SCHEDULED FOR ORAL
ARGUMENT ON APRIL 4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 86-5089, 86-5090, 86-5091 and 86-5139

SECURITIES INDUSTRY ASSOCIATION,

Plaintiff-Appellee,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,

Defendants-Appellants.

and

BANKERS TRUST COMPANY,

Defendant-Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT BANKERS TRUST COMPANY

John W. Barnum
Laura B. Hoguet
Paul L. Friedman

WHITE & CASE
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 872-0013

Attorneys for Appellant
Bankers Trust Company

Of Counsel:

Griffin B. Bell
James D. Miller
KING & SPALDING
1730 Pennsylvania
Avenue, N.W.
Washington, D.C. 20006
(202) 737-0500

March 21, 1986

TABLE OF CONTENTS

TABLE OF AUTHORITIES

* Cases or authorities chiefly relied upon are marked by asterisks.

Statutes

Administrative Materials

* Cases or authorities chiefly relied upon are marked by asterisks.

Page

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECURITIES INDUSTRY ASSOCIATION, Plaintiff-Appellee, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al., Defendants-Appellants, and BANKERS TRUST COMPANY, Defendant-Intervenor-Appellant.	Nos. 86-5089 86-5090 86-5091 86-5139

REPLY BRIEF FOR APPELLANT BANKERS TRUST COMPANY

Summary of Argument

The Glass-Steagall Act gives a simple answer to the question presented by this case: Bankers Trust may accommodate the short-term credit needs of its customers by placing their commercial paper provided it does so as an agent within the confines of Section 16's permissive phrase and does not underwrite the paper as investment banks do.

The differences between Bankers Trust's commercial paper placement service, described in the Board Statement,

and the commercial paper business of an investment bank dealer, described in the amicus brief of Goldman, Sachs & Co., are substantial. Goldman Sachs purchases paper for its own account when it wishes to do so; it also commits to its issuer-customers to purchase their unsold paper, and it commits to its purchasers to repurchase paper they do not want to hold. Goldman Sachs Br. 11, 14 n.11. Bankers Trust does none of these things. JA 113-15. SIA nonetheless contends that Bankers Trust is "underwriting" commercial paper because the paper is sold by the issuer rather than by another customer. Here SIA ignores Becker's teaching that what matters for Glass-Steagall Act purposes is the role of the bank. 104 S. Ct. at 2989. Bankers Trust's role in placing commercial paper is purely that of an agent, which is a role that Section 16 permits banks to have in the purchase and sale of securities. The primary-secondary market distinction by which SIA would define "underwriting" has nothing to do with the role of the bank and has nothing to do with the language or purpose of the Glass-Steagall Act.

SIA's reliance on Becker and Camp to invalidate the activities of Bankers Trust in this case is equally misplaced. Schwab reiterates what is clear on the face of Sections 16 and 21, which is that "selling" permitted by

Section 16 is not prohibited by Section 21. Nor are Becker and Camp hostile, as SIA and its amicus ICI contend, to bank securities activities (like Bankers Trust's commercial paper service) that are conducted on a purely agency basis. Rather, Becker and Camp, together with Schwab and ICI II, reveal that the congressional concerns underlying the Glass-Steagall Act were focused upon the promotion of securities in which a bank acquires a principal's interest, and were not directed to agency activity which, as the existence of Section 16's permissive phrase demonstrates, was never viewed by Congress as raising comparable "subtle hazards."

The Board Statement is a reasonable interpretation of the Glass-Steagall Act in view of the facts found by the Board and the Board and Bankers Trust are entitled to summary judgment confirming its validity.

Argument and Authorities

I.

THE GLASS-STEAGALL ACT AS INTERPRETED IN BECKER PERMITS BANK PLACEMENT OF COMMERCIAL PAPER ON AN AGENCY BASIS.

Far from "teaching" that Bankers Trust's placement of commercial paper violates the Glass-Steagall Act, SIA Br. 7, the Supreme Court in Becker expressed no opinion as to

whether the Bank was "underwriting" commercial paper but left this issue to be determined on remand. Becker, 104 S. Ct. at 2992 n.12.1/ Becker held only that commercial paper was a security for purposes of the Glass-Steagall Act; had the Court determined otherwise, there would have been no Glass-Steagall Act constraint against Bankers Trust's acting as principal with respect to such paper. The Court's analysis of hazards and promotional pressures was directed to that possibility, which would follow if commercial paper were not a security under the Glass-Steagall Act. Moreover, the Becker Court cannot have shared the view of SIA and the district court that Bankers Trust's placement of commercial paper is illegal because of inherent "promotional pressures" no matter how the business is conducted, because if the Court had been of that view it would not have needed to remand for a determination of whether the Bank was "underwriting" the paper.

