency, in the case of any national banking association, any District [of Columbia] bank, or any Federal branch or agency of a foreign bank;
- (2) the Board of Governors of the Federal Reserve System, in the case of –
 - (A) any State member insured bank (except a District bank),
 - (B) any branch or agency of a foreign bank with respect to any provision of the Federal Reserve Act which is made applicable under the International Banking Act of 1978,
 - (C) any foreign bank which does not operate an insured branch,
 - (D) any agency or commercial lending company other than a Federal agency,
 - (E) supervisory or regulatory proceedings arising from the authority given to the Board of Governors under section 7(c)(1) of the International Banking Act of 1978, including such proceedings under the Depository Institutions Supervisory Act, and
 - (F) any bank holding company and any subsidiary of a bank holding company (other than a bank);
- (3) the Federal Deposit Insurance Company in the case of a State nonmember insured bank (except a District bank), or a foreign bank having an insured branch; and
- (4) the Director of the Office of Thrift Supervision in the case of any savings association or any savings and loan holding company.

12 U.S.C. §1813(q)(1)-(4). As we shall see below, this same division of responsibility is followed under section 12(i) of the 1934 Act, with the exception of, for example, BHCs and SLHCs, which are directly regulated by the SEC under the 1934 Act. See *infra* notes 19-22 and accompanying text.

¹⁸See generally 15 U.S.C. §§78d, 78l(a), (b), (g) (establishment of SEC; coverage of 1934 Act as to publicly traded issuers).

¹⁹*Id.* §78l(1).

member banks,²⁰ in the case of the FDIC, state-chartered, nonmember, insured banks;²¹ and, in the case of thep OTS, insured savings associations.²²

3. Substantive limitations

The authority of the agencies to administer the 1934 Act is also limited to specified provisions of the act.²³ These substantive provisions concern: (i) the registration requirement of section 12;²⁴ (ii) the periodic reporting requirements of section 13;²⁵ (iii) proxy and tender offer disclosure provisions of section 14;²⁶ and, (iv) the insider reporting and trading liability provisions of section 16.²⁷ Significantly, the general antifraud provisions of the 1934 Act, sections 10(b) and 14(e),²⁸ are not included in the delegation of authority to the agencies, and these enforcement provisions remain with the SEC, even in situations involving depository institutions.²⁹

4. The "substantially similar" limitation

Finally, as currently in force³⁰ section 12(i) requires the agencies, in administering the substantive provisions delegated to them to promulgate implementing regulations "substantially similar . . . to regulations and rules issued by the [Securities and Exchange] Commission" under the same sections of the 1934 Act. This requirement does not apply if the agencies publish in the Federal Register findings and reasons, to the effect that implementation of such regulations "are not necessary or appropriate in the public interest or for the protection of investors."³¹ Such implementing regulations, or the requisite findings and reasons, are required to be published within 60 days of any changes made in SEC regulations and rules.³²

B. Problems of Implementation

Given the peculiar division of authority mandated by section 12(i), certain problems naturally suggest themselves. A review of the actual experience of the agencies in administering the 1934 Act would appear to confirm that these potential problems have materialized.³³

²⁰Id. §78l(2).

²¹Id. §78l(3).

²²Id. §78l(4). Prior to the enactment of the FIRREA, supra note 3, the now defunct FHLBB had 1934 Act authority over institutions the deposits of which are insured by the now defunct FSLIC. See 15 U.S.C. §78l(i)(4) (1988).

²³See 15 U.S.C. §78l(i), delegating authority "to administer and enforce [15 U.S.C. §§78j, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p. . . ."

²⁴See id. §78l. On the registration requirement, see Fundamentals at 406-433. On the registration requirement as applied to depository institutions, see 1 Malloy, supra note 3 at 498-501 (1988 & Cum. Supp.).

²⁵See 15 U.S.C. §78m. On the reporting requirements, see Fundamentals at 433-436. On the reporting requirements as applied to depository institutions, see 1 Malloy, supra note 3 at 501-503 (1988 & Cum. Supp.).

²⁶See 15 U.S.C. §78n(a), (c), (d), (f). On these proxy and tender offer disclosure requirements, see Fundamentals at 449-532. On these requirements as applied to depository institutions, see 1 Malloy, supra note 3 at 520-525 (1988 & Cum. Supp.).

²⁷See 15 U.S.C. §78p. On the insider trading provisions of section 16, see Fundamentals at 541-582. On these provisions as applied to depository institutions, see 1 Malloy, supra note 3 at 503-520 (1988 & Cum. Supp.).

²⁸15 U.S.C. §§78j(b), 78n(e).

²⁹See SEC v. Warner, 652 F. Supp. 647 (S.D.Fla. 1987) (SEC enforcement of antifraud provisions of 1933 and 1934 Acts). See also 1 Malloy, supra note 3 at 525-535 (1988 & Cum. Supp.) (discussing arguments with respect to antifraud authority and concluding that this authority remains with the SEC).

³⁰See infra notes 82-84 and accompanying text (discussing amendment of section 12(i) to require "substantially similar" regulations).

³¹15 U.S.C. §78l(i).

³²Id.

³³See infra notes 117-203 and accompanying text (criticizing the current system under section 12(i)).

1. Complexity and duplication of effort

There can be no doubt that the regulatory system resulting from section 12(i) is complex. It results necessarily in an almost complete duplication of effort, since the initiative for securities regulation remains with the SEC, and the agencies are required to react to such initiatives in a "substantially similar" manner. One may reasonably question whether such duplication is justified on any principled grounds.³⁴

2. Timeliness of regulatory amendments

The admittedly complex situation engendered by section 12(i) is exacerbated by the fact that the mandate of that section has for the most part simply been ignored by the agencies.³⁵ This has turned the problem of duplication of effort, inherent in section 12(i), into an even more -- and unjustifiably -- confusing regulatory environment.

3. Incorporation by reference

The FHLBB (as well as its successor, the OTS) has never had a problem with timeliness under section 12(i). Unfortunately, the way in which this agency has achieved its perfect record in this regard is by simply incorporating by reference all pertinent SEC regulations and subsequent amendments.³⁶ The Fed has since followed the FHLBB/OTS model in this regard.³⁷ This practice raises serious questions concerning its consistency with the expectations of section 12(i) in delegating 1934 Act authority³⁸ and concerning the agencies' compliance with other generally applicable administrative principles.³⁹

³⁴See *infra* notes 148-151 and accompanying text (discussing arguments concerning justification of current duplication of effort).

³⁵See *infra* notes 90-116 and accompanying text, (reviewing experience of the agencies in administering section 12(i)). See also Charts 1-3, *infra* (indicating significant delays in implementation).

³⁶ 36/ See 12 C.F.R. §563d.1 (1990). [All subsequent citations to the Code of Federal Regulations are to the current text, as amended, unless a prior official text is indicated.]

³⁷See 52 Fed. Reg. 49,374 (1987) (codified at 12 C.F.R. §208.16) (1934 Act requirements for State member banks; incorporating SEC "rules, regulations and forms").

³⁸See *infra* note 109 and accompanying text (discussing consistency of incorporation-by-reference approach with section 12(i)).

³⁹See *infra* notes 110-113 and accompanying text (discussing consistency of incorporation-by-reference with Federal Register Act).

II. ANALYSIS OF STATUTORY AUTHORITY

A. Favored Treatment of Securities Issued by Depository Institutions

One distinctive feature of federal regulation of securities issued by depository institutions is that they receive relatively favored, or at least differentiated, treatment. As a general rule, these securities are not subject to the Securities Act of 1933 (1933 Act).⁴⁰ Furthermore, although they may be subject to the 1934 Act, they are not generally subject to the administrative authority of the SEC.⁴¹

Thus, the treatment of such securities results in two levels of discontinuity in federal policy with respect to securities regulation. First, in principle the initial issuance of these securities in the distribution market is generally exempt from the federal system of securities regulation, while in the context of the trading or secondary market for securities, these securities are generally subject to the federal system of continuous disclosure. Second, at the administrative level, while virtually all other issuers subject to federal securities regulation are accordingly subject to the administrative authority of the SEC, depository institutions issuers are subject to the administrative authority of their appropriate federal regulatory agency, not the SEC, except for enforcement of the antifraud provisions of federal securities laws, which remains with the SEC.⁴²

B. Securities Issued by Depository Institutions and the 1933 Act

Bank and thrift-issued securities are generally exempt from the registration requirements of the 1933 Act.⁴³ These exemptions may be explained in part by the simultaneous congressional

⁴⁰15 U.S.C. §§77a to 77aa. On the applicability of the 1933 Act to securities issued by depository institutions, see notes 43-50, *infra*, and accompanying text.

⁴¹See 15 U.S.C. §78(i). On the administration of the 1934 Act with respect to securities issued by depository institutions, see notes 51-89, *infra*, and accompanying text.

⁴²See, e.g., SEC v. Warner, 652 F. Supp. 647 (S.D.Fla. 1987) (SEC antifraud enforcement, despite section 12(i) delegation to FHLBB). See also note 29, *supra*, and accompanying text.

⁴³See 15 U.S.C. §77c(a)(2), which provides in pertinent part as follows:

Except as hereinafter expressly provided, the provisions of [the 1933 Act] shall not apply to any of the following classes of securities:
 . . .

(2) Any security issued or guaranteed by . . . any bank; . . . or any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian; . . . or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank [subject to certain qualifications]. . . .

See *id.* §77c(a)(5)(A), which provides in pertinent part as follows:

Except as hereinafter expressly provided, the provisions of [the 1933 Act] shall not apply to any of the following classes of securities:
 . . .

(5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution. . . .

As originally enacted, the exemption contained in section 3(a)(5) applied only to an institution "substantially all the business of which is confined to the making of loans to members. . . ." This language was replaced in 1970, *see* Act of Dec. 14, 1970, Pub. L. No. 91-547, §27(c), 84 Stat. 1413, 1434, by the present requirement that the institution be supervised and examined by a state or federal supervisory authority.

Nevertheless, despite these exemptions, the agencies have undertaken to regulate the issuance of securities, through elaborate regulatory provisions not unlike the SEC 1933 Act regulations, under their own regulatory statutes. See generally 1 Malloy, *supra* note 3, at 408-441 (1988 & Cum. Supp.) (discussing Comptroller and FHLBB/OTS 1933 Act analogs).

consideration of the Banking Act of 1933, which was intended to address more directly the need for expanded federal regulation of commercial banks.⁴⁴

Despite these exemptions, the general antifraud provisions of the 1933 Act do, by their own terms, apply to bank- and thrift-issued securities.⁴⁵ Furthermore, while judicial interpretation of the exemptions has been somewhat sparse, the courts have tended to interpret the scope of the exemptions rather narrowly, in light of the remedial purposes of the act.⁴⁶

These two exemptions "are to be strictly construed and . . . the burden of proof rests upon the party who claims the exemption,⁴⁷ consistent with the generally applicable judicial interpretation of exemptions from regulatory statutes. The courts have generally not been willing to decide the question of an exemption's applicability solely on the basis of the "name or charter powers" of the institution, but rather have insisted upon an examination of "the character of business actually done by the corporation" as the controlling issue.⁴⁸ This approach appears to be directly supported by the language of each exemption itself.⁴⁹

Given these judicial attitudes, the exemptions have been held to be unavailable in many cases involving securities ostensibly issued by a bank or thrift.⁵⁰

⁴⁴On the interrelationship between the 1933 Act and the Banking Act of 1933, commonly known as the Glass-Steagall Act, see 1 Malloy, supra note 3 at 400-402 (1988). For a review of the legislative history of the Glass-Steagall Act, see 2 Malloy, supra note 3, at 559-572 (1988).

⁴⁵See, e.g., 15 U.S.C. §77q(a), (c), which provides as follows:

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instrumentalities of transportation or communications in interstate commerce or by the use of the mails, directly or indirectly –

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. . . .

c) The exemptions in section 77c of this title [section 3 of the 1933 Act] shall not apply to the provisions of this section.

(Emphasis added.) The exemptions for bank- and thrift-issued securities are among those provided in section 3. See note 43, supra, and accompanying text. The antifraud provisions of section 12(2) of the 1933 Act do not apply, by their own terms, to bank-issued securities. See 15 U.S.C. §77j(2) ("whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof").

⁴⁶For a useful discussion of the legislative history of the exemption of thrift-issued securities in particular, see *Tcherepnin v. Knight*, 389 U.S. 332, 340-342 (1967). The Seventh Circuit also referred to this legislative history in *Tcherepnin v. Knight*, 371 F.2d 374, 378 (7th Cir. 1967), but its reading of the legislative history was rejected by the Supreme Court. See *Tcherepnin*, 389 U.S. at 342, n. 30. See generally 1 Malloy, supra note 3, at 376-377 (1988) (discussing *Tcherepnin*).

⁴⁷*SEC v. American Int'l Sav. & Loan Ass'n*, 199 F. Supp. 341, 347 (D.Md. 1961), citing *SEC v. Ralston Purina Company*, 346 U.S. 119, 126 (1953); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Spokane & Inland Empire R.R. Co. v. United States*, 241 U.S. 344, 350 (1916). *Accord* *Capital Funds, Inc. v. SEC*, 348 F.2d 582, 586 (8th Cir. 1965), citing *Edwards v. United States*, 312 U.S. 473 (1941); *Ralston Purina*, supra; *SEC v. Sunbeam Gold Mines Co.*, 95 F.2d 699 (9th Cir. 1938); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2d Cir. 1959); *SEC v. Culpepper*, 270 F.2d 241 (2d Cir. 1959). See also *Melton v. Unterreiner*, 436 F. Supp. 740, 743 (E.D.Mo. 1977), quoting *Capital Funds*, supra, modified and affirmed, 575 F.2d 204, 207 (8th Cir. 1978), citing *Capital Funds*, supra.

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⁴⁹See note 43, supra, and accompanying text. Cf. *American Int'l*, 199 F. Supp. at 347 (original language of section 3(a)(5)); *Capital Funds*, 348 F.2d at 586 (language of section of 3(a)(2)); *Melton*, 436 F. Supp. at 743 (same); *Melton*, 575 F.2d at 207 & n. 4 (section 3(a)(2)); comparison with 12 U.S.C. §36(f), defining "branch").

⁵⁰See 1 Malloy, supra note 3, at 403-408 (1988) (discussing exemption cases).

C. Securities Issued by Depository Institutions and the 1934 Act

Whatever the scope of its coverage, the application of the 1934 Act does not differ in principle as between the securities of depository institutions and those of other issuers. As originally enacted, the 1934 Act⁵¹ prohibited any member of a national securities exchange, broker or dealer to effect any transaction in any nonexempt security⁵² on a national securities exchange unless the security was registered under the act.⁵³ The process entailed disclosure in the registration filing of a range of material information required by the 1934 Act,⁵⁴ as prescribed by the SEC.⁵⁵ Such filings are generally publicly available.⁵⁶

Registration of a class of securities under the 1934 Act also imposed other continuing periodic reporting and other requirements on the issuer of such securities. For example, issuers of such securities were required to file with the SEC periodic and other reports containing material and other information prescribed by the SEC.⁵⁷ Registration also triggered the application of the 1934 Act provisions concerning the conduct of, and required disclosure to stockholders with respect to, proxy solicitations.⁵⁸ Finally, registration triggered reporting requirements for directors, officers and principal stockholders of such issuers with respect to their beneficial ownership of equity securities of the issuer and any subsequent change in such ownership.⁵⁹ Such persons were strictly liable for any shortswing profits resulting from their purchase and sale or sale and purchase of such securities within any sixmonth period.⁶⁰

Since the 1934 Act registration requirement was essentially triggered by trading (and, hence, listing) of securities on a national securities exchange, the securities of depository institutions potentially were within the scope of the 1934 Act as originally enacted. In fact, the impact of 1934 Act upon such institutions was minimal. Previously listed commercial banks had been delisting their securities from the national exchanges even before the passage of the act.⁶¹ By April 1963, the securities of only five banks were listed on any registered national securities exchange.⁶²

By the early 1960's, increasing concern over the significance of the over-the-counter (OTC) securities markets prompted Congress in 1961 to require the SEC to undertake a special study of these markets.⁶³ Among the results of that study were legislative proposals for amendments to the 1934 Act to bring OTC bank securities under the act for the first time.⁶⁴ Despite the existing examination and reporting requirements imposed by federal and state bank regulatory laws,⁶⁵ none of

⁵¹ Act of June 6, 1934, ch. 404, tit. I, 48 Stat. 881 (1934).