1/ Several references in Becker show that the Court regards the Act as prohibiting underwriting activity, rather than activity that is not "underwriting": "Bankers Trust may not underwrite commercial paper if [it] is a 'security' . . . ." 104 S. Ct. at 2986 (emphasis added); "[Underwriting] places a commercial bank in the role of an investment banker . . . .", id. at 2991 (emphasis added); "The Act's prohibition on underwriting is a flat prohibition . . . ." id. (emphasis added).

A. SIA Misreads Becker.

Like the district court, SIA equates Bankers Trust's agency placement of commercial paper with the promotion of "particular securities" and argues that Becker prohibits banks from promoting "particular securities" whether they do so as principal or as agent. SIA Br. 38. SIA quotes Becker's statement that "By giving banks a pecuniary incentive in the marketing of a particular security, commercial-bank dealing in commercial paper also seems to produce precisely the conflict of interest that Congress feared . . . ." Becker, 104 S. Ct. at 2990, quoted at SIA Br. 7, 39. However, it is "dealing" in commercial paper as a principal for one's own account, not "selling" as an agent, that gives rise to the "pecuniary interest" and "salesman's stake" that Congress thought incompatible with prudent commercial banking. Schwab, 104 S. Ct. at 3010 and n.32 ("All these 'subtle hazards' are attributable to the promotional pressures that arise from . . . entities that purchase and sell particular investments on their own account.").

SIA similarly points to Becker's statements that "banks might use their relationships with depositors to facilitate the distribution of securities in which the bank has an interest . . . ." and that "[a bank] may feel pres-

sure to purchase unsold notes . . . ." 104 S. Ct. at 2989-90, quoted at SIA Br. 39. These are references to pressures that banks might feel if they were underwriting commercial paper, but they do not apply to selling solely as agent. As Bankers Trust is prohibited from purchasing unsold notes for its own account, there need be no concern that it will "feel pressure" to make unsound purchases. Similarly, as Bankers Trust is barred from having an interest in the paper it places, there is no basis for concern that any such interest would lead it to exploit depositor relationships in order to facilitate placement of that paper.

Put another way, there is no reason to be afraid of a conflict arising between a bank's interest in "a particular security" and the interests of its depositors or customers if the bank is not allowed to acquire an interest in the "particular security" in the first place. The congressional concern with "promotional pressures" underlying the Glass-Steagall Act was not with selling per se but with the evils that Congress thought could ensue if banks had a conflict of interest and were subject to "promotional pressures." Where the basis for the conflict does not exist -- that is where the bank does not have any interest in the security but only sells it as an agent for a commission -- the need for concern about "promotional pressures" vanishes.

Justice Blackmun, the author of the majority opinion in Becker, made this same point in his dissent in Camp. Justice Blackmun there wrote:

> I recognize and am fully aware of the factors and of the economic considerations that led to the enactment of the Glass-Steagall Act. . . . [T]hose then-prevailing conditions, the legislative history, and the remedy Congress provided, prompt me to conclude that what was proscribed was the involvement and activity of a national bank in investment, as contrasted with commercial banking, in underwriting and issuing, and in acquiring speculative securities for its own account. These were the banking sins of that time.

401 U.S. at 643.

Justice Blackmun went on to point out that the Glass-Steagall Act clearly permits a bank to act as "an agent for the individual customer's securities and funds." Id. Disagreeing with the Camp majority, Justice Blackmun took the view that the open-end mutual fund sought to be operated by Citibank was in essence an agency, not a principal, activity and therefore permitted by the Glass-Steagall Act.

Justice Blackmun rejected completely the view of the district court and SIA in this case that Glass-Steagall Act "hazards" require forbidding even agency activities. His view, by contrast, was that the Act permits agency activities even if they create "exactly the same hazards" as the forbidden principal activities. Id. at 643-44. Justice Blackmun's approach to the statute is the correct one

because it gives effect to the distinction Congress drew in Section 16 of the Act without purporting to vary the plain meaning of its language to fit some perceived broad legislative purpose. See Dimension, 106 S. Ct. at 688-89.

B. ICI Misreads Camp.

ICI's amicus brief misdescribes Camp as having held that Citibank's proposed activity undermined the legislative purpose of the Glass-Steagall Act "[e]ven though Citibank floated its [open-end mutual] fund's shares in the primary market solely as agent." ICI Br. 13.2/ The Court of Appeals in Camp had upheld the proposed regulation of the Comptroller on the reasoning that it authorized only an agency, but not a principal, activity by the bank. The Supreme Court reversed, not by holding the Glass-Steagall Act applicable to agency activity, but because it believed that the activity in question was in substance a principal activity forbidden by the Act on its face. Only then did the Court embark on its "hazards" analysis.

Thus in Camp the Court said that ICI and the other petitioners "contend that a purchase of stock by a bank's

---

2/ ICI here pursues an argument advanced by SIA in its Response in Opposition to Bankers Trust's Motion for a Stay Pending Appeal and To Vacate Injunction (at 21 n.*), namely that Camp "[held] bank sales of mutual fund shares illegal under Section 16 even though the bank acted only as agent." (Emphasis by SIA.) SIA's statement grossly misstates Camp's holding.

investment fund is a purchase of stock by a bank for its own account in violation of [Section 16]." 401 U.S. at 623-24. The Court added that:

> The differences between the investment fund that the Comptroller has authorized and a conventional open-end mutual fund are subtle at best, and it is undisputed that this bank investment fund finds itself in direct competition with the mutual fund industry. One would suppose that the business of a mutual fund consists of buying stock "for its own account" and of "issuing" and "selling" "stock" or "other securities" evidencing an undivided and redeemable interest in the assets of the fund. On their face, §§ 16 and 21 of the Glass-Steagall Act appear clearly to prohibit this activity by national banks.

Id. at 625 (footnote omitted). In the footnote to this passage in Camp the Supreme Court described as "both reasonable and rational" the Board's determination under Section 32 of the Act that an investment fund of the type involved in Camp would "constitute a single entity" with the bank and that the fund "would be regarded as nothing more than an arm or department of the bank." And to make it clear that it was adopting the same viewpoint, the Supreme Court went on to say: "Moreover, there is no danger that to characterize the bank [in Camp] and its fund as a single entity will disserve the purpose of Congress." Id. at 625-26 n.12.

For the SIA to say in the face of the Supreme Court's words that in Camp "the bank acted only as agent" is

insupportable. The Supreme Court specifically concluded that the bank and the mutual fund were a "single entity," and that the business of the mutual fund, and therefore of the bank, "consists of buying stock 'for its own account' and of 'issuing' and 'selling' 'stock' or 'other securities' evidencing an undivided and redeemable interest in the assets of the fund."3/

Thus the Court's decision in Camp was predicated on the Court's conclusion that principal, not agency, activity was at stake. That this was indeed the Court's premise was recognized first by Justice Blackmun in his dissent discussed above, and then by the Court in a later case that upheld bank operations of a closed-end mutual fund. Investment Co. Institute v. Board of Governors, 450 U.S. 46, 66 n.37 (1981) ("ICI II"). Finally in Schwab, the Court, distinguishing the agency brokerage at issue there from the activity involved in Camp, reiterated that "all these 'subtle hazards' are attributable to the promotional pressures that arise from . . . entities that purchase and sell particular investments on their own account." 104 S. Ct. at 3011 n.23 (emphasis added).

3/ The activities of Citibank also would not have fallen within the "permissive phrase" in Section 16 because the units of participation in the fund were not being sold "without recourse." The purchasers of such units had the contractual right to require Citibank's open-end mutual fund to repurchase those units upon demand.

ICI cannot twist Camp, any more than SIA can twist Becker, into holding that the Glass-Steagall Act forbids a bank from purchasing or selling "a particular security" where it does so solely as agent for its customer and not for its own account.

C. Goldman Sachs Misreads the Board.

After the Supreme Court held in Becker that commercial paper is a security for Glass-Steagall Act purposes, Bankers Trust modified its service to conform strictly to the agency model and to eliminate any vestige of practices that, rightly or wrongly, could be considered to be "underwriting." The Board and the district court agreed that these changes were "substantial[]" (the Board at JA 206) and "material" (the court at JA 311).4/ Certainly Bankers Trust's current "agency only" commercial paper service as outlined in the Board Statement differs significantly from the commercial paper dealer operation described in the amicus brief of Goldman, Sachs & Co.: "If Goldman Sachs is unsuccessful in placing all of the issuer's commercial paper with purchasers by the 12:15 p.m. deadline, Goldman Sachs often purchases the unsold quantity for its own inventory

4/ SIA's reference to literature Bankers Trust used to describe its service in 1978, SIA Br. 5 n.**, is consequently not a proper source for describing that service today.

for resale the following day. Issuers expect their marketer to make such purchases . . . ." Goldman Sachs Br. at 11. In contrast, as the Board found, Bankers Trust does not make such purchases. Goldman Sachs insists that its "marketing and promotional activities" are the same as Bankers Trust's even though one acts as principal and the other as agent, id. at 19, but there is no factual basis in the Board Statement to support this assertion. Whatever Goldman Sachs' promotional and marketing activities may be, those of Bankers Trust as described in the Board Statement and as the Board found do not undermine the purposes of the Glass-Steagall Act.