⁵² I.e., nonexempt under the 1934 Act. See 15 U.S.C. §78c(a)(12).

⁵³ *Id.*, §78l(a). On the procedures and requirements for 1934 Act registration, see *id.*, §78l(b). See also 17 C.F.R. §§240.12b-1 - 240.12b-37.

⁵⁴ See 15 U.S.C. §78l(b).

⁵⁵ See, e.g., 17 C.F.R. §§240.12b-20 - 240.12b-25.

⁵⁶ See, e.g., *id.* §§240.24b-1 - 240.12b-3.

⁵⁷ See 15 U.S.C. §78m.

⁵⁸ See *id.* §78n.

⁵⁹ *Id.*, §78p(a).

⁶⁰ *Id.*, §78p(b). For a fascinating alternative reading of section 16 and its legislative purpose, see Thel, The Genius of Section 16: Regulating the Management of Publicly Held Companies, 42 *Hasting L.J.* 391 (1991).

⁶¹ See SEC, Report of Special Study of Securities Markets, pt. 3 at 36, reprinted in H.R. Doc. No. 95, Part 3, 88th Cong., 1st Sess. (1963) [hereinafter "Special Study"].

⁶² See *id.* Almost from the enactment of the 1934 Act, SEC regulations contained a "temporary exemption," Rule 12a-1, exempting exchange-listed bank securities from the registration requirement of the act. See Sec. Ex. Act Rel. 291 (1935), revoked Sec. Ex. Act Rel. 18,853, 25 SEC Docket 794 (1982). This exemption was supposed to be effective pending adoption of an appropriate registration form, but (in light of the extremely small number of affected banks) the form was never adopted. See Special Study, pt. 3 at 36 & n.62.

⁶³ See Act of Sept. 5, 1961, Pub. L. No. 87-196, 75 Stat. 465 (codified at 15 U.S.C. §78s(d)).

⁶⁴ For a discussion of the Special Study and its recommendations with respect to OTC bank securities, see 1 Malloy, supra note 3 at 484-487.

⁶⁵ See, e.g., Special Study, pt. 3, at 36-38.

these requirements appeared to serve adequately the objective of protection of investors⁶⁶ which is one central focus of federal securities laws.⁶⁷ The SEC therefore took the position that the protections afforded by the 1934 Act were "clearly needed."⁶⁸

The SEC's initial draft bill, circulated for industry comment in April 1963, would have amended section 12 of the 1934 Act by adding a new subsection as follows:

In respect of any security issued by a bank all powers, functions, and duties of the Commission pursuant to the provisions of this subsection shall vest in (the appropriate banking regulatory authority).⁶⁹

The draft, submitted to an industry liaison committee, was based essentially upon the recommendations of the Special Study.⁷⁰ However, the SEC "had not reached a final determination with respect to all of the subsidiary questions as to the exact form of the legislation."⁷¹ The language of the above quoted draft section 12(i) as finally introduced in Congress had been redrafted to read as follows:

In respect of any securities issued by banks the powers, functions and duties of the Commission pursuant to the provisions of this title shall be delegated in whole or in part to the federal banking regulatory agency or instrumentality which has jurisdiction to examine or supervise the business of such banks, upon the request of such agency or instrumentality.⁷²

The proposal attracted considerable attention from both interested federal agencies and private groups.⁷³ The delegation provision was criticized by the Fed, though it conceded in principle that

⁶⁶The Comptroller of the Currency had, in fact, imposed a reporting requirement on national banks under his general authority to require special reports under the National Bank Act, but these reports were confidential. See 12 U.S.C. §161. See also Special Study, pt. 3, at 36 & n. 63. In addition, the Comptroller had recently promulgated disclosure regulations roughly analogous to the periodic, proxy, and insider trading disclosure requirements of the 1934 Act. See id. at 37. However, the SEC's assessment of these regulations was that they were inadequate to the task of affording meaningful disclosure protection to investors. The Special Study stated in this regard:

The recent efforts of the Comptroller to improve the lot of bank shareholders . . . take only a modest step toward the full protections afforded by sections 13, 14, and 16 [of the 1934 Act]. The Comptroller has required national banks to send annual reports to their shareholders. The [1934 Act] and [SEC] rules under it require annual reports to be sent to shareholders when proxies are solicited, but additionally more detailed and more frequent financial reports are required to be filed with the [SEC]. The Comptroller's proxy regulation requires either less complete disclosure in relation to options for officers and directors and transactions of such persons with the bank or no disclosure at all. No provision is made, moreover, for examination of proxy materials before their use. Similarly, no provision is made for the presentation of proposals by persons not affiliated with management. The insidertrading provisions, finally, are mere reporting provisions; nothing like the recovery provision of section 16(b) [of the 1934 Act, 15 U.S.C. S 78p(b),] is included.

Id. at 39.

⁶⁷See generally Comptroller of the Currency v. Lance, 632 F. Supp. 437 (N.D.Ga. 1986) (purpose of 1934 Act section 12(i) to provide investor protection).

⁶⁸Special Study at 38.

⁶⁹Hearings on S. 1642 Before the Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. 16 (1963) (statement of William L. Cary, Chairman, Securities and Exchange Commission).

⁷⁰Memorandum of the Securities and Exchange Commission with respect to Changes in H.R. 6789 between its Submission to the Industry Liaison Committee and its Introduction in Congress, reprinted in Investor Protection, Part 1: Hearings on H.R. 6789, H.R. 6793, S. 1642 before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st & 2d Sess. 652 (1963-1964) [hereinafter House Hearings].

⁷¹House Hearings at 652. See also Special Study (pt. 1) at ix (Letter of Transmittal to the Congress from Chairman Cary, April 3, 1963).

⁷²H.R. 6789, 88th Cong., 1st Sess. (1963).

⁷³See House Hearings at 652.

bank securities should be subject to the disclosure provisions of the 1934 Act.⁷⁴ The Fed questioned the advisability of the delegation provision and argued that, if the disclosure provisions of the Act were made applicable to banks with OTC securities, it should be administered by the SEC, not the regulatory agencies.⁷⁵ The FDIC took the contrary view, arguing that the delegation to the federal bank regulatory agencies should be mandatory rather than discretionary.⁷⁶ The Senate version of the bill, S. 1642, adopted the FDIC suggestions, and it was this version that was eventually enacted as section 12(i).⁷⁷ The House Report adopted this approach as well.⁷⁸

Accordingly, as to securities issued by FDIC-insured national and district banks, state-chartered member banks and state-chartered non-member banks, administration and enforcement of sections 12, 13, 14(a), 14(c), 14(d) and 14(f), and 16 were vested respectively in the Comptroller, the Fed and the FDIC.⁷⁹ The detachment of this authority from the SEC was complete. The three agencies had the power

to make rules and regulations as may be necessary for the execution of the functions vested in them . . . and none of the rules, regulations, forms or orders issued or adopted by the [SEC] . . . shall be in any way binding upon such officers and agencies in the performance of such functions, or upon any such banks in connection with the performance of such functions.⁸⁰

So matters remained until the enactment of the Williams Act in 1968,⁸¹ which amended section 12(i) to include references to new subsections 78n(d) and 78n(f) (sections 14(d) and 14(f) of the Act), dealing with the regulation of tender offers. The Act left section 12(i) otherwise unchanged.

The Depository Institutions Act of 1974⁸² added the language that brought FSLIC-insured institutions within the scope of section 12(i), and authorized the FHLBB to promulgate 1934 Act regulations. In light of the rather diffident record of the agencies in utilizing their section 12(i) authority,⁸³ however, the 1974 Act also amended the subsection to require the promulgation of regulations by the agencies that were

substantially similar . . . to regulations and rules issued by the [SEC] under sections 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors, and publish such findings, and the detailed reasons therefor, in the Federal Register.⁸⁴

⁷⁴See, e.g., Letter from Wm. McC. Martin, Jr. to Rep. Harris, Chairman, House Interstate and Foreign Commerce Committee, June 21, 1963, reprinted in H.R. Rep. No. 1418, 88th Cong., 2d Sess. 32 (1964) (hereinafter Harris Letter).

⁷⁵See *id.* at 33-34:

The [Federal Reserve] Board considers it inadvisable to provide that these and other provisions of the Securities Exchange Act of 1934, in their application to banks, may be administered by an agency other than the Commission. . . . Under [proposed section 12(i)], responsibility would be fragmented and the tasks performed less efficiently. . . . Accordingly the Board concludes that the reporting, proxy, and "insider trading" provisions of the 1934 Act should be administered by the Commission in their application to banks as well as in their application generally, and therefore recommends the deletion of [proposed section 12(i)].

⁷⁶See, e.g., House Hearings at 68-69 (letter to Rep. Harris from Director Wolcott, Nov. 19, 1963).

⁷⁷Cf. 109 Cong. Rec. 13726 (1963) (remarks of Sen. Williams).

⁷⁸See H.R. Rep. No. 1418 at 31.

⁷⁹15 U.S.C. § 78l(i)(1)-(3) (1970). For a useful discussion of the legislative history of section 12(i), see 6 Loss & Seligman at 1768-1771.

⁸⁰15 U.S.C. § 78l(i) (1988).

⁸¹Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified as amended at 15 U.S.C. § 78l (1988)).

⁸²Act of Oct. 28, 1974, Pub. L. No. 93-495, §105(b), 88 Stat. 1503 (codified at 15 U.S.C. § 78l (1988)).

⁸³See notes 90-95, *infra*, and accompanying text.

⁸⁴12 U.S.C. § 78l(i) (1976).

Furthermore, timeliness of this system of parallel regulations was to be ensured by the additional requirement imposed upon the agencies that

Such regulations . . . , or the reasons for failure to publish such substantially similar regulations to those of the [SEC], shall be published in the Federal Register within 120 days of the date of enactment of this subsection, and, thereafter, within 60 days of any changes made by the [SEC] in its relevant regulations and rules.⁸⁵

In fact, it appears that this clear statutory mandate has been uniformly ignored by the agencies, either by marked delays in publication of parallel rules⁸⁶ or by virtually wholesale incorporation by reference of SEC regulations,⁸⁷ since the enactment of the 1974 Act.

No congressional action has been taken affecting in any substantive respect the system of parallel regulation applicable since the 1974 Act. However, the enactment of the FIRREA, with its extensive regulatory restructuring -- abolishing the FHLBB and the FSLIC and establishing the OTS⁸⁸ -- entailed certain conforming amendments to section 12(i). The FIRREA changed the reference in the section to "banks" to read "banks and practice raises serious questions concerning its consistency with the expectations of section 12(i) in delegating 1934 Act authority⁸⁹ and concerning the agencies' compliance with other generally applicable administrative principles.⁹⁰

⁸⁵Id.

⁸⁶See notes 96-105, infra, and accompanying text.

⁸⁷See notes 106-116, infra, and accompanying text.

⁸⁸See notes 10-11, supra, and accompanying text.

⁸⁹See infra note 109 and accompanying text (discussing consistency of incorporation-by-reference approach with section 12(i)).

⁹⁰See infra notes 110-113 and accompanying text (discussing consistency of incorporation-by-reference with Federal Register Act).

II. ANALYSIS OF STATUTORY AUTHORITY

A. Favored Treatment of Securities Issued by Depository Institutions

One distinctive feature of federal regulation of securities issued by depository institutions is that they receive relatively favored, or at least differentiated, treatment. As a general rule, these securities are not subject to the Securities Act of 1933 (1933 Act).⁹¹ Furthermore, although they may be subject to the 1934 Act, they are not generally subject to the administrative authority of the SEC.⁹²

Thus, the treatment of such securities results in two levels of discontinuity in federal policy with respect to securities regulation. First, in principle the initial issuance of these securities in the distribution market is generally exempt from the federal system of securities regulation, while in the context of the trading or secondary market for securities, these securities are generally subject to the federal system of continuous disclosure. Second, at the administrative level, while virtually all other issuers subject to federal securities regulation are accordingly subject to the administrative authority of the SEC, depository institutions issuers are subject to the administrative authority of their appropriate federal regulatory agency, not the SEC, except for enforcement of the antifraud provisions of federal securities laws, which remains with the SEC.⁹³

B. Securities Issued by Depository Institutions and the 1933 Act

Bank and thrift-issued securities are generally exempt from the registration requirements of the 1933 Act.⁹⁴ These exemptions may be explained in part by the simultaneous congressional consideration of

⁹¹15 U.S.C. §§77a to 77aa. On the applicability of the 1933 Act to securities issued by depository institutions, see notes 43-50, *infra*, and accompanying text.

⁹²See 15 U.S.C. §781(i). On the administration of the 1934 Act with respect to securities issued by depository institutions, see notes 51-89, *infra*, and accompanying text.

⁹³See, e.g., SEC v. Warner, 652 F. Supp. 647 (S.D.Fla. 1987) (SEC antifraud enforcement, despite section 12(i) delegation to FHLBB). See also note 29, *supra*, and accompanying text.

⁹⁴See 15 U.S.C. §77c(a)(2), which provides in pertinent part as follows:

Except as hereinafter expressly provided, the provisions of [the 1933 Act] shall not apply to any of the following classes of securities:

...

(2) Any security issued or guaranteed by . . . any bank; . . . or any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian; . . . or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank [subject to certain qualifications]. . . .

See 15 U.S.C. §77c(a)(2), which provides in pertinent part as follows:

Except as hereinafter expressly provided, the provisions of [the 1933 Act] shall not apply to any of the following classes of securities:

...

(5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution. . . .

As originally enacted, the exemption contained in section 3(a)(5) applied only to an institution "substantially all the business of which is confined to the making of loans to members. . . ." This language was replaced in 1970, *see* Act of Dec. 14, 1970, Pub. L. No. 91-547, §27(c), 84 Stat. 1413, 1434, by the present requirement that the institution be supervised and examined by a state or federal supervisory authority.