II.

THE FOCUS PROPERLY BELONGS ON THE PLAIN LANGUAGE OF SECTION 16.

Becker teaches that Sections 16 and 21 of the Glass-Steagall Act "seek to draw the same line." 104 S. Ct. at 2986. Because Section 16 defines a form of selling-as-agent that is expressly authorized as lawful, the same form of selling-as-agent is lawful under Section 21 as well. To remove any possible doubt on this point, Congress in 1935 amended Section 21 to include a proviso to ensure that "selling" under Section 16 would also be lawful under Sec-

tion 21.5/ Hence, if Bankers Trust's commercial paper service is conducted within the confines of Section 16, it is legal under Section 21 notwithstanding the "flat prohibitions" of the latter section.

A. SIA's Effort To Read the Significance out of Section 16 Must Again Be Rejected.

12 U.S.C. § 24, of which Section 16 of the Glass-Steagall Act became a part, is an authorizing statute directed to banks. It both creates and limits the powers banks are to have, and is therefore a logical place to look in order to determine whether a particular bank activity is permitted.

Section 21, by contrast, is a prohibitory statute directed to those engaged in the business of "issuing, underwriting, selling, or distributing" securities; it tells such persons that they may not receive deposits (i.e., engage in commercial banking) "to any extent whatever."6/ "Sections 16 and 21 of the Glass-Steagall Act approach the

---

5/ The 1935 amendment to Section 21 is discussed fully in Brief for Appellant Bankers Trust Company at 14-15 nn.9 & 10 and Brief of Morgan Guaranty Trust Company of New York as Amicus Curiae at 20-21 and n*.

6/ ICI in its brief misleadingly describes the use of the phrase "to any extent whatever" in Section 21 as applying to the securities activities described in that section. ICI Br. at 22. In fact, it is applicable only to the prohibition against taking deposits.

legislative goal of separating the securities business from the banking business from different directions. The former places a limit on the power of a bank to engage in securities transactions; the latter prohibits a securities firm from engaging in the banking business." ICI II, 450 U.S. at 62 (emphasis added). See also Becker, 104 S. Ct. at 2986. To prohibit investment banks from engaging in commercial banking it was sufficient to prohibit receiving deposits. To place a limit on banks' securities transactions, however, required providing separately for several different types of securities transactions.

The "flat prohibitions" of Section 21 cannot detract from the carefully-defined permission conferred upon banks by Section 16 to purchase and sell securities as agents for their customers. SIA's approach to this case, which begins with the "flat prohibitions" of Section 21, is a torture of statutory construction whose only, and transparent, purpose is to avoid giving effect to Section 16 as Congress wrote it.

This is the third case in which SIA has sought to narrow Section 16 into insignificance. In Schwab SIA argued, without success, that Section 16 was meant to allow banks to accommodate an occasional customer but was never intended to authorize them to engage in the brokerage

business.7/ After losing Schwab SIA in Security Pacific argued, again unsuccessfully, that Section 16 was meant to authorize banks to buy and sell securities for existing "customers" but not for new "customers". Security Pacific, 577 F. Supp. 252 (D.D.C. 1983), aff'd per curiam, 758 F.2d 739 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 790 (1986). Having failed to limit the scope of Section 16 to occasional sales, or to existing customers, SIA here claims it is limited to "retail brokerage." Once again SIA's narrowing effort must fail.

Had Congress wanted to limit the authority conferred by Section 16 to "retail brokerage," or for that matter to "occasional sales for established customers," it would have done so. Congress' use in the permissive phrase of Section 16 of the distinction between selling as a principal (forbidden) and selling as an agent (permitted) was deliberate, since risk to bank assets was certainly the first concern that led to enactment of the statute. Such risk is absent when a bank acts merely as agent, and even the "subtle hazards" described in Camp arise, as the Court said in Schwab, only when the bank acts as principal and not when it sells as an agent. Hence there is no support in the putative legislative purpose, any more than in the words

---

7/ See Brief of Petitioner SIA at 21-25 filed in Schwab.

Congress used, for SIA's continually constricted reading of Section 16.8/

B. Bankers Trust's Authority To Place Commercial Paper Derives from Section 16 and Does Not Rest upon Reading Any Securities Act Exemption into the Glass-Steagall Act.