Nevertheless, despite these exemptions, the agencies have undertaken to regulate the issuance of securities, through elaborate regulatory provisions not unlike the SEC 1933 Act regulations, under their own regulatory statutes. See generally 1 Malloy, *supra* note 3, at 408-441 (1988 & Cum. Supp.) (discussing Comptroller and FHLBB/OTS 1933 Act analogs).

the Banking Act of 1933, which was intended to address more directly the need for expanded federal regulation of commercial banks.⁹⁵

Despite these exemptions, the general antifraud provisions of the 1933 Act do, by their own terms, apply to bank and thrift-issued securities.⁹⁶ Furthermore, while judicial interpretation of the exemptions has been somewhat sparse, the courts have tended to interpret the scope of the exemptions rather narrowly, in light of the remedial purposes of the act.⁹⁷

These two exemptions "are to be strictly construed and . . . the burden of proof rests upon the party who claims the exemption,⁹⁸ consistent with the generally applicable judicial interpretation of exemptions from regulatory statutes. The courts have generally not been willing to decide the question of an exemption's applicability solely on the basis of the "name or charter powers" of the institution, but rather have insisted upon an examination of "the character of business actually done by the corporation" as the controlling issue.⁹⁹ This approach appears to be directly supported by the language of each exemption itself.¹⁰⁰

Given these judicial attitudes, the exemptions have been held to be unavailable in many cases involving securities ostensibly issued by a bank or thrift.¹⁰¹

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⁹⁶45/ See, e.g., 15 U.S.C. §77q(a), (c), which provides as follows:

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instrumentalities of transportation or communications in interstate commerce or by the use of the mails, directly or indirectly –

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. . . .

(c) The exemptions in section 77c of this title [section 3 of the 1933 Act] shall not apply to the provisions of this section.

(Emphasis added.) The exemptions for bank and thrift-issued securities are among those provided in section 3. See note 43, *supra*, and accompanying text. The antifraud provisions of section 12(2) of the 1933 Act do not apply, by their own terms, to bank-issued securities. See 15 U.S.C. §77j(2) ("whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof").

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Registration of a class of securities under the 1934 Act also imposed other continuing periodic reporting and other requirements on the issuer of such securities. For example, issuers of such securities were required to file with the SEC periodic and other reports containing material and other information prescribed by the SEC.¹⁰⁸ Registration also triggered the application of the 1934 Act provisions concerning the conduct of, and required disclosure to stockholders with respect to, proxy solicitations.¹⁰⁹ Finally, registration triggered reporting requirements for directors, officers and principal stockholders of such issuers with respect to their beneficial ownership of equity securities of the issuer and any subsequent change in such ownership.¹¹⁰ Such persons were strictly liable for any short-swing profits resulting from their purchase and sale or sale and purchase of such securities within any six-month period.¹¹¹60/

Since the 1934 Act registration requirement was essentially triggered by trading (and, hence, listing) of securities on a national securities exchange, the securities of depository institutions potentially were within the scope of the 1934 Act as originally enacted. In fact, the impact of 1934 Act upon such institutions was minimal. Previously listed commercial banks had been delisting their securities from the national exchanges even before the passage of the act.¹¹² By April 1963, the securities of only five banks were listed on any registered national securities exchange.¹¹³

By the early 1960's, increasing concern over the significance of the over-the-counter (OTC) securities markets prompted Congress in 1961 to require the SEC to undertake a special study of these markets.¹¹⁴ Among the results of that study were legislative proposals for amendments to the 1934 Act to bring OTC bank securities under the act for the first time.¹¹⁵ Despite the existing examination and reporting requirements imposed by federal and state bank regulatory laws,¹¹⁶ none of these

¹⁰²Act of June 6, 1934, ch. 404, tit. I, 48 Stat. 881 (1934).

¹⁰³I.e., nonexempt under the 1934 Act. See 15 U.S.C. §78c(a)(12).

¹⁰⁴Id. §78l(a). On the procedures and requirements for 1934 Act registration, see id. §78l(b). See also 17 C.F.R. §§240.12b-1 - 240.12b-37.

¹⁰⁵See 15 U.S.C. §78l(b).

¹⁰⁶See, e.g., 17 C.F.R. §§240.12b-20 - 240.12b-25.

¹⁰⁷See, e.g., id. §§240.24b-1 - 240.12b-3.

¹⁰⁸See 15 U.S.C. §78m.

¹⁰⁹See id. §78n.

¹¹⁰Id. §78p(a).

¹¹¹Id. §78p(b). For a fascinating alternative reading of section 16 and its legislative purpose, see Thel, The Genius of Section 16: Regulating the Management of Publicly Held Companies, 42 Hasting L.J. 391 (1991).

¹¹²See SEC, Report of Special Study of Securities Markets, pt. 3 at 36, reprinted in H.R. Doc. No. 95, Part 3, 88th Cong., 1st Sess. (1963) [hereinafter "Special Study"].

¹¹³See id. Almost from the enactment of the 1934 Act, SEC regulations contained a "temporary exemption," Rule 12a-1, exempting exchange-listed bank securities from the registration requirement of the act. See Sec. Ex. Act Rel. 291 (1935), revoked Sec. Ex. Act Rel. 18,853, 25 SEC Docket 794 (1982). This exemption was supposed to be effective pending adoption of an appropriate registration form, but (in light of the extremely small number of affected banks) the form was never adopted. See Special Study, pt. 3 at 36 & n.62.

¹¹⁴See Act of Sept. 5, 1961, Pub. L. No. 87-196, 75 Stat. 465 (codified at 15 U.S.C. §78s(d)).

¹¹⁵For a discussion of the Special Study and its recommendations with respect to OTC bank securities, see I Malloy, supra note 3 at 484-487.

¹¹⁶See, e.g., Special Study, pt. 3, at 36-38.

requirements appeared to serve adequately the objective of protection of investors¹¹⁷ which is one central focus of federal securities laws.¹¹⁸ The SEC therefore took the position that the protections afforded by the 1934 Act were "clearly needed."¹¹⁹

The SEC's initial draft bill, circulated for industry comment in April 1963, would have amended section 12 of the 1934 Act by adding a new subsection as follows:

In respect of any security issued by a bank all powers, functions, and duties of the Commission pursuant to the provisions of this subsection shall vest in (the appropriate banking regulatory authority).¹²⁰

The draft, submitted to an industry liaison committee, was based essentially upon the recommendations of the Special Study.¹²¹ However, the SEC "had not reached a final determination with respect to all of the subsidiary questions as to the exact form of the legislation."¹²² The language of the above quoted draft section 12(i) as finally introduced in Congress had been redrafted to read as follows:

In respect of any securities issued by banks the powers, functions and duties of the Commission pursuant to the provisions of this title shall be delegated in whole or in part to the federal banking regulatory agency or instrumentality which has jurisdiction to examine or supervise the business of such banks, upon the request of such agency or instrumentality.¹²³

The proposal attracted considerable attention from both interested federal agencies and private groups.¹²⁴ The delegation provision was criticized by the Fed, though it conceded in principle that bank securities should be subject to the disclosure provisions of the 1934 Act.¹²⁵ The Fed questioned

¹¹⁷The Comptroller of the Currency had, in fact, imposed a reporting requirement on national banks under his general authority to require special reports under the National Bank Act, but these reports were confidential. See 12 U.S.C. §161. See also Special Study, pt. 3, at 36 & n. 63. In addition, the Comptroller had recently promulgated disclosure regulations roughly analogous to the periodic, proxy, and insider trading disclosure requirements of the 1934 Act. See *id.* at 37. However, the SEC's assessment of these regulations was that they were inadequate to the task of affording meaningful disclosure protection to investors. The Special Study stated in this regard:

The recent efforts of the Comptroller to improve the lot of bank shareholders . . . take only a modest step toward the full protections afforded by sections 13, 14, and 16 [of the 1934 Act]. The Comptroller has required national banks to send annual reports to their shareholders. The [1934 Act] and [SEC] rules under it require annual reports to be sent to shareholders when proxies are solicited, but additionally more detailed and more frequent financial reports are required to be filed with the [SEC]. The Comptroller's proxy regulation requires either less complete disclosure in relation to options for officers and directors and transactions of such persons with the bank or no disclosure at all. No provision is made, moreover, for examination of proxy materials before their use. Similarly, no provision is made for the presentation of proposals by persons not affiliated with management. The insidertrading provisions, finally, are mere reporting provisions; nothing like the recovery provision of section 16(b) [of the 1934 Act, 15 U.S.C. S 78p(b),] is included. *Id.* at 39.

¹¹⁸See generally *Comptroller of the Currency v. Lance*, 632 F. Supp. 437 (N.D.Ga. 1986) (purpose of 1934 Act section 12(i) to provide investor protection).

¹¹⁹Special Study at 38.

¹²⁰Hearings on S. 1642 Before the Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. 16 (1963) (statement of William L. Cary, Chairman, Securities and Exchange Commission).

¹²¹Memorandum of the Securities and Exchange Commission with respect to Changes in H.R. 6789 between its Submission to the Industry Liaison Committee and its Introduction in Congress, reprinted in Investor Protection, Part I: Hearings on H.R. 6789, H.R. 6793, S. 1642 before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st & 2d Sess. 652 (1963-1964) [hereinafter House Hearings].

¹²²House Hearings at 652. See also Special Study (pt. 1) at ix (Letter of Transmittal to the Congress from Chairman Cary, April 3, 1963).

¹²³H.R. 6789, 88th Cong., 1st Sess. (1963).

¹²⁴See House Hearings at 652.

¹²⁵See, e.g., Letter from Wm. McC. Martin, Jr. to Rep. Harris, Chairman, House Interstate and Foreign Commerce Committee, June 21, 1963, reprinted in H.R. Rep. No. 1418, 88th Cong., 2d Sess. 32 (1964) (hereinafter Harris Letter).

the advisability of the delegation provision and argued that, if the disclosure provisions of the Act were made applicable to banks with OTC securities, it should be administered by the SEC, not the regulatory agencies.¹²⁶ The FDIC took the contrary view, arguing that the delegation to the federal bank regulatory agencies should be mandatory rather than discretionary.¹²⁷ The Senate version of the bill, S. 1642, adopted the FDIC suggestions, and it was this version that was eventually enacted as section 12(i).¹²⁸ The House Report adopted this approach as well.¹²⁹

Accordingly, as to securities issued by FDIC-insured national and district banks, state-chartered member banks and state-chartered nonmember banks, administration and enforcement of sections 12, 13, 14(a), 14(c), 14(d) and 14(f), and 16 were vested respectively in the Comptroller, the Fed and the FDIC.¹³⁰ The detachment of this authority from the SEC was complete. The three agencies had the power

to make rules and regulations as may be necessary for the execution of the functions vested in them . . . and none of the rules, regulations, forms or orders issued or adopted by the [SEC] . . . shall be in any way binding upon such officers and agencies in the performance of such functions, or upon any such banks in connection with the performance of such functions.¹³¹

So matters remained until the enactment of the Williams Act in 1968,¹³² which amended section 12(i) to include references to new subsections 78n(d) and 78n(f) (sections 14(d) and 14(f) of the Act), dealing with the regulation of tender offers. The Act left section 12(i) otherwise unchanged.

The Depository Institutions Act of 1974¹³³ added the language that brought FSLIC-insured institutions within the scope of section 12(i), and authorized the FHLBB to promulgate 1934 Act regulations. In light of the rather diffident record of the agencies in utilizing their section 12(i) authority,¹³⁴ however, the 1974 Act also amended the subsection to require the promulgation of regulations by the agencies that were

substantially similar . . . to regulations and rules issued by the [SEC] under sections 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors, and publish such findings, and the detailed reasons therefor, in the Federal Register.¹³⁵

¹²⁶See *id.* at 33-34:

The [Federal Reserve] Board considers it inadvisable to provide that these and other provisions of the Securities Exchange Act of 1934, in their application to banks, may be administered by an agency other than the Commission. . . . Under [proposed section 12(i)], responsibility would be fragmented and the tasks performed less efficiently. . . . Accordingly the Board concludes that the reporting, proxy, and "insider trading" provisions of the 1934 Act should be administered by the Commission in their application to banks as well as in their application generally, and therefore recommends the deletion of [proposed section 12(i)].

¹²⁷See, e.g., House Hearings at 68-69 (letter to Rep. Harris from Director Wolcott, Nov. 19, 1963).

¹²⁸Cf. 109 Cong. Rec. 13726 (1963) (remarks of Sen. Williams).

¹²⁹See H.R. Rep. No. 1418 at 31.

¹³⁰15 U.S.C. S 78l(i)(1)-(3) (1970). For a useful discussion of the legislative history of section 12(i), see 6 Loss & Seligman at 1768-1771.

¹³¹15 U.S.C. §78l(i) (1988).

¹³²Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified as amended at 15 U.S.C. §78l (1988)).

¹³³Act of Oct. 28, 1974, Pub. L. No. 93-495, §105(b), 88 Stat. 1503 (codified at 15 U.S.C. §78l (1988)).

¹³⁴See notes 90-95, *infra*, and accompanying text.

¹³⁵12 U.S.C. §78l(i) (1976).

Furthermore, timeliness of this system of parallel regulations was to be ensured by the additional requirement imposed upon the agencies that

Such regulations . . . , or the reasons for failure to publish such substantially similar regulations to those of the [SEC], shall be published in the Federal Register within 120 days of the date of enactment of this subsection, and, thereafter, within 60 days of any changes made by the [SEC] in its relevant regulations and rules.¹³⁶

In fact, it appears that this clear statutory mandate has been uniformly ignored by the agencies, either by marked delays in publication of parallel rules¹³⁷ or by virtually wholesale incorporation by reference of SEC regulations,¹³⁸ since the enactment of the 1974 Act.

No congressional action has been taken affecting in any substantive respect the system of parallel regulation applicable since the 1974 Act. However, the enactment of the FIRREA, with its extensive regulatory restructuring--abolishing the FHLBB and the FSLIC and establishing the OTS¹³⁹--entailed certain conforming amendments to section 12(i). The FIRREA changed the reference in the section to "banks" to read "banks and savings associations," deleted references to "institutions the accounts of which are insured by the [FSLIC]," and vested authority in the OTS that had previously been vested in the FHLBB.¹⁴⁰

¹³⁶*Id.*

¹³⁷See notes 96-105, *infra*, and accompanying text.

¹³⁸See notes 106-116, *infra*, and accompanying text.

¹³⁹See notes 10-11, *supra*, and accompanying text.

¹FIRREA, § 744(u)(2), 103 Stat. at 441 (codified at 12 U.S.C.A. § 781(i) (West Supp. 1991)). For the current text of section 12(i), as amended by the FIRREA, see note 7, *supra*.

III. REGULATORY IMPLEMENTATION

A. Delayed Implementation of Mandated Amendments

Both before¹⁴¹ and after¹⁴² the 1974 amendment of section 12(i) of the 1934 Act,¹⁴³ the Comptroller, Fed and FDIC have generally been extremely slow to promulgate regulations implementing the 1934 Act, whether or not "substantially similar" to SEC regulations. The Comptroller's initial implementing regulations can only be fairly described as skeletal,¹⁴⁴ particularly when compared with the relatively complete set of regulations, not unlike the analogous SEC regulations, promulgated by the Fed and the FDIC.¹⁴⁵ Indeed, it was not until 1971 that the Comptroller acted to bring his 1934 Act regulations into conformity with the more complete approach and format of the corresponding regulations of the other agencies.¹⁴⁶

¹⁴¹See Table 1, *infra* (selected 1934 Act issuances of agencies, pre-1974 amendment).

¹⁴²See Table 2, *infra* (selected 1934 Act issuances of agencies, post-1974 amendment).

¹⁴³See notes 82-85, *supra* (discussing 1974 amendment).

¹⁴⁴93/ See, e.g., 29 Fed. Reg. 12,300 (1964) (codified at 12 C.F.R. pts. 10-12) (issued under NBA statutory authority); 30 Fed. Reg. 6160 (1965) (codified at 12 C.F.R. pt. 12) (issued under 1934 Act authority); 31 Fed. Reg. 6949 (1966) (codified at 12 C.F.R. pts. 10-12). For SEC criticism of the Comptroller's original "stop-gap" securities regulations, see note 66, *supra*.

¹⁴⁵See 30 Fed. Reg. 362 (1965) (codified at 12 C.F.R. pt. 206) (Fed 1934 Act regulations); *id.* at 396 (codified at 12 C.F.R. pt. 335) (FDIC 1934 Act regulations).

¹⁴⁶36 Fed. Reg. 14,997 (1971) (codified at 12 C.F.R. pt. 11; replacing *id.* pt. 10; revising *id.* pt. 16; amending *id.* pt. 18).

TABLE I
SELECTED 1934 ACT ISSUANCES — PRE-1974 AMENDMENT

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION
1. OCC: August 27, 1964 Annual Report pt. 10 Proxies pt. 11 § 16 Reports pt. 12 [NBA Authority]	29 Fed. Reg. 12,300 (1964)
2. Fed: January 12, 1965 effective January 1, 1965 Securities of Member Banks pt. 206 [1934 Act Authority]	30 Fed. Reg. 362 (1965)
3. FDIC: January 12, 1965 effective January 1, 1965 Securities of Insured State Nonmember Banks pt. 335 [1934 Act Authority]	30 Fed. Reg. 396 (1965)
4. OCC: February 20, 1965 Proxy contests § 11.5 (c) [NBA Authority]	30 Fed. Reg. 2308 (1965)
5. OCC: May 1, 1965 § 16 exemptions [1934 Act Authority]	30 Fed. Reg. 6160 (1965)
6. Fed: May 18, 1965 Interpreting "officer" in pt. 206	30 Fed. Reg. 6731 (1965)
7. Fed: December 7, 1965 Form F-5 Proxy solicitation by bank management § 206.102	30 Fed. Reg. 15,089 (1965)
8. Fed: December 10, 1965 Proxy solicitation by bank management § 206.103	30 Fed. Reg. 15,286 (1965)

TABLE 1 Continued

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION
9. OCC: May 12, 1966 Annual Report pt. 10 Proxies pt. 11 § 16 Reports pt. 12	31 Fed. Reg. 6949 (1966)
10. Fed: April 28, 1967 §§ 206.4, 206.46 Registration of Additional Class of Securities of a Bank	32 Fed. Reg. 6552 (1967)
11. OCC: May 10, 1967 Annual Report pt. 10 Financial Statements pt. 18	32 Fed. Reg. 7070 (1967)
12. OCC: October 7, 1967 Minority stockholder proposals § 11.3	32 Fed. Reg. 13,962 (1967)
13. OCC: December 6, 1967 § 16 Ownership Reports pt. 12	32 Fed. Reg. 17,468 (1967)
14. Fed: December 6, 1967 Beneficial ownership § 206.2 Minority stockholder proposals § 206.5	32 Fed. Reg. 17,469 (1967)
15. FDIC: December 6, 1967 Beneficial ownership § 335.2 Minority stockholder proposals § 335.5	32 Fed. Reg. 17,470 (1967)
16. Fed: August 10, 1968 Tender offers §§ 206.4, 206.5, 206.47, 206.51, 206.53 [Williams Act effective July 29, 1968]	33 Fed. Reg. 11,394 (1968)
17. OCC: August 15, 1968 Proxies/Tender Offers pt. 11 § 16 Ownership Reports pt. 12 [Williams Act]	33 Fed. Reg. 11,587 (1968)
18. FDIC: August 15, 1968 Tender offers §§ 335.4, 335.5, 335.47, 335.51, 335.53 [Williams Act]	33 Fed. Reg. 11,589 (1968)

TABLE I Continued

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION
19. OCC: August 17, 1968 [Explaining August 15 issue]	33 Fed. Reg. 11,705 (1968)
20. Fed: December 30, 1969 Financial statements, proxies, other reports and forms §§ 206.2-206.5, 206.7, 206.42, 206.44, 206.71	34 Fed. Reg. 20,304 (1969)
21. FDIC: December 30, 1969 Financial statements, proxies, other reports and forms §§ 335.2-335.5, 335.7, 335.42, 335.44, 335.46, 335.51, 335.71	34 Fed. Reg. 20,318 (1969)
22. FDIC: January 10, 1970 Correction of December 30, 1969 issue §§ 335.42, 335.71	35 Fed. Reg. 385 (1970)
23. FDIC: January 20, 1970 Correction of December 30, 1969 issue § 335.71	35 Fed. Reg. 760 (1970)
24. OCC: September 16, 1970 Annual Report pt. 10 to Stockholders	35 Fed. Reg. 14,502 (1970)
25. Fed: February 11, 1971 Tender Offers and other Stock Acquisitions; Registration Statements and Reports; Proxy statements §§ 206.4-206.5 [1970 1934 Act Amendments effective December 22, 1970]	36 Fed. Reg. 2862 (1971)
26. FDIC: March 3, 1971 Registration statements and reports, Proxies §§ 335.4-335.5 [1970 1934 Act Amendments]	36 Fed. Reg. 3959 (1971)
27. OCC: August 12, 1971 Securities Act Disclosure Regulations — pt. 11 [1934 Act regulations con- formed to Fed's regulations]	36 Fed. Reg. 14,997 (1971)

TABLE 1 Continued

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION
28. OCC: November 10, 1971 Forms F-2, F-7, F-8 §§ 11.42, 11.61, 11.62	36 Fed. Reg. 21,451 (1971)
29. OCC: January 29, 1972 Forms F-9, A, B, C, and D § 11.71	37 Fed. Reg. 1458 (1972)
30. OCC: December 5, 1972 § 16 exemption § 11.6	37 Fed. Reg. 25,818 (1972)
31. FDIC: May 31, 1973 Technical correction; redesignation of Executive Secretary § 335.3	38 Fed. Reg. 14,265 (1973)
32. OCC: August 13, 1974 Financial statements; disclosure of standby letters of credit § 11.7	39 Fed. Reg. 28,974 (1974)
33. Fed: August 17, 1974 Financial statements; disclosure of standby letters of credit § 206.7	39 Fed. Reg. 29,916 (1974)

TABLE 2
SELECTED 1934 ACT ISSUANCES — POST-1974 AMENDMENT

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION/SEC ACTION
34. FDIC: October 8, 1975 Audited financial statements	40 Fed. Reg. 47,346 (1975) SEC: 36 Fed. Reg. 13,915 (July 28, 1971)
35. FDIC: February 3, 1976 319 corrections to October 8, 1975 issue	41 Fed. Reg. 4889 (1976)
36. OCC: October 12, 1976 Financial reporting requirements and other amendments §§ 11.2-11.7, 11.41, 11.42, 11.44, 11.45, 11.51, 11.61, 11.62, 11.71, 11.102	41 Fed. Reg. 44,822 (1976) SEC: October 6, 1975
37. Fed: October 21, 1976 Financial statements. Form F-4, Form F-9A §§ 206.7, 206.44, 206.71	41 Fed. Reg. 46,427 (1976)
38. Fed: January 17, 1977 Financial statements § 206.71	42 Fed. Reg. 3171 (1977)
39. FDIC: March 9, 1977 Disclosure of interim results in financial reports §§ 335.4, 335.7, 335.41, 335.44, 335.51	42 Fed. Reg. 13,104 (1977)
40. FDIC: March 21, 1977 Correction to March 9, 1977 issue	42 Fed. Reg. 15,307 (1977)
41. FDIC: December 2, 1977 Correction to March 9, 1977 issue	42 Fed. Reg. 61,249 (1977)

TABLE 2 (Continued)

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION/SEC ACTION
42. OCC: December 28, 1978 Confidential treatment, proxy dissemination to beneficial owners, preliminary proxy material, shareholder proposals, tender offers §§ 11.2-11.5, 11.7, 11.41-11.44, 11.47, 11.51, 11.54, 11.71	43 Fed. Reg. 60,537 (1978) SEC: 43 Fed. Reg. 7651 (1978) 43 Fed. Reg. 18484 (1978) 43 Fed. Reg. 29767 (1978)
43. Fed: December 28, 1978 Current reports, Proxies, § 16 reports, Form F-2, Form F-3, Form F-4, Form F-5, Form F-11, Form F-13 §§ 206.4-206.6, 206.42-206.44, 206.47, 206.51, 206.54	43 Fed. Reg. 60,549 (1978)
44. FDIC: December 28, 1978 Beneficial ownership, registration, proxies, shareholder proposals, financial statements, Form F-1, Form F-2, Form F-3, Form F-4, Form F-5, Form F-9, Form F-11, Form F-13 §§ 335.2, 335.4, 335.5, 335.7, 335.41-335.44, 335.47, 335.51, 335.54, 335.71	43 Fed. Reg. 60,561 (1978)
45. Fed: January 26, 1979 Correction to December 28, 1978 issue § 206.54	44 Fed. Reg. 5391 (1979)
46. FDIC: January 30, 1979 Correction to December 28, 1978 issue § 335.4	44 Fed. Reg. 5869 (1979)

TABLE 2 (Continued)

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION/SEC ACTION
47. FDIC: November 27, 1979 Acquisition statements, Shareholder proposals, Form S-K simplification, Corporate governance, Management remuneration, Management indebtedness, Changes in independent accountants, auditor fees, technical corrections §§ 335.2, 335.4-335.6, 335.41-335.44, 335.46-335.48, 335.51	44 Fed. Reg. 67,627 (1979)
48. Fed: November 28, 1979 Beneficial ownership and acquisition statements, Corporate governance, Management remuneration, Independent auditor fees, simplification and other SEC amendments §§ 206.4, 206.5, 206.41-206.44, 206.47, 206.48, 206.51	44 Fed. Reg. 67,961 (1979)
49. OCC: December 4, 1979 Beneficial ownership, Shareholder proposals, Corporate governance, Management remuneration, Independent accountants and auditors fees §§ 11.4, 11.5, 11.41-11.44, 11.47, 11.48, 11.51, 11.54	44 Fed. Reg. 69,614 (1979)
50. FDIC: December 28, 1979 Corrections to November 27, 1979 issue	44 Fed. Reg. 76,754 (1979)
51. FDIC: September 15, 1980 Form and content of financial statements, Form F-9 §§ 335.7, 335.41, 335.51, 335.71	45 Fed. Reg. 60,885 (1980) SEC: 43 Fed. Reg. (Sep 7, 1978) Regulation S-X, Article 9
52. Fed: October 2, 1980 Form and content of financial statements, Form F-9 §§ 206.7, 206.71	45 Fed. Reg. 65,184 (1980)

TABLE 2 (Continued)

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION/SEC ACTION
53. OCC: January 22, 1981 Tender offers. Corporate governance. Proxy voting advice. Dividend reimbursement plans §§ 11.3, 11.5, 11.6, 11.51, 11.53, 11.54	46 Fed. Reg. 6865 (1981) SEC: 44 Fed. Reg. 38,810 (July 2, 1979) 44 Fed. Reg. 46,736 (Aug. 8, 1979) 44 Fed. Reg. 49,406 (Aug. 22, 1979) 44 Fed. Reg. 68,764 (Nov. 29, 1979) 44 Fed. Reg. 70,236 (Dec. 6, 1979) 45 Fed. Reg. 33,957 (May 21, 1980)
54. Fed: February 6, 1981 Safe harbor from liability for projections. Corporate governance. Dividend reinvestment plans. Tender offers; Interpretation—issuer tender offers. going-private transactions: technical amendments §§ 206.3, 206.5, 206.6, 206.8, 206.41, 206.42, 206.44, 206.51, 206.53 (redesignated 206.51), 206.54 (redesignated 206.52), 206.104	46 Fed. Reg. 11,237 (1981)
55. Fed: March 11, 1981 Correction to February 6, 1981 issue § 206.	46 Fed. Reg. 16,089 (1981)
56. Fed: April 14, 1981 Correction to February 6, 1981 issue § 206.5	46 Fed. Reg. 21,747 (1981)
57. FDIC: May 5, 1981 Safe harbor for projections. Foreign bank reporting. Corporate governance, Dividend reinvestment plans, tender offers. Issuer tender offers. Going-private transactions. § 16(b) exemption New Format for 12 C.F.R. pt. 335	46 Fed. Reg. 25,204 (1981) SEC: 44 Fed. Reg. 38,810 (July 2, 1979) 44 Fed. Reg. 46,735 (Aug. 8, 1979) 44 Fed. Reg. 49,406 (Aug. 22, 1979) 44 Fed. Reg. 68,764 (Nov. 29, 1979) 44 Fed. Reg. 70,236 (Dec. 6, 1979) 45 Fed. Reg. 33,957 (May 21, 1980)
58. OCC: September 15, 1981 Corrections to January 22, 1981 issue § 11.5	46 Fed. Reg. 45,747 (1981)

TABLE 2 (Continued)

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION/SEC ACTION
59. Fed. January 29, 1982 Correction to February 6, 1981 issue § 206.44	47 Fed. Reg. 4230 (1982)
60. FDIC: December 14, 1983 Interim financial reporting, Timely filing of statements, Reporting effects of changing prices, Accounting amendments, Exhibit requirements, Finan- cial statements, technical §§ 335.103, 335.203, 335.206, 335.212, 335.220, 335.221, 335.309a, 335.312, 335.321, 335.331, 335.358, 335.411, 335.506, 335.508, 335.509, 335.512, 335.604, 335.621	48 Fed. Reg. 35,553 (1983) SEC: 45 Fed. Reg. 23,651 (Apr. 8, 1980) 45 Fed. Reg. 58,822 (Sep. 5, 1980) 45 Fed. Reg. 63,630 (Sep. 25, 1980) 45 Fed. Reg. 63,660 (Sep. 25, 1980) 45 Fed. Reg. 76,974 (Nov. 21, 1980) 46 Fed. Reg. 11,952 (Feb. 12, 1981) 46 Fed. Reg. 12,480 (Feb. 17, 1981) 46 Fed. Reg. 13,988 (Feb. 25, 1981) 46 Fed. Reg. 19,456 (Mar. 31, 1981) 47 Fed. Reg. 5404 (Feb. 5, 1982) 47 Fed. Reg. 57,679 (Dec. 28, 1982)
61. FDIC: December 23, 1983 Corrections to December 14, 1983 issue	48 Fed. Reg. 56,734 (1983)
62. OCC: October 30, 1985 Complete reformatting and up- dating of pt. 11	50 Fed. Reg. 45,276 (1985) SEC: 45 Fed. Reg. 23,651 (Apr. 8, 1980) 45 Fed. Reg. 58,822 (Sep. 5, 1980) 45 Fed. Reg. 63,630 (Sep. 25, 1980) 45 Fed. Reg. 63,660 (Sep. 25, 1980) 45 Fed. Reg. 63,682 (Sep. 25, 1980) 46 Fed. Reg. 11,952 (Feb. 12, 1981) 46 Fed. Reg. 12,480 (Feb. 17, 1981) 46 Fed. Reg. 19,456 (Mar. 31, 1981) 46 Fed. Reg. 56,171 (Nov. 16, 1981) 47 Fed. Reg. 5404 (Feb. 5, 1982) 47 Fed. Reg. 17,046 (Apr. 21, 1982) 47 Fed. Reg. 29,651 (July 8, 1982) 47 Fed. Reg. 29,532 (July 9, 1982) 47 Fed. Reg. 49,963 (Nov. 4, 1982) 47 Fed. Reg. 55,491 (Dec. 10, 1982) 47 Fed. Reg. 55,661 (Dec. 13, 1982) 47 Fed. Reg. 57,679 (Dec. 28, 1982) 48 Fed. Reg. 9520 (Mar. 7, 1983) 48 Fed. Reg. 11,104 (Mar. 16, 1983) 48 Fed. Reg. 35,082 (Aug. 3, 1983) 48 Fed. Reg. 35,218 (Aug. 23, 1983) 48 Fed. Reg. 44,467 (Sep. 29, 1983)