Bankers Trust derives its authority to place commercial paper from the permission Section 16 gives commercial banks to purchase and sell securities as agent for their customers. As long as Bankers Trust places commercial paper in this manner, it is not "underwriting."9/ Under-

---

8/ ICI argues that Congress' failure to pass legislation allowing banks to underwrite commercial paper evidences an intent that banks not conduct the activities at issue here. To support this argument ICI refers to legislation that has been introduced over the years to permit banks to underwrite securities, but which did not become law. Such legislation would have permitted banking organizations not to place commercial paper as agent, but to underwrite, deal in and distribute it on a basis identical with investment banks. The Financial Services Competitive Equity Act, S. 2851, 98th Cong., 2d Sess. (passed by the Senate on Sept. 13, 1984), would have permitted commercial banks to underwrite and deal in commercial paper on the same basis as investment banks. Another bill, Financial Services Clarification Act, S. 716, 99th Cong., 1st Sess., 131 Cong. Rec. S3323-26 (introduced Mar. 20, 1985), includes the same provision regarding commercial paper as S. 2851.

Contrary to ICI's claim, therefore, Congress has not refused to expressly authorize banks to do what Bankers Trust believes, and the Board agrees, Bankers Trust may do under existing law, which is to place commercial paper as agent for its issuer-customers.

9/ The Federal Energy Regulatory Commission has ruled that a bank's placement of commercial paper is neither "under-
(footnote continued)

writing, in the common usage of the word in 1933 when the Glass-Steagall Act was passed, meant buying securities from an issuer for resale, and hence did not encompass selling as agent upon the order of a customer. No reference to the federal securities laws is needed to sustain Bankers Trust's commercial paper program under the Glass-Steagall Act, although those laws corroborate the Board's result.

It is SIA that in this Court repeatedly attempts to "pick and choose" from the federal securities laws. SIA first redefines "underwriting" to encompass so-called "best efforts underwriting," which exists under the securities laws and nowhere else, and then SIA imports a primary-secondary market distinction into Section 16 that would make that section's permissive phrase inapplicable to "selling" securities as agent where the securities in question are sold by the issuer rather than by another customer. Neither the "firm commitment" versus "best efforts" nor the primary versus secondary market distinction has any place in the context of the Glass-Steagall Act, and SIA's resort to them betrays the weakness of its position under the plain language of Section 16.

(footnote continued from previous page)
writing" nor the "marketing of securities" under the Federal Power Act. See F.E.R.C. Order Conditionally Granting Application To Hold Interlocks, 32 F.E.R.C. ¶ 61,375, Dkt. No. ID-2084-000, Sept. 17, 1985.

SIA twists Becker inside out, finally, by describing it as holding that, where Congress created an exemption in the Securities Act but did not create a corresponding exemption in the Glass-Steagall Act, Congress did not intend for there to be any exemption for Glass-Steagall Act purposes. On the contrary, the Court in Becker observed that Congress rejected Senator Glass' proposed amendment to exclude commercial paper from the definition of a "security" in the Securities Act, and concluded that Congress similarly must not have intended to exclude commercial paper from the meaning of a "security" for purposes of the Glass-Steagall Act. 104 S. Ct. at 2987.

Congress defined an "underwriter" in Section 2(11) of the Securities Act, in relevant part, as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ." 15 U.S.C. § 77b(11) (1984). This broad definition, encompassing both persons who purchase from an issuer and those who sell for an issuer as agent, was necessary to vary the ordinary business meaning of the word, which refers only to the principal activity (purchasing from the issuer). In the Glass-Steagall Act Congress used the word in its ordinary sense of principal activity, and therefore did not need to define it. The broad defini-

tion was necessary in the Securities Act because Congress' purpose there was to impose disclosure obligations upon all concerned with the issuance of securities without regard to the capacity in which they acted; for the Glass-Steagall Act's different purpose, the common language meaning of "underwriter" was appropriate.

It is also clear, as judicial and administrative decisions since the inception of the securities laws have recognized, that an "underwriting" is part of a "distribution" and that a "distribution" is equivalent to a public offering. See, e.g., Neuwirth Investment Fund, Ltd. v. Swanton, 422 F. Supp. 1187, 1194-95 (S.D.N.Y. 1975). In his treatise on securities regulation, Professor Loss states with respect to the definition of the term "underwriter" in the Securities Act that:

> A person who purchases securities from an issuer with a view to investment is not an "underwriter" under the first part of the definition. Nor is a person an underwriter who buys securities from an issuer with a view to reoffering them to a small number of persons for investment, or who on the issuer's behalf sells securities to a small number of persons for investment. There must be a contemplated "distribution" -- a term which the Commission regards as more or less synonymous with "public offering."

1 L. Loss, Securities Regulation 551 (2d ed. 1961) (emphasis in original). It is fair to conclude that the same Congress that used the words "underwriter" and "distribution" to

refer to a public offering in the Securities Act had that same meaning in mind when they passed the Glass-Steagall Act a few weeks earlier.