TABLE 2 (Continued)

BANK REGULATORY AGENCY ACTION	FED. REG. CITATION/SEC ACTION
63. OCC: February 10, 1986 Technical amendments to pt. 11, as reformatted and reorganized by October 30, 1985 issue	51 Fed. Reg. 4887 (1986)
64. OCC: February 10, 1986 Corrections to October 30, 1985 issue	51 Fed. Reg. 4889 (1986)
65. Fed. December 31, 1987 Rescinding pt. 206 and adding § 208.16	52 Fed. Reg. 49,374 (1987)
66. Fed: January 8, 1988 Supplemental notice to December 31, 1987 issue; agency forms under review	53 Fed. Reg. 492 (1988)
67. OCC: October 28, 1988 Technical amendments to October 30, 1985 issue	53 Fed. Reg. 43,677 (1988)
68. FDIC: December 29, 1989 Independent audit requirements. Compensation, Small transaction exemption, Issuer tender offers, Proxy rules. All holders and best price tender offer rules, Shareholder communications, nonbank companies financial disclosure in merger transactions §§ 335.101, 335.201, 335.203, 335.204, 335.206, 335.207, 335.209, 335.210, 335.212, 335.214, 335.220, 335.307, 335.309a, 335.310, 335.312, 335.321, 335.331, 335.332, 335.359, 335.401, 335.402, 335.407-335.410, 335.503, 335.507, 335.509-335.510, 335.512, 335.513, 335.521, 335.602, 335.603, 335.610, 335.618, 335.621-335.623, 335.625-335.628, 335.701, 335.702	SEC: 47 Fed. Reg. 29,652 (July 8, 1982) 47 Fed. Reg. 55,861 (Dec. 13, 1982) 48 Fed. Reg. 34,253 (July 28, 1983) 48 Fed. Reg. 44,467 (Sep. 29, 1983) 48 Fed. Reg. 46,012 (Oct. 11, 1983) 51 Fed. Reg. 25,873 (July 17, 1986) 51 Fed. Reg. 42,048 (Nov. 20, 1986) 52 Fr 18,200 (May 8, 1987)

In the post-1974 amendment context, final action by the regulators in promulgating "substantially similar" 1934 Act rules has been delayed in some cases over five years after pertinent SEC amendments have been issued.¹⁴⁷ Failure to meet the deadline mandated by section 12(i) of the 1934 Act¹⁴⁸ has been a uniform feature of the agencies' administration of the 1934 Act. The only explanation offered for these delays came from staff of the FDIC, who noted that the 60-day time frame was, as a practical matter, extremely tight and that changes in provisions from the SEC proposed version to final rule version of regulatory amendments made it difficult to anticipate the amendments that would be required of the agencies under section 12(i).¹⁴⁹ The FDIC has apparently settled upon a practice of annual review and updating of its 1934 Act regulations,¹⁵⁰ but this still leaves multi-year delays unexplained.

Nor is the pattern of delays explained on the basis of agency review and modification of SEC 1934 Act amendments, as contemplated by the 1974 amendment of section 12.¹⁵¹ Neither staff of the Office of the

¹⁴⁷See Charts 1-3, *infra* (delays in promulgation).

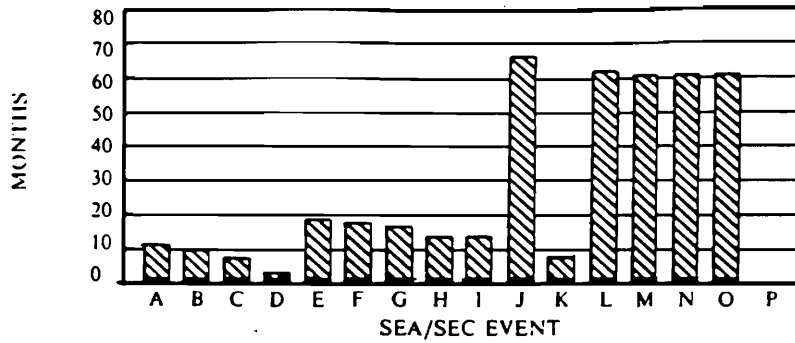
¹⁴⁸See text at note 85, *supra*.

¹⁴⁹Interview with Gerald J. Gervino, FDIC Senior Attorney and Lawrence H. Pierce, FDIC Securities Activities Officer, Washington, D.C. (September 21, 1990) [hereinafter "FDIC Interview"].

¹⁵⁰*Id.*

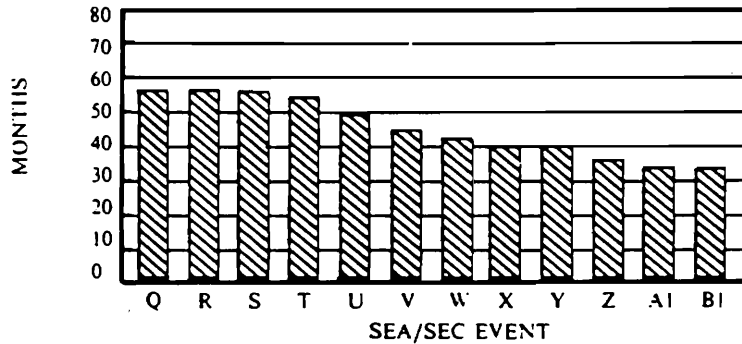
¹⁵¹See text at note 84, *supra*.

CHART 1: OCC EXPERIENCE



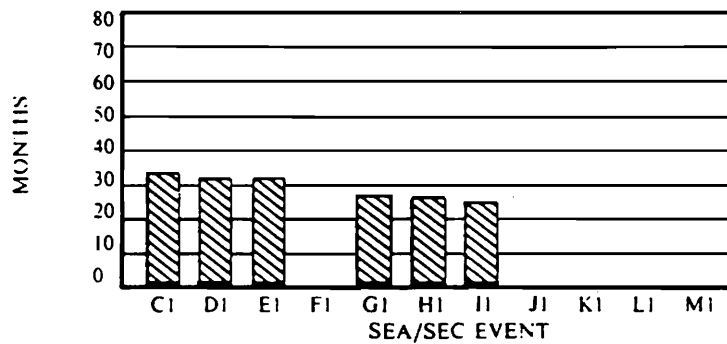
■ 12(i) TIME LIMIT ▨ EXCESS TO ISSUANCE

CHART 1.1



■ 12(i) TIME LIMIT ▨ EXCESS TO ISSUANCE

CHART 1.2



■ 12(i) TIME LIMIT ▨ EXCESS TO ISSUANCE

CHART 1.3

Notes to Chart 1

1. This chart represents length of time, in months, that the agency took to implement a final rule substantially similar to an SEC amendment of its 1934 Act regulations ("SEA/SEC Event"). In each case length of time is rounded to the nearest month and is necessarily an approximation only.

2. The chart only considers final rules, both for SEC amendments and for corresponding implementing regulations of the agency.

3. Where data were ambiguous, or where the agency may not have yet acted to implement a substantially similar rule, no value appears for that SEA/SEC Event.

4. The data are presented on a selective basis only, and generally only for issuance after the 1974 amendment of section 12(i) required promulgation of final regulations by the agencies "substantially similar" to SEC amendments. (Cf. Table 2. *supra*.)

5. The "SEA/SEC Events" selected for comparison are SEC issuances identified by the following key:

<u>Key</u> Issuance Date	<u>Key</u> Issuance Date
A October 6, 1975	U November 16, 1981
B February 1978	V February 5, 1982
C April 1978	W April 21, 1982
D September 7, 1978	X July 8, 1982
E July 2, 1979	Y July 9, 1982
F August 8, 1979	Z November 4, 1982
G August 22, 1979	A1 December 10, 1982
H November 29, 1979	B1 December 13, 1982
I December 6, 1979	C1 December 28, 1982
J April 8, 1980	D1 March 7, 1983
K May 21, 1980	E1 March 16, 1983
L September 5, 1980	F1 July 28, 1983
M September 25, 1980	G1 August 3, 1983
N September 25, 1980	H1 August 23, 1983
O September 25, 1980	I1 September 29, 1983
P November 25, 1980	J1 October 11, 1983
Q February 12, 1981	K1 July 17, 1986
R February 17, 1981	L1 November 20, 1986
S February 25, 1981	M1 May 8, 1987
T March 31, 1981	

CHART 2: FED EXPERIENCE

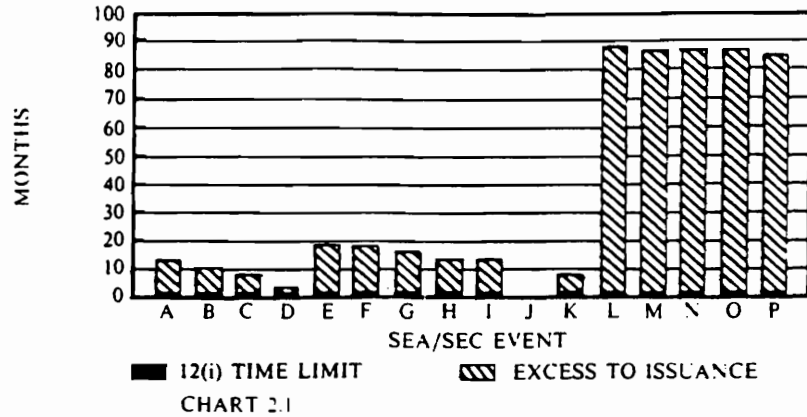


CHART 2.1

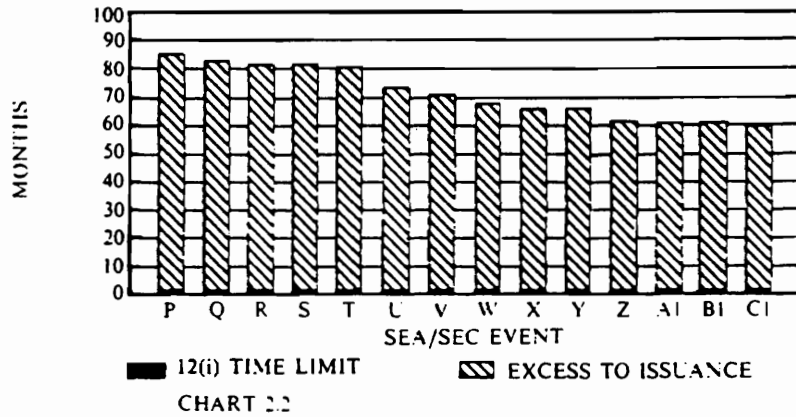


CHART 2.2

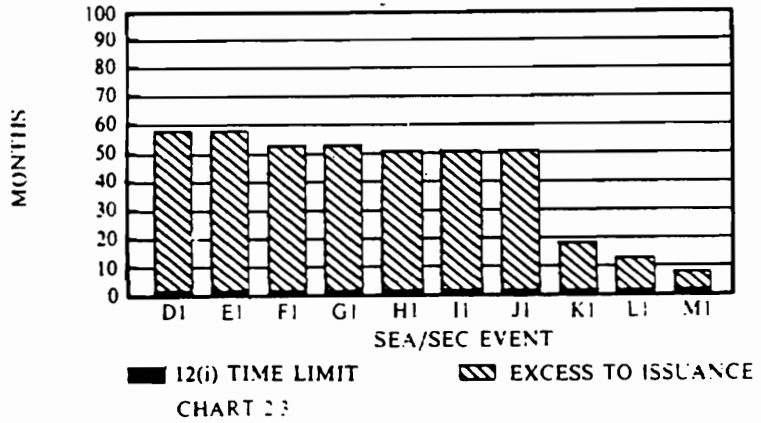
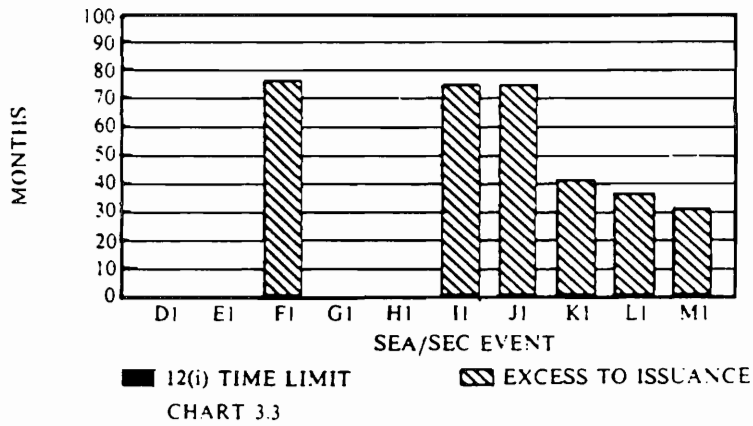
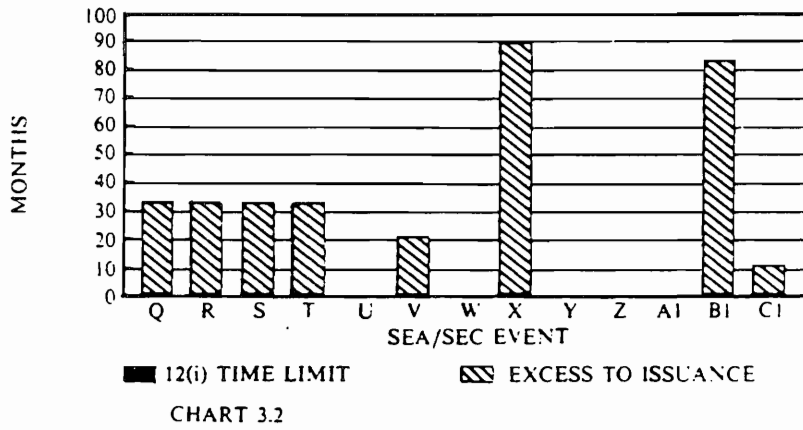
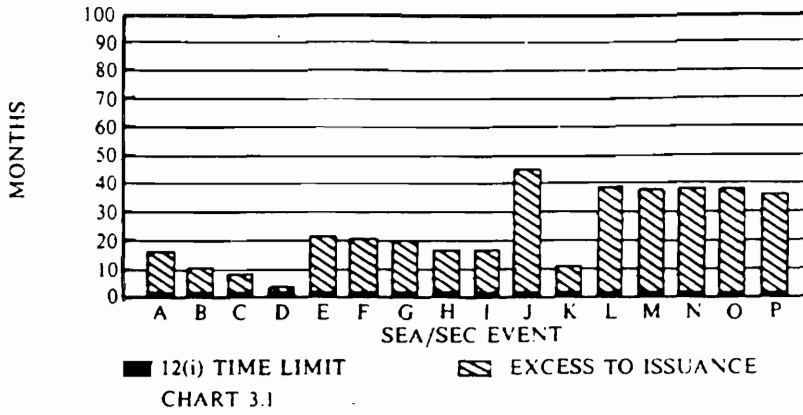


CHART 2.3

[See supra notes accompanying Chart 1.]

CHART 3: FDIC EXPERIENCE



[See *supra* notes accompanying Chart 1.]

Comptroller of the Currency (OCC),¹⁵² staff of the Fed,¹⁵³ nor staff of the OTS¹⁵⁴ could recall any specific instances in which their respective agencies had invoked their authority to make and publish a finding, and detailed reasons therefor, to the effect that an SEC 1934 Act amendment was "not necessary or appropriate in the public interest or for protection of investors."¹⁵⁵ Staff of the FDIC noted that there were a few instances of explicit departures from SEC amendments (particularly in the area of issuer tender offers, for example).¹⁵⁶

B. Substantive Incorporation by Reference

The now defunct FHLBB and, since the enactment of FIRREA,¹⁵⁷ the OTS have never experienced any delay in the promulgation of 1934 Act implementing regulations substantially similar to SEC regulations. However, in the first instance this situation has been due to the fact that, in fulfilling its statutory responsibilities under section 12(i) as to insured thrift institutions, the FHLBB simply incorporated by reference¹⁵⁸ all "rules, regulations and forms . . . prescribed by the [SEC] pursuant to [the sections enumerated in section 12(i)] or applicable in connection with obligations imposed by those sections."¹⁵⁹

This incorporation by reference did little to satisfy the FHLBB's 1934 Act responsibilities. The FHLBB approach neglected the implicit assumption in section 12(i) that the responsible regulatory agencies would assess new amendments to the SEC 1934 Act regulations to determine the need for and appropriateness of the amendments with respect to banks and insured institutions.¹⁶⁰

Furthermore, the FHLBB approach appears to have been inconsistent with regulations promulgated by the Administrative Committee of the Federal Register (ACFR)¹⁶¹ under the authority of the Federal Register Act.¹⁶² The FHLBB, in effect, did not publish its generally applicable 1934 Act regulations, and the net result is a failure to fully and directly inform those subject to its regulations.

¹⁵²Telephone Interview with Ellen Broadman, Director, OCC Securities & Corporate Practices Division, Washington, D.C. (August 22, 1990) [hereinafter "OCC Interview"].

¹⁵³Interview with Walter McEwen, Fed Senior Attorney, Washington, D.C. (August 16, 1990) [hereinafter "Fed Interview"].

¹⁵⁴Interview with Howard Bluver, OTS Assistant Chief Counsel, Washington, D.C. (August 15, 1990) [hereinafter "OTS Interview"].

¹⁵⁵U.S.C. § 78i(i).

¹⁵⁶FDIC Interview.

¹⁵⁷See notes 10-11, 88-89, *supra*, and accompanying text (FIRREA transfer of functions from FHLBB to OTS).

¹⁵⁸Strictly speaking, the key provision of neither the FHLBB regulations nor the succeeding OTS regulations characterizes what it is doing as an "in-corporation by reference." See, e.g., 12 C.F.R. § 563d.1 (1989) (SEC "rules, regulations and forms . . . shall apply to securities issued by insured institutions"). However, staff of the Office of the Federal Register (OFR) have expressed the view that, in substance and effect, the FHLBB and OTS provisions do in fact work an incorporation by reference. Interview with Michael White and Fran McDonald, OFR staff, Washington, D.C. (August 17, 1990) [hereinafter "OFR Interview"].

¹⁵⁹12 C.F.R. § 563d.1 currently provides as follows:

In respect to any securities issued by savings associations, the powers, functions, and duties vested in the Securities and Exchange Commission (the "Commission") to administer and enforce sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Securities Exchange Act of 1934 (the "Act") are vested in the Office. The rules, regulations and forms prescribed by the Commission pursuant to those sections or applicable in connection with obligations imposed by those sections, shall apply to securities issued by savings associations, except as otherwise provided in this part. The term "Commission" as used in those rules and regulations shall with respect to securities issued by savings associations be deemed to refer to the Office unless the context otherwise requires. All filings with respect to securities issued by savings associations required by those rules and regulations to be made with the Commission shall be made with the Office by submitting such filings to the Chief Counsel, Corporate and Securities Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, except as noted in § 563d.2 of this part. Except to the extent specifically provided, no filing fees specified by the Commission's rules shall be paid to the Office.

¹⁶⁰See note 84, *supra*, and accompanying text.

¹⁶¹See ACFR, *Updating_of_Publication_Procedures*, 50 Fed. Reg. 12,462 (1985) (criticizing cross-referencing practices of administrative agencies).

¹⁶²44 U.S.C.A. §§ 1501-1511 (West 1969 & Supp. 1990).

The FHLBB regulations were first promulgated and published before the ACFR regulations, interpreting the preexisting requirements of the Federal Register Act, were issued. With the transfer of authority from the now defunct FHLBB to the OTS, identical OTS regulations, continuing the incorporation by reference, were published in November 1989.¹⁶³ OFR staff speculated that the OTS regulations were able to slip through, despite the 1985 ACFR guidelines, because of the large volume (310 printed pages) and relative urgency of the publishing project.¹⁶⁴

In December 1987, the Fed adopted the FHLBB approach to crossreferencing the SEC's 1934 Act regulations.¹⁶⁵ At the time, the Fed argued that this approach was preferable, *inter alia*, "[b]ecause of the small number of registered State member banks."¹⁶⁶ If in fact market conditions have shifted decisively in favor of registration of bank holding company parents of banks, which are directly subject to SEC regulation, with a corresponding sharp decline in 1934 Act registrations of banks and thrift institutions,¹⁶⁷ then one may question the continuing utility of the split administrative jurisdiction created by section 12(i) of the 1934 Act.

¹⁶³See 54 Fed. Reg. 49,411, 49,634-49,635 (1989) (codified at 12 C.F.R. pt. 563d), amended, 55 Fed. Reg. 3040 (1990) (codified at 12 C.F.R. § 563d.2). Hence, as to insured savings associations, the OTS incorporates by reference all "rules, regulations and forms prescribed by the Commission pursuant to [the sections of the Act enumerated in section 12(i)] or applicable in connection with obligations imposed by those sections." 12 C.F.R. § 563d.1. See also id. § 563d.210 (form and content of financial statements).

¹⁶⁴OFR Interview.

¹⁶⁵52 Fed. Reg. 49,374 (1987) (rescinding 12 C.F.R. pt. 206, adding id. § 208.16). In particular, 12 C.F.R. § 208.16(a) provides:

(a) Filing requirements. Except as otherwise provided in this section, a State member bank the securities of which are subject to registration pursuant to section 12(b) or section 12(g) of the Securities Exchange Act of 1934 (the "1934 Act") (15 U.S.C. 78l (b) and (g)) shall comply with the rules, regulations and forms adopted by the Securities and Exchange Commission ("Commission") pursuant to sections 12, 13, 14(a), 14(c), 14(d), 14(f) and 16 of the 1934 Act (15 U.S.C. 78l, 78m, 78n(a), (c), (d), (f) and 78p). The term "Commission" as used in those rules and regulations shall with respect to securities issued by State member banks be deemed to refer to the Board unless the context otherwise requires.

¹⁶⁶52 Fed. Reg. at 49,375. Fed staff has indicated that currently there are only 34 member banks that are registered under section 12 of the 1934 Act. Fed Interview.

¹⁶⁷The OCC staff has indicated that currently there are only approximately 70 national banks that are registered under section 12 of the 1934 Act. OCC Interview. The FDIC staff has indicated that currently there are only approximately 240 insured nonmember banks that are registered under section 12 of the 1934 Act. FDIC Interview. OTS staff provided documentation indicating that, as of July 1990, some 318 savings

IV. CRITIQUE OF THE CURRENT SYSTEM

A. Incorporation by Reference

Whatever the relative merits of the system of delegated administration contemplated by section 12(i) of the 1934 Act, the system is not, and in fact almost from its inception has not been, working.¹⁶⁸ It may be that, given its tight 60-day deadline¹⁶⁹ and the number and complexity of SEC amendments with which the agencies must deal,¹⁷⁰ the system is not capable of timely implementation. This possibility in itself counsels a change in the current situation. In any event, none of the current responses of the agencies to the problem is an adequate alternative.

OTS staff commended the practical merits of the substantive incorporation by reference practice that the OTS and its predecessor agency have used since 1974.¹⁷¹ On the other hand, Fed staff suggested that associations were registered under section 12, with another 38 savings association complying with current and periodic reporting requirements of the 1934 Act, though they are not registered under section 12. (This compliance is required by OTS Securities Offerings regulations, which impose these reporting requirements on associations filing offering circulars that become effective. 12 U.S.C. § 563g.18(a).) the acceptance of an incorporation by reference approach by the Fed may indicate that agency's preference--as originally expressed in 1964¹⁷²--eventually to return 1934 Act administration to the SEC.¹⁷³

Incorporation by reference of SEC regulations and amendments currently is not a valid alternative.¹⁷⁴ The ACFR has long been skeptical of the practice,¹⁷⁵ and it formalized its criticism in published interpretive guidance on publication procedures in 1985.¹⁷⁶ "Cross-referencing" is an impermissible "substitute for publication in full text."¹⁷⁷ Furthermore, the potential for harm in this practice is well recognized. "Regulatory burdens on the public are not lessened by shifting them by cross-referencing from one agency's regulations to another."¹⁷⁸ The practice also "makes the Federal Register system difficult to use."¹⁷⁹

Another well recognized problem with cross-referencing has adverse implications for the delegation regime that Congress established with the enactment of section 12(i), as amended in 1974. The ACFR has noted:

Cross-referencing can create procedural problems for an agency. An untenable situation results when one agency adopts the rules of another agency by cross-referencing. The first agency surrenders to the second control over future amendments to the regulations. An agency could find itself, because the other agency changed its regulations, referencing regulations that are irrelevant or referencing regulations that cannot be enforced or which no longer exist.¹⁸⁰

¹⁶⁸See notes 90-95, *supra*, and accompanying text (discussing pre1974 administration of section 12(i)).

¹⁶⁹See text at note 85, *supra*.

¹⁷⁰FDIC staff expressed particular concern over the practical difficulties of complying with section 12(i) in light of the great number and complexity of the SEC proposed and final 1934 Act amendments. FDIC Interview.

¹⁷¹OTS Interview.

¹⁷²See notes 74-75, *supra* and accompanying text (Fed's position during consideration of 1964 amendments).

¹⁷³Fed Interview.

¹⁷⁴See notes 106-116, *supra*, and accompanying text (discussion of incorporation by reference practices of the FHLBB/OTS and the Fed).

¹⁷⁵OFR Interview.

¹⁷⁶See 50 Fed. Reg. 12,462 (1985) (codified at 1 C.F.R. §21.21).

¹⁷⁷1 C.F.R. §21.21(c).

¹⁷⁸50 Fed. Reg. at 12,462.

¹⁷⁹*Id.*

¹⁸⁰*Id.* at 12,463.

Yet it was precisely this sort of "surrender" of administrative control (to the SEC) that Congress consciously rejected in drafting section 12(i) as it did.¹⁸¹

B. Publication Delays

Inordinately delayed publication of "substantially similar" amendments, whether on an ad hoc, occasional basis, or upon yearly (but possibly untimely) review, is also obviously at odds with the clear mandate of section 12(i) of the 1934 Act.¹⁸² Staff at the various agencies could offer no cogent justification of the marked and continuing departures from this publication requirement.

The pattern of delays in publication¹⁸³ is striking, and has on occasion resulted in delays of as much as five to seven years. Staff at the OCC,¹⁸⁴ the FDIC,¹⁸⁵ and the OTS,¹⁸⁶ (as well as the Fed staff) while without question knowledgeable and expert in securities regulation, indicated that often pertinent SEC amendments may be informally applied as an interpretive matter, even if not yet formally implemented in their respective regulations. Yet surely the mandate of section 12(i)—and well recognized principles of administrative law as well¹⁸⁷—requires something more than this.

C. Duplication of Effort

Given the strains and inconsistencies evident in the administration of section 12(i), one must ask whether the regulatory overlap and duplication of effort entailed by the section is acceptable. All of the agencies are on record as opposing unnecessary duplication and the costs that it entails.¹⁸⁸ In that context, all have agreed, at least in principle, that the elimination of section 12(i), the source of this particular overlap and duplication, is warranted.¹⁸⁹ While the SEC reaffirmed its support of the Task Group's recommendation in April 1988,¹⁹⁰ as well as in more recent testimony,¹⁹¹ the agencies have counselled circumspection on this issue, in light of the many related and unrelated issues explored by the Task Group.¹⁹²

More recently, a Treasury Report on a safer, more competitive banking system, resulting from an eighteen-month interagency consultation and study mandated by the FIRREA,¹⁹³ also appears to have endorsed the transfer of 1934 Act authority to the SEC.¹⁹⁴ Congress is currently considering implementing legislation.¹⁹⁵ Certainly, these latest efforts encompass a broader field of regulatory

¹⁸¹ See notes 76-78, *supra*, and accompanying text.

¹⁸² See text at note 85, *supra*.

¹⁸³ See Charts 1-3, *supra*.

¹⁸⁴ OCC Interview.

¹⁸⁵ FDIC Interview.

¹⁸⁶ OTS Interview.

¹⁸⁷ See, e.g., 5 U.S.C. §552(a)(1)(D) (APA requirement); 44 U.S.C. §1510(a) (complete codification of each agency's generally applicable rules to be published).

¹⁸⁸ See Report of the Task Group on Regulation of Financial Services 29-30 (1984).

¹⁸⁹ See *id.* at 39-41 (Task Group discussion of "regulation by function"); *id.* at 91 (Task Group recommendation that 1934 Act responsibility be transferred to the SEC).

¹⁹⁰ See SEC, Memorandum to the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce Concerning Financial Services Deregulation and Repeal of the Glass-Steagall Act, April 13, 1988, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) } 87,313 (April 22, 1988) at 93,756, 93,764.

¹⁹¹ See, e.g., Testimony of Richard C. Breeden, Chairman, SEC, Concerning Issues Involving Financial Institutions and Accounting Principles Before the Sen. Comm. on Banking, Housing and Urban Affairs 13-17 (September 10, 1990).

¹⁹² See, e.g., Letter from L. William Seidman, Chairman, FDIC, to Rep. Markey (August 28, 1990) (clarifying FDIC position that repeal of section 12(i) must be accomplished within broader financial services reform).

¹⁹³ FIRREA §1001.

¹⁹⁴ See U.S. Department of the Treasury, *Modernizing the Financial System: Recommendations for Safer, More Competitive Banks* (1991), *reprinted in*, Fed. Banking L. Rep. (CCH) No. 1377, Part II (February 14, 1991), at 57-58 (recommending "functional regulation" by the SEC). On the concept of "functional regulation," see note 138, *supra*.

¹⁹⁵ See, e.g., S. 713, §242(f), 102d Cong., 1st Sess. (1991), 137 Cong. Rec. S3754 (March 20, 1991) (repealing 1934 Act section 12(i)).

reform than just the proper administration of the 1934 Act. However, the fact remains that, whatever the outcome of broader consideration of financial services reform, section 12(i) does not work as currently constituted.

D. Potential for Harm

Nevertheless--surprising as it may seem--there are those who might ask, where is the harm in allowing the agencies to discharge their section 12(i) responsibilities as they see fit? We may overlook for the moment the modest proposition that federal agencies ought to carry out the law in accordance with its terms, except to note that Congress, in its constitutional authority, has determined with relative precision how those responsibilities are to be discharged. Altering that determination by administrative fiat could call into question the good faith of the agencies involved.