C. Bankers Trust Is "Dealing" under Section 16 but not "Underwriting".

According to SIA, Section 16 prohibits Bankers Trust from placing commercial paper even as agent for the account of its issuer-customers. SIA's construction rests on reading into the words "dealing" and "underwriting" as used in Section 16 a distinction imported from the securities laws between transactions in the secondary market (which SIA calls "dealing" and equates with "securities brokerage") and selling for an issuer (which SIA calls "underwriting"). SIA Br. 20.

The defect in SIA's argument is that the distinction it imports into Section 16 cuts across the distinction the statute makes by its express language: between transactions as principal (i.e., "dealing" (other than as agent) and "underwriting") and transactions as agent (i.e., authorized "dealing"). The concern of Congress, as revealed by the language of Section 16, was with the role of the bank (agent versus principal for its own account) and not with whether the transaction takes place in the primary or the

secondary market.10/ Accordingly the Supreme Court in Schwab, speaking of the language of Section 16, used the terms "underwriter" and "dealer" to contrast with "broker" and "agent," and so distinguished principal from agency activity without drawing any further distinction between primary and secondary markets.11/ The Court certainly did not limit all permissible bank selling of securities to "brokerage;" it would not then have remanded Becker the same day.

Nor does the Securities Act analogy to which SIA here turns, see SIA Br. 20 n.*, help its case. Just as Section 16 refers to the "business of dealing" in securities but does not limit "dealing" to secondary market transac-

---

10/ The legislative history of the Banking Act of 1935, which amended the Glass-Steagall Act, confirms the fundamental distinction in Section 16 between the roles of a bank in a securities transaction: when a bank buys and sells "stocks solely for the account of [its] customers and as an accommodation thereto and not for [its] own account . . . there is involved no investment by the bank of its own funds" and hence "no objection can be seen thereto." Hearings on H.R. 5357 Before the House Comm. on Banking and Currency, 74th Cong., 1st Sess. 663 (1935) (testimony of J. O'Connor, Comptroller of the Currency).

11/ "As underwriter and dealer, the firm buys and sells securities on its own account, thereby assuming all risk of loss. As broker, the firm buys and sells securities as agent . . . ." 104 S. Ct. at 3010 n.18. The Supreme Court in Schwab said that the "permissive phrase found in § 16 accurately describes securities brokerage." Id. at 3011 n.20. The Court did not say the "permissive phrase" describes only retail securities brokerage, which is SIA's incorrect characterization of what the Court said. SIA Br. 20.

tions, so also does Section 2(12) of the Securities Act define a "dealer" broadly to include transactions in all markets: "any person who engages . . . as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person." 15 U.S.C. § 77b(12) (1984). This broad definition of "dealer" clearly encompasses "offering" an issuer's securities in the primary market as well as secondary market transacting.12/ Thus a bank that sells securities for issuer-customers is engaged in the "business of dealing" under Section 16 just as is the bank that sells for other customers.

12/ SIA cites the "dealers' exemption" in the Securities Act as indicating that Congress understood dealers to trade only in the secondary market. SIA Br. 21. Although Congress generally exempted dealers from the prospectus requirements of the Securities Act, it recognized that dealers as well as underwriters may be involved in the distribution of securities to the public; hence dealer transactions that occur between distribution and post-distribution trading in Section 4(3) of the Securities Act are not exempt. 15 U.S.C. § 77d(3) (1984). L. Loss, Fundamentals of Securities Regulation 120 (1983).

SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738 (2d Cir.), cert. denied, 314 U.S. 618 (1941), cited at SIA Br. 16 and 21, involved Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1) (1984), which, like Section 4(3), distinguishes between a distribution in the primary market, in which issuers, underwriters and dealers are involved, and post-distribution trading, in which dealers enjoy an exemption.

D. Bankers Trust Places Commercial Paper "Upon the Order" of Its Customers.

SIA argues that Bankers Trust's placement of commercial paper is not "upon the order" of its issuer-customers because "in the Board's current view . . . a bank may actively solicit both issuers and purchasers of commercial paper . . . ." SIA Br. 23. The Board Statement makes clear, however, that Section 16 authorizes banks to sell securities only as agent on the order of customers. JA 203. The Board found that Bankers Trust "places commercial paper only at the direction of the issuer . . . . [T]he issuer, not the bank, decides whether to raise funds by issuing commercial paper and, if so, in what amount." JA 209-10.

Section 16 does not bar a bank from seeking a buyer for the paper its customer has instructed it to sell. The discount broker in Schwab, for example, took only "unsolicited" orders from customers wishing to buy or sell securities. Similarly, Bankers Trust's commercial paper placement is "unsolicited" because the Bank's issuer-customer, having decided to sell commercial paper, instructs the Bank to place it on the issuer's behalf. JA 209-11 and n.19. To carry out its customer's order the Bank must find a buyer for the paper, just as the broker in Schwab had to find a purchaser or a seller for the security its customer wanted to sell or buy. This process of seeking the other

side of a trade is not prohibited "soliciting" on the Bank's part any more than it was considered "soliciting" on the part of the broker in Schwab.