In any event, the potential for harm would seem fairly evident. As the Fed noted when section 12(i) was first under consideration, the delegation of 1934 Act authority to the agencies has in fact resulted in a regulatory system that is "fragmented and the tasks performed less efficiently."¹⁹⁶ Indeed, all of the agencies are on record as endorsing the repeal of section 12(i) because of the inefficiency and duplication that it entails, even if it were implemented as written.¹⁹⁷

Furthermore, the current situation is rife with potential confusion for those banks subject to the section 12(i) system. Regulations currently applicable to these banks at any particular time may be entirely out of step with their SEC analogs, yet the agencies on an "informal" basis may be applying the SEC analogs, unpromulgated and not readily available to the banks. This situation runs counter to basic precepts of administrative law.¹⁹⁸

Incorporation by reference approaches simply exacerbate the potential problem involved in this situation. Clarity of application and ease of use of published codifications of federal regulations--goals that prompted the ACFR to discourage incorporation by reference--are inevitably compromised under the current situation.

It may be suggested that there are implicit benefits in that situation. There could arguably be a benefit to having all regulations applicable to depository institutions administered by a unitary authority, rather than split between the SEC (for purposes of securities regulation) and the agencies (for purposes of substantive regulation). Yet this argument is decisively compromised by the fact that all of the agencies have already endorsed in principle a "functional regulation" approach, entailing SEC administration of all securities regulation, in place of the current "institutional regulation" approach.¹⁹⁹

It may also be argued that leaving section 12(i) authority in the agencies ensures an efficient flow of information, directly available only to those agencies in their supervision of depository institutions, to the internal units administering the section. However, what most often seems to occur is a coopting of the goals of securities disclosure, in favor of the goal of confidential, nonpublic regulation that informs much of depository institutions regulation.²⁰⁰

Finally, it may be argued that shareholders of depository institutions may be better protected by securities regulation administered by agencies that are otherwise fully informed about the circumstances of these institutions. This self-serving argument is somewhat undercut by the fact that the agencies have already ceded the point that securities regulation ought to be in the hands of the SEC. The arcane division of regulatory authority enshrined in section 12(i)--of doubtful utility in

¹⁹⁶Harris Letter at 34.

¹⁹⁷See notes 137-138, *supra*, and accompanying text.

¹⁹⁸See, e.g., 44 U.S.C. §1510(a) (Federal Register Act; requiring Code of Federal Regulations to contain "complete codifications of the documents of each agency of the Government having general applicability or promulgated by the agency").

¹⁹⁹See note 138, *supra*.

²⁰⁰See notes 173-203, *infra*, and accompanying text.

any event given the relatively small number of depository institutions²⁰¹ not already subject to SEC authority through their registered holding companies—may itself impede the flow of information to the markets, a goal of securities regulation.²⁰²

E. Institutional Bias

1. Contrasting institutional approaches

Current practices of the agencies with regard to section 12(i), whether utilizing incorporation by reference or simply delaying the supposedly inevitable, invite the suspicion that that there is "a certain ambivalence on the part of the bank [and thrift] regulators with respect to the rigorous application of federal securities regulation to participants in the banking system."²⁰³ While this report emphatically declines to question the dedication of the operative staffs of the agencies that directly administer the 1934 Act, each staff is not the agency *in toto*, and a degree of institutional bias against the disclosure approach to regulation represented in the 1934 Act may still be evident in each agency taken as an institutional whole.

It is almost a truism of federal bank regulatory law and lore that the regulatory style is one that relies on the confidential resolution of supervisory and enforcement problems,²⁰⁴ almost to the exclusion of public disclosure. Likewise, it is a truism of federal securities regulation that it is "disclosure-oriented,"²⁰⁵ and that it uses the instrument of public disclosure as its basic enforcement device. These truisms may set up a false, or at least unnecessary, opposition between federal securities regulation and the regulation of depository institutions. In fact, public disclosure can be a legitimate instrument of federal bank regulation.²⁰⁶ Furthermore, it has recently been suggested that federal securities regulation, at least as originally conceived, may have been more substantive than current "disclosure-oriented" characterizations may be willing to admit.²⁰⁷

²⁰¹See notes 115-116, *supra* (discussing the small number of 1934 Act reporting depository institutions currently supervised by the agencies).

²⁰²See testimony of James R. Doty, SEC General Counsel, before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, at 4-7 (Aug. 2, 1990).

²⁰³Malloy, *Public Disclosure as a Tool of Federal Bank Regulation*, 9 Ann. Rev. Banking L. 229, 253 (1990).

²⁰⁴See, e.g., Mathewson, *From Confidential Supervision to Market Discipline: The Role of Disclosure in the Regulation of Commercial Banks*, 11 J. Corp. L. 139, 146-150 (1986) (discussing development of "confidential supervision" as basic tenet of federal bank regulation); Huber, *Mandatory Disclosure of Information About Banks*, 6 Ann. Rev. Banking L. 53, 75-76 (1987) (discussing confidentiality). Nowhere has this preference for confidentiality been stronger or more clearly articulated than in the area of formal enforcement actions on the part of the bank regulators. See Malloy, *Balancing Public Confidence and Confidentiality: Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, 61 Temple L. Rev. 723, 725 (1988) ("Regulatory enforcement proceeds to a significant extent in shadowy, informal ways, outside of public view and, usually, without judicial review.") See also *id.* at 791-93 (criticizing extreme confidentiality of bank regulatory enforcement). In this regard, in December 1987 the Administrative Conference of the United States (ACUS) adopted a recommendation for, among other things, the regular publication, or other accessible dissemination, by the depository institution regulators of redacted decisions and accompanying opinions issued in formal enforcement adjudications. See 52 Fed. Reg. 49,141, 49,152 (1987) (codified at 1 C.F.R. §350.87-12). Consistent with the ACUS recommendation, the FIRREA now generally mandates the publication and availability to the public of final orders issued with respect to formal administrative enforcement proceedings initiated by such regulators. FIRREA, §913 (codified at 12 U.S.C. §§1818 (u), 1786(s)). See Malloy, *Nothing to Fear but FIRREA Itself: Revising and Reshaping the Enforcement Process of Federal Bank Regulation*, 50 Ohio St. L.J. 1117 (1990) (discussing ACUS recommendation and FIRREA mandate thereof).

²⁰⁵See, e.g., *Fundamentals* at 7 ("there is a recurrent theme throughout [the federal securities] statutes of disclosure, again disclosure, and still more disclosure. Substantive regulation has its limits.") See also *id.* at 25-35 (discussing opposition of "disclosure" and "merit" approaches to securities regulation). See generally Cohen, "Truth in Securities" Revisited, 79 Harv. L. Rev. 1340 (1966) (discussing the disclosure-oriented approach taken by the principal federal securities statutes).

²⁰⁶*Cf.* Huber, *Enforcement Powers of Federal Banking Agencies*, 7 Ann. Rev. Banking L. 123, 176 (1988) ("disclosure of information about banking organizations can be viewed as an enforcement tool"), citing Huber, *supra* note 153; Mathewson, *supra* note 153 at 177 ("Perhaps the proper role of public disclosure in bank regulation is . . . the generation of public confidence in a sound banking system").

²⁰⁷See, e.g., Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385 (1990).

The clearest articulation of the institutional bias of the agencies in favor of confidentiality was provided in 1975, in a sharply barbed response to the now classic study by Professor Kenneth Scott of the chartering and "licensing" decisions of the regulators.²⁰⁸ Professor Scott advanced the proposition, modest enough on its face, that the regulators "should undertake to provide a full statement of their objectives in approving or denying charter or [Federal Reserve] membership applications and branches, and should define in concrete terms the standards to be applied."²⁰⁹ Scott suggested that this undertaking could best be implemented "by the adoption of policy statements and rules of general applicability, which should be as specific as possible."²¹⁰ Scott also recommended, *inter alia*, that the regulators "should systematically collect and publish their licensing decisions and opinions in some convenient form."²¹¹

It may tell us a great deal about the depth of feeling on the issue of confidentiality that C. Westbrook Murphy, then Deputy Chief Counsel of the Office of the Comptroller of the Currency, responded to Scott's recommendation with an excoriating attack approaching *ad hominem* argument.²¹² In the course of this exercise, Murphy raised *sua sponte* the "need for confidentiality."²¹³

There is a need for bank regulation to proceed confidentially because of "the way in which a published decision sometimes affects the solvency of a particular bank. An unfavorable opinion from a banking agency can shatter public confidence in a banking institution."²¹⁴ Murphy was, of course, writing in the context of decisions as to chartering and other "secondary approvals,"²¹⁵ and his

²⁰⁸Scott, *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*, 42 U. Chi. L. Rev. 235 (1975).

²⁰⁹*Id.* at 294.

²¹⁰The present author advanced much the same recommendation with respect to the formal enforcement policies and standards of the regulators. See Malloy, *supra* note 153 at 793. The ACUS formally adopted this recommendation (1 C.F.R. §350.87-12), but Congress did not act on this proposition in enacting FIRREA.

²¹¹Scott, *supra* note 157 at 295. The present author advanced a similar recommendation with respect to the formal enforcement decisions and accompanying orders of the regulators. See Malloy, *supra* note 153 at 791-93. The ACUS formally adopted this recommendation (1 C.F.R. §350.87-12), and Congress has since mandated publication. See note 153, *supra*.

²¹²See Murphy, *What Reason for the Quest? A Response to Professor Scott*, 42 U. Chi. L. Rev. 299, 299-300 (1975):

Professor Scott starts with some erroneous assumptions about the statutory discretion vested in the Comptroller; continues by resurrecting issues about hearing procedures and the scope of judicial review that were settled by the federal courts six or seven years ago; . . . and concludes that the federal banking agencies should publish chartering standards, or issue written opinions in every case, or both. Because of its abundance of irrelevant arguments and its paucity of discussion about the real issues raised by its conclusions and recommendations, the article is not of much use in determining whether or not published standards and written decisions have any valid place in modern banking supervision.

Quite apart from its occasionally overheated tone, the Murphy response also indulged in a certain amount of disingenuous rhetoric. Thus, in addressing Scott's recommendation of the adoption of policy statements and rules of general applicability, Murphy responded in part by arguing that, "[i]f the Comptroller could write standards sufficiently detailed to cover every foreseeable situation, the bank chartering process could be handled by a file clerk. . . . Professor Scott's article offers little help, however, on the difficult problem of writing such standards." *Id.* at 307 (emphasis added). Since Scott's recommendations did not call for such a manifestly impractical set of standards to be drafted, it is not surprising that his article would not assist Mr. Murphy. Murphy apparently saw only two possibilities in this regard: either publication of all-inclusive "abstract predictive standards," *id.* at 308, or the opaque incantation of the bare statutory criteria that, then and now, appear in the Comptroller's regulations. See 12 C.F.R. §5.20(c) (factors considered in charter applications). Surely, a fair reading of Scott's article would suggest that this is a false opposition; the middle ground is held by his recommendation of informative published standards.

A more balanced presentation of the traditional arguments in favor of confidential supervision is found in Mathewson, *supra* note 153 at 139-141 (danger of bank runs), *id.* at 146-150 (legal basis for confidentiality).

²¹³Murphy, *supra* note 161 at 309.

²¹⁴*Id.* Cf. Mathewson, *supra* note 153 at 174-176 (describing incidents of failure of public confidence interrelated to public disclosure of adverse information about depository institutions).

²¹⁵On "secondary approvals," see Scott, *supra* note 157 at 269-70. See generally 1 Malloy, *supra* note 3 at 22 n. 1 (discussing primary and secondary entry restrictions in bank regulatory law).

argument for confidentiality as applied to de novo chartering is therefore somewhat indirect.²¹⁶ That is, if adverse information concerning other banks with which applicants are associated comes to light in the charter application process, public disclosure of such information could threaten the existing banks with insolvency.²¹⁷ Thus, insolvency of a poorly managed bank in questionable financial condition is to be avoided by keeping everyone in the dark.

This principle of confidentiality is easily extended into other areas of bank regulation. For example, examination results and reports of condition are to be maintained in confidence.²¹⁸ By extension, this institutional preference for confidentiality informs bank regulation generally. "[T]he underlying philosophy of bank regulation--protection of depositors--does not always mesh well with a system of public disclosure of facts whose publication could result in the bank's insolvency."²¹⁹

Yet a nagging doubt remains unresolved by this principle of nondisclosure. Murphy argues that adverse public disclosure with respect to a bank creates a substantial risk for the bank's depositors,²²⁰ yet depositors generally seem to be able to engage in ambulatory risk avoidance--by removing their deposits with relative ease once clear early warning is given.²²¹ Furthermore, there is a fine point concerning causality to be considered here: what risk there is was "created" by the poor management of the bank, not by the emergence of the truth of the bank's condition.

2. Disclosure approaches of the agencies

Certainly, there does appear to be some tension between the perspective of traditional bank regulation, as conceived by Murphy, and the principle of public disclosure. Too often it seems that the principle of confidentiality protects the regulators from the tedious task of explaining themselves, at least as much as it ever protects the depositors.²²² Modest changes in administrative attitudes are nevertheless apparent, and the principle of confidentiality has been undercut in several respects. Of course, federal securities law appears to mandate public disclosure as an instrument of regulation, notwithstanding the general principle of confidentiality. Furthermore, the federal bank regulatory system, in certain selective areas, is beginning to rely increasingly on the principle of public disclosure.²²³

However, a review of, for example, the relatively recent initiatives of the bank regulators into annual public disclosure under the rubric of bank regulation²²⁴ raises certain ambiguities when measured against the expectations of securities regulation. These ambiguities may suggest a degree of ambivalence on the part of these regulators with respect to the expectations of securities regulations. As I have observed elsewhere,²²⁵ an unstated assumption discernible beneath the surface of the agencies' annual disclosure requirements seems to be that a bank might otherwise not be

²¹⁶On "secondary approvals," see Scott, supra note 157 at 269-70. See generally I Malloy, supra note 3 at 22 n. 1 (discussing primary and secondary entry restrictions in bank regulatory law).

²¹⁷See Murphy, supra note 161 at 309-10, citing Olsen v. Camp, 328 F. Supp. 728 (E.D.Mich. 1970) (organizers of a proposed new bank associated with existing banks in unsatisfactory condition).

²¹⁸See, e.g., 12 C.F.R. §4.16(b)(8). Cf. Consumers Union v. Heimann, 589 F.2d 531, 534 (D.C.Cir. 1978) (upholding confidentiality of examination reports under Freedom of Information Act).

²¹⁹See, e.g., 12 C.F.R. §4.16(b)(8). Cf. Consumers Union v. Heimann, 589 F.2d 531, 534 (D.C.Cir. 1978) (upholding confidentiality of examination reports under Freedom of Information Act).

²²⁰*Id.*

²²¹See, e.g., Garten, Banking on the Market: Relying on Depositors to Control Bank Risks, 4 Yale J. Reg. 129, 153-54 (1986) (most depositors can easily shift deposits in response to emerging problems).

²²²See, e.g., Rosenbaum, Little Chance Seen for Bills That Would Rein in Fed, N.Y. Times, Oct. 10, 1989, at D1, col. 1 (quoting economist who believed that Fed secrecy "makes it easier for [Fed governors] to avoid public criticism"). Cf. Murphy, supra note 161 at 311 (advocating elimination of judicial review to facilitate administrative process).

²²³For examples, see Malloy, supra note 152 at 235-243.

²²⁴See *id.* at 236-243 (discussion of annual disclosure requirements).

²²⁵See *id.* at 237 n. 43 (FDIC annual disclosure policy not generally requiring disclosure of enforcement actions), *id.* at 241 n. 67 (OCC policy; same). But cf. *id.* at 238 n. 47 (FDIC annual disclosure requirements under securities law).

required to disclose potentially material information to its security holders and the interested public (for example, concerning enforcement action taken by the bank's primary federal regulator), at least as matter of bank regulatory policy.²²⁶ Indeed, a bank might be required by its regulator, for example, to keep an enforcement action confidential.²²⁷

3. Tensions in concurrent administration of bank supervisory and securities regulation regimes

The degree to which such administrative enforcement actions have been treated as confidential is one of the features of the bank regulatory system that most clearly distinguishes it from the system of federal securities regulation. Ironically, the concurrent imposition of these two regulatory systems on banks may result in the obligation, under federal securities laws, for a bank to disclose to investors the occurrence of administrative enforcement by bank regulators, if deemed material, although such actions would generally be treated confidentially for bank regulatory purposes.

It may be, of course, that concurrent duties under federal securities law, requiring public disclosure of such information where material would simply obviate this concern. One fair reading²²⁸ of SEC v. Youmans²²⁹ is that securities regulatory concerns, and the attendant principle of public disclosure, does in fact operate to resolve this concern in favor of disclosure.²³⁰ However, on its own facts Youmans may not entirely unknit the ravelled sleeve of care, because it did not precisely pose the problem of the concurrent application of the securities and bank regulatory law by the same agency (i.e., by a bank regulator). Rather, the concerns of securities regulation (ultimately vindicated by the court and unaddressed on appeal) were advanced by the SEC, with only an indirect assertion of the principle of confidentiality by one of the private parties to the litigation.²³¹ Nor does the court offer any analysis as to why the principle of public disclosure preempts confidentiality in this case; it simply articulates its conclusion that disclosure was required.²³²

As was noted previously in this study,²³³ for an independent bank with securities subject to the 1934 Act's periodic disclosure requirements, its primary federal regulator would be charged with the application of both federal bank regulatory and securities law. In such a situation of complete concurrence of the two regulatory programs, is it so certain that the expectations of public disclosure would necessarily have been pressed to the detriment of the principle of confidentiality? Available empirical indications are ambiguous.

²²⁶Cf. 12 C.F.R. §18.9 (OCC annual disclosure regulation; disclosure of content of examination reports and reports of supervisory activity, or any representation concerning such reports generally prohibited).

²²⁷Cf. SEC v. Youmans, 543 F. Supp. 1292, 1297, 1301 (E.D.Tenn. 1982), reversed in part on other grounds and remanded, 729 F.2d 413 (6th Cir.), cert. denied sub nom. Holliday v. SEC, 469 U.S. 1034 (1984) (despite defendant's argument that disclosure could not be made because of confidentiality of Comptroller's examination report, national bank's holding company violated 1934 Act by failure to disclose information).

²²⁸See Garten, Regulatory Growing Pains: A Perspective on Bank Regulation in a Deregulatory Age, 57 Fordham L. Rev. 501, 562-63 n. 347 (emphasis added): "For banks and bank holding companies subject to the periodic disclosure requirements of the securities laws, any final orders or written agreements with the regulators . . . must be disclosed." (Citing Youmans, supra note 176.) This, of course, assumes that the order or agreement is deemed material. See Basic Inc. v. Levinson, 485 U.S. 224 (1988) (discussing materiality for securities regulation purposes); Taylor v. First Union Corp. of South Carolina, 857 F.2d 240, 243-244 (4th Cir. 1988) (silence concerning prior merger negotiations; Basic distinguished).

²²⁹Supra note 176.

²³⁰In Youmans, the district court held that the bank holding company's periodic reports under the 1934 Act "should have disclosed material facts relating to [the holding company's] financial condition and methods of doing business, including . . . restrictions imposed upon it under an agreement with the Comptroller of the Currency. . . ." Youmans, 543 F. Supp. at 1301.

²³¹See id. at 1297 (confidentiality of Comptroller's report apparently advanced by a party defendant).

²³²Id. at 1301.

²³³See supra notes 19-22 and accompanying text.

First, there is a paucity of examples of active enforcement of the securities laws by the bank regulators. Few securities enforcement matters are ever advanced.²³⁴ Second, even outside the context of active enforcement, the public record of the implementation and administration of the securities laws by the bank regulators seems at best ambivalent and at worst diffident.

Another ambivalent example of the bank regulators' use of public disclosure as a tool of supervision and enforcement is afforded by an October 1988 issuance of the OCC.²³⁵ Among other things, the issuance identified guidelines under which the OCC would consider "taking and making public enforcement actions relating to the securities activities of national banks."²³⁶ The policies and procedures discussed in the issuance were intended as internal guidelines only, and did not create, in and of themselves, enforceable substantive or procedural rights.²³⁷

The OCC securities law enforcement policies were intended to serve one or more of the following purposes: "(1) to be preventive, (2) to be remedial/corrective, or (3) to be disciplinary. These purposes are not mutually exclusive, and an appropriate enforcement action could be taken to meet one or more of these goals."²³⁸ OCC policy established two distinct categories of circumstances in which administrative enforcement powers may be used. First, there were circumstances in which there would be a strong bias in favor of formal enforcement action, as opposed to other, informal means of enforcement.²³⁹ In general, formal enforcement action was considered to be particularly appropriate in cases involving:

1. violations of the antifraud provisions of the federal securities laws, or rules promulgated thereunder;^[240]
2. misuse of customer funds or securities;
3. customer abuse;
4. serious and/or repetitive violations of law;
5. significant internal controls breakdown; or
6. other deceptive or unfair practices.²⁴¹

In the absence of these factors, administrative enforcement against securities law violations generally would be instituted under the OCC's bank regulatory enforcement authority,²⁴² even though other jurisdictional bases might exist for the action.²⁴³ The decision whether or not to take action under the jurisdictional basis of the federal securities laws, as opposed to the federal bank regulatory enforcement provisions, would have potentially significant consequences for the publicity of the enforcement action.²⁴⁴

Second, there were circumstances in which mitigating factors may counsel modifying a proposed remedy in

²³⁴For example, in 1986 the OCC reported in excess of 400 enforcement actions of various types. See 5 OCC Q. J. 85-115 (1986); 6 OCC Q. J. 85-116 (1987). Of these, only two actions were securities enforcement cases. See 5 OCC Q. J. at 114-15.

²³⁵See OCC Banking Bulletin 88-28, October 6, 1988, reprinted in 4 Fed. Banking L. Rep. } 49,251 (October 28, 1988).

²³⁶Id. at 28,251 (emphasis added).

²³⁷Id. Cf. SEC v. National Student Marketing Corp., 538 F.2d 404, 407 (D.C.Cir. 1976), cert. denied, 429 U.S. 1073 (1977) (effect of internal SEC rule on enforceable rights of investigative target).

²³⁸Banking Bulletin 88-28, supra note 184, at 28,251.

²³⁹Administrative means of enforcement would range from informal advice and moral suasion to formal administrative or civil judicial action. In addition to [OCC] authority to take enforcement actions under 12 U.S.C. §1818 with respect to violations of the federal securities laws, the OCC also has power to institute enforcement proceedings under the federal securities laws for violations by banks and their associated persons who are engaged in certain types of securities activities, namely, (i) bank municipal securities dealers, (ii) bank government securities dealers, and (iii) bank transfer agents.Id.

²⁴⁰But cf. supra notes 28-29 and accompanying text (antifraud provisions of 1934 Act not delegated to the bank regulators).

²⁴¹Banking Bulletin 88-28, supra note 184, at 28,251.

²⁴²See, e.g., 12 U.S.C. §1818. For a discussion of this administrative authority, post-FIRREA, see generally Malloy, Nothing to Fear but FIRREA Itself, supra note 153.

²⁴³Banking Bulletin 88-28, supra note 184, at 28,252.

²⁴⁴See notes 177-183 and accompanying text, supra (problem of concurrent applicability of bank and securities regulation programs).

a formal administrative action. In such circumstances the responsible party²⁴⁵ had the discretion to decide to institute an action under a different statute, to make a modified charge, or to seek a lesser sanction.²⁴⁶ The OCC issuance gave the following examples of possible "mitigative factors":

1. The nature and severity of the institution's problems.
2. The likelihood of a significant adverse impact on the banking industry.
3. The capability, willingness, cooperation, integrity, commitment and intent of bank management, board of directors, or ownership to correct the problems. In this regard, it is appropriate to consider the extent to which meaningful corrective action has already been taken, is being taken (including, where appropriate, restitution to customers), or can reasonably be expected to be taken.
4. The absence of fraud or deliberate deception of customers.
5. The gravity or extent of violations.
6. Whether customers were exposed to risk.
7. The bank's record of compliance with previous criticisms or supervisory actions.
8. A proposed respondent's previous record.
9. The presence of unique circumstances that might tend to alter the need to take formal administrative action.²⁴⁷

The presence of any of these mitigative factors would not in itself have constituted a defense against an enforcement action or warrant lightened sanctions.²⁴⁸ Each case necessarily would be evaluated on its own merits, in the discretion of OCC responsible officials.²⁴⁹

The decision whether or not to pursue the matter under the jurisdictional basis of the federal securities laws, or under federal bank regulatory enforcement authority,²⁵⁰ apparently tilted ever so delicately in the direction of confidential bank enforcement instead of securities enforcement, would generally have important consequences with respect to the publicity of the enforcement action taken. Administrative actions undertaken by the OCC pursuant to the authority of the federal securities laws would usually be made public at their inception.²⁵¹

This general rule was based on the OCC's desire "to give effect to the principle of competitive equality and in light of the practice of other agencies charged with enforcing the federal securities laws."²⁵² However, the Comptroller retained the discretion to determine that such an enforcement proceeding should be private, in the public interest.²⁵³ In contrast, such administrative actions under federal bank regulatory enforcement authority would generally be made public, on a case-by-case basis, only "after consideration of the views of the proposed respondents, should there exist any of the circumstances presenting a strong bias for formal enforcement action."²⁵⁴

While the OCC issuance generally appeared to acknowledge the concurrent applicability of two counterpoised regulatory regimes and the need for some degree of convergence between the two regulatory programs on the issue of public disclosure, it remained institutionally biased in favor of confidentiality. If there is to some significant degree a continuing institutional bias in federal bank

²⁴⁵Primary responsibility in this regard was given to the "Senior Deputy Comptrollers for Bank Supervision . . . to use OCC administrative authorities as necessary to accomplish supervisory objectives. Banking Bulletin 88-28, supra note 184, at 28,252. However, it was expected that the Senior Deputy Comptroller for Bank Supervision - Policy would continue to use the OCC Supervisory Review Committee to advise on all enforcement actions involving bank securities activities. See id. at 28,253.

²⁴⁶Id.

²⁴⁷Id.

²⁴⁸Id. Cf. note 186 and accompanying text, supra (guidelines do not create enforceable substantive or procedural rights).

²⁴⁹Banking Bulletin 88-28, supra note 184, at 28,252.

²⁵⁰See notes 191-192 and accompanying text, supra.

²⁵¹Banking Bulletin 88-28, supra note 184 at 28,252.

²⁵²Id.

²⁵³Id.

²⁵⁴Id.

regulation, particularly in the enforcement area, in favor of confidentiality, then ambiguity necessarily exists when the two regulatory regimes are concurrently applied.

The tensions resulting from this ambiguity, it may be argued, occasionally appear to manifest themselves in a certain ambivalence on the part of the bank regulators with respect to the rigorous application of federal securities regulation to participants in the banking system. However one may view this argument, it is hard to avoid the fact that implementation of the 1934 Act with respect to bank and thrift issued securities has been diffident. Delay or passivity in the face of relatively clear statutory responsibilities is the norm. At a policy level, the OCC at least attempted to articulate its approach to the concurrence of the two regimes, and it seems fairly clear that that approach does not give an entirely distinct and rigorous role to securities regulation and the principle of public disclosure.

V. CONCLUSIONS AND RECOMMENDATIONS

In light of the preceding discussion, I advance certain conclusions and make the following recommendation.

A. Discontinuity in Administration of Section 12(i) of the 1934 Act

Whatever else might be said, it is apparent that there is significant discontinuity between the explicit mandate contained in section 12(i) of the 1934 Act and the practice of the agencies in implementing the section. Inordinate delays in publication and wholesale incorporation by reference of the regulations of another administrative agency are neither good practice as a general matter of administrative law, nor do these practices seem consistent with the literal mandate of section 12(i). It might seem straightforward enough for the Conference to adopt a recommendation calling upon the agencies to make improvements in their administration of the section. However, the prospects for improvement in administration, in light of the longstanding practices of the agencies, are not encouraging. In any event, such a modest recommendation would seem to be clearly out of step with current trends.²⁵⁵

B. Direct Applicability of SEC Regulations

An alternative modest proposal would be to amend section 12(i) to acknowledge the apparent practical impossibility of the agencies in attempting (or not attempting) to meet the express deadlines imposed by the section. Rather than an incorporation by reference that is fundamentally inconsistent with the explicit mandate of section 12(i), the section might instead directly impose the regulations of the SEC, to be administered by the agencies. The agencies could be given a statutory right to make a finding that variance is required from the provisions of those regulations, and publish that finding together with the superseding regulatory provision. To ensure timeliness of the agencies' actions in this regard, their right to create a variance could be subject to a time limit.²⁵⁶

The problem with this approach is that it retains the duplication of effort at the implementation level, and the resultant inefficiencies that have uniformly been criticized in the current system for administration of the 1934 Act.²⁵⁷ Furthermore, this approach does not address concerns over the potential institutional bias that could impede the effective application and enforcement of the 1934 Act.²⁵⁸

²⁵⁵Cf. notes 142-144, *supra*, and accompanying text (discussing Treasury Report and pending legislation looking to repeal of section 12(i)).

²⁵⁶Thus, section 12(i) might be amended to read as follows:

(i) In respect of any securities issued by banks and savings associations the deposits of which are insured in accordance with the Federal Deposit Insurance Act, the regulations and rules issued by the Commission under sections 78j, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p shall apply directly to such banks and savings associations, but shall be administered and enforced (1) with respect to national banks and banks operating under the Code of Law of the District of Columbia, by the Comptroller of the Currency, (2) with respect to all other member banks of the Federal Reserve System, by the Board of Governors of the Federal Reserve System, (3) with respect to all other insured banks, by the Federal Deposit Insurance Corporation, and (4) with respect to savings associations the accounts of which are insured by the Federal Deposit Insurance Corporation, by the Office of Thrift Supervision. The Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision shall have the power, within 30 days of the promulgation by the Commission of any final rule amending such regulations and rules, to make and publish in the Federal Register a finding that implementation of such rule with respect to insured banks and insured institutions is not necessary or appropriate in the public interest or for protection of investors.

²⁵⁷See notes 137-141, *supra*, and accompanying text.

²⁵⁸See notes 152-203, *supra*, and accompanying text.

C. Recommendation: Repeal of Section 12(i) of the 1934 Act

In light of the preceding discussion, there would appear to be a strong case for the proposition that section 12(i) should be repealed. The section has never been administered as intended by its literal language. Even if so administered, it would entail considerable potential for duplication and inefficiency, leading to the danger of relative ineffectiveness in the application of the 1934 Act to depository institutions. In any event, it is inconsistent with notions of functional regulation endorsed in principle by all concerned administrative agencies.

Accordingly, it is suggested that the Conference adopt a recommendation to the effect that:

Section 12(i) of the Securities Exchange Act of 1934, 15 U.S.C. § 781(i) should be repealed, with the effect that full responsibility for administration of the Act with respect to registered depository institutions be placed with the Securities and Exchange Commission.