Further confusion on the subject of "soliciting" arises from SIA's suggestion that Bankers Trust's "tombstone" announcements constitute the "solicitation" of issuer-customers. SIA Br. at 24. This is incorrect. It is perfectly consistent with Section 16 for the Bank to make the existence of its commercial paper placement service known through the customary "tombstones," just as the bank discount brokers whose services have become widespread since Schwab advertise those services to prospective customers. "Solicitation" refers to efforts to induce a customer to buy or sell a particular security; Bankers Trust acts solely "upon the order" of its customers in placing commercial paper because, like the broker in Schwab, it does not solicit them to enter into particular transactions but only places paper upon their instructions.13/

13/ SIA also argues that "tombstones" may be "general solicitations" in violation of Rule 502 of SEC Regulation D. This is not correct. A "tombstone" announces "as a matter of public record" that the Bank has been designated a customer's commercial paper placement agent. The Board's finding that such announcements do not advertise or solicit offers to purchase commercial paper from Bankers Trust is well-supported by authority. JA 223. See L. Loss, Fundamentals of Securities Regulation 112 n.30 (1983).

Contrary to SIA and ICI's claims, the SEC does not take
(footnote continued)

SIA also contends that Bankers Trust does not place commercial paper solely upon the order of its issuer-customers because the Bank "acts as financial advisor" and "counsels [issuers] on timing and terms of the sale." SIA Br. 24. The legal test, however, is not whether a bank renders such advice to customers, but rather whether "no sales or purchases are executed unless directed by the customer . . . ." New York Stock Exchange, Inc. v. Smith, 404 F. Supp. 1091, 1097 (D.D.C. 1975). Thus "the purchase and sale of securities is solely on the order and for the account of customers within the meaning of § 16 of the Glass-Steagall Act whenever the ultimate decision to buy or

---

(footnote continued from previous page)
the view that "tombstones" violate Regulation D or turn private placements into public offerings. If the SEC did take such a view, many fewer "tombstones" would appear in newspaper and magazine financial pages. The SEC merely states that whether a "tombstone" constitutes "general solicitation" depends on the facts of a particular case. SEC Release No. 33-6455, 1 Fed. Sec. L. Rep. (CCH) ¶ 2380 at 2637-13 (Mar. 3, 1983).

SIA members routinely publish "tombstones" to record their activity as financial intermediaries in commercial paper programs, without challenge that such advertisements violate the SEC release which provides that Section 3(a)(3) commercial paper "ordinarily is not advertised for sale to the general public." SEC Release No. 33-4412, 1 Fed. Sec. L. Rep. (CCH) ¶ 2045 at 2571 (Sept. 20, 1986). SIA members also routinely publish "tombstones" to record completion of private placements without violating SEC Regulation D by offering the securities involved to the readers of the advertisement. "Tombstones" are advertisements of services provided by financial institutions and do not offer a particular security for sale.

sell and the choice of the security rests with the customer and not with the bank." In re American National Bank of Austin, Texas, [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,732, at 87,183 (Sept. 2, 1983). Accord Securities Industry Association v. Federal Home Loan Bank Board, 588 F. Supp. 749 (D.D.C. 1984); Comptroller Staff Interpretive Letter No. 353, [Current Binder] Fed. Banking L. Rep. (CCH) ¶ 85,523 (July 30, 1985). In this case the Board found (and, indeed, it was uncontested) that "the issuer, not the bank, decides whether to raise funds by issuing commercial paper." JA 210.

III.

THE BOARD'S POWER TO INTERPRET AND ENFORCE THE GLASS-STEAGALL ACT MUST BE RESPECTED.

The district court and SIA attack as "regulation" the Board's careful analysis on this remand of Bankers Trust's commercial paper service in light of the language of the statute and its legislative purpose and history. This attack is baseless for, far from undercutting the Board's power to make such an analysis, Becker criticized the Board only for not performing it at the administrative level, which on remand the Board has done. Far from discarding the well-reasoned Board Statement, the district court should have deferred to it as embodying the Board's expert

interpretation of the Act fully consistent with both the language of the Act and its underlying purpose and history. Schwab, 104 S. Ct. at 3009; Office of Consumers' Counsel v. FERC, No. 84-1099, slip op. at 24 (D.C. Cir., Feb. 4, 1986).

Equally untenable is SIA's complaint, echoed by the district court, that the very process of examination by which the Board determines that banks are in compliance with the banking laws (including the Glass-Steagall Act) constitutes, where commercial paper is concerned, a "system of ad hoc regulation." SIA Br. at 12-13. Like SIA, the district court confused "regulation" with the making of judgments as to whether particular conduct is or is not prohibited by the Act.[14/] The Board, though it may not "regulate" under the Glass-Steagall Act, is constrained to enforce it. Where as here the Board sees fit to suggest that a bank keep its records in a manner that will facilitate the Board's enforcement of the Act through the examination process, the Board is not indulging in forbidden "regulation" but is, rather, carrying out its statutory mandate.

In short, the Board, as in Schwab, was interpreting the statute, not writing regulations. The Board's consideration of the facts and the circumstances in interpret-

---

14/ Becker criticized the Board not for interpreting whether certain conduct violated the Glass-Steagall Act but for attempting to define by regulation what was a security under the Act.

ing the statute is a strength, not a weakness, and the Board's notation that different facts and circumstances might lead to a different interpretation is axiomatic, not regulation.

IV.

THE BOARD AND THE BANK ARE ENTITLED TO SUMMARY JUDGMENT HERE.

In an effort to block Bankers Trust's motion for summary judgment in the district court, SIA attempted to raise an issue of fact as to whether Bankers Trust had violated the Board Statement. The district court acknowledged that, for the purpose of considering SIA's motion for summary judgment, the description of Bankers Trust's activities contained in the Board Statement must be assumed to be true. JA 320. When it reached the "subtle hazards" issues, however, the district court disregarded this factual predicate and treated SIA's allegations as evidence of the temptations to which Bankers Trust would succumb if allowed to place commercial paper even as agent. SIA makes the same argument in this Court: "The practice may continue even today. But, whether or not it does, its existence confirms . . . that temptations fueled by the marketplace will lead to Glass-Steagall conflicts . . . ." SIA Br. 52 (emphasis by SIA).

SIA cannot have it both ways. The Board Statement described a method of placing commercial paper which, if followed, is permitted by the Glass-Steagall Act. For the purposes of its summary judgment motion SIA must accept the Board's description of the facts as to the activities in question. SIA may not now contradict this assumption by asserting in its next breath that the Bank does not in fact conduct its service in the manner described by the Board or, even worse, that the Bank would inevitably be "tempted" not to do so. The Board, based on its full study of Bankers Trust's commercial paper placement service, concluded to the contrary that no basis existed for the Glass-Steagall Act "subtle hazards" concerns here, and the Board's findings in this regard are entitled to deference.

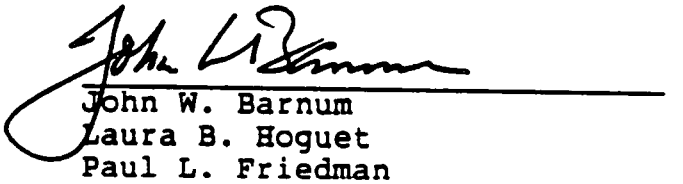
The issue of whether Bankers Trust operates its commercial paper program in the manner described by the Board is not the issue before this Court, which is solely whether the activities described by the Board violate the Glass-Steagall Act. Upon reversal of the district court's decision here this Court should direct entry of summary judgment for the Board and Bankers Trust and thus determine that Bankers Trust's commercial paper service, when conducted in the manner described by the Board, is permitted by the Glass-Steagall Act.

CONCLUSION

For the reasons set forth in this memorandum and in the Brief for Appellant Bankers Trust Company previously filed herein, this Court should reverse the February 4 and February 18 Orders of the district court, vacate the injunction entered against Bankers Trust, and grant the Board's and Bankers Trust's motions for summary judgment.

March 21, 1986

Respectfully submitted,



John W. Barnum
Laura B. Hoguet
Paul L. Friedman

WHITE & CASE
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 872-0013

Attorneys for Appellant
Bankers Trust Company

Of Counsel:

Griffin B. Bell
James D. Miller
KING & SPALDING
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 737-0500

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Brief for Appellant Bankers Trust Company has been served by hand delivery this 21st day of March, 1986 to:

James B. Weidner, Esq.
Rogers & Wells
1737 H Street, N.W.
Washington, D.C. 20006

Attorney for Securities Industry Association

Anthony J. Steinmeyer, Esq.
Appellate Staff, Civil Division
U.S. Department of Justice
Room 3617 Main Building
Washington, D.C. 20530

Richard M. Ashton, Esq.
Board of Governors of the
Federal Reserve System
20th & Constitution Avenue, N.W.
Washington, D.C. 20551

Attorneys for Board of Governors of the
Federal Reserve System

W. Michael Tupman