SEC Amus

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 87-1486
87-1490

W. DAVID HOLLOWAY, *et al.*,

Appellants, Cross-Appellees,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,

Appellees, Cross-Appellants.

On Appeal from the United States District Court
for the Northern District of Oklahoma

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

The Securities and Exchange Commission submits this brief, amicus curiae, to address the question whether certain debt instruments offered and sold to the public are securities subject to the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. 1/ The three corporate issuers were (i) a finance company, (ii) a trust company (subject to regulation by the Oklahoma Banking Department, but not regulated as a state bank subject to the full panoply of state banking regulation), and (iii) their parent company, a holding company

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1/ The Commission files this brief in support of the position of the plaintiffs-appellants in No. 87-1490 and in support of the position of the plaintiffs-appellees in No. 87-1486.

which also owned a bank. The three companies issued virtually identical instruments. Under the "investment-commercial dichotomy" used by this Court, all of the instruments meet the test for securities in the form of notes. Notwithstanding this conclusion, the district court considered it necessary to analyze in detail the state and federal regulatory schemes applicable to all three issuers -- federal bank holding company regulation, state securities regulation, and state trust company regulation. In its view, this approach is mandated by Marine Bank v. Weaver, 455 U.S. 551 (1982), which held that certificates of deposit issued by federally regulated banks were exempt from the antifraud provisions.

We agree with the district court's conclusion that the instruments issued by the holding company and the finance company are not within the bank-regulation exception of Marine Bank and thus are securities. Moreover, we strongly disagree with the district court's additional conclusion that, under the reasoning of Marine Bank, purchasers of the virtually-identical instruments issued by the trust company are not entitled to the protections of the securities laws. The district court justified the disparate treatment on the theory that purchasers of instruments from the trust company (unlike purchasers of the other instruments) were "abundantly protected" by state trust company regulation.

We believe that this conclusion as to the trust company instruments represents an unwarranted extension of the holding in Marine Bank. The Supreme Court in that case relied on the prefatory language to the statutory definitions -- "unless the context otherwise requires," 2/ to find a narrow exception to securities antifraud coverage for certificates of deposit issued by a federally-regulated and insured bank. This determination was based on the existence of a comprehensive bank regulatory scheme designed to ensure the solvency of the issuing bank and the safety of deposits.

Marine Bank, in our view, affords no basis for drawing distinctions among the three issuers of the instruments involved in this case -- or among the various, virtually-identical instruments they issued -- none of which was subject to federal, or even the complete panoply of state, bank regulation. Accordingly, for purposes of securities antifraud liability, none of the three corporate issuers can be distinguished from any other ordinary business corporation that seeks to raise capital from the public. Nor do we believe, at least in the case of the holding company and the finance company, that it was appropriate even to engage in a regulatory analysis. Except in those circumstances where an issuer is subject to a comprehensive regulatory scheme directed to the protection of purchasers of the instruments in question, such analysis is not warranted; and Marine Bank has no application to companies that are not even arguably engaged in the banking business. The Commission is concerned that the adoption by this Court of either the district court's approach, or its conclusion with respect to the instruments issued by the trust company, would erode antifraud protection for persons who purchase debt securities.

2/ Definitions under both the Securities Act and the Securities Exchange Act are preceded by the phrase "unless the context otherwise requires * * *." 15 U.S.C. 77b; 15 U.S.C. 78c.

STATEMENT OF FACTS

This is a class action seeking damages based on alleged violations of registration and antifraud provisions of the Securities Act and Securities Exchange Act in connection with the offer and sale of certain debt instruments (Amended Complaint at 22-34 ¶¶ 5.1-6.4). The instruments were issued by Republic Trust & Savings ("Trust"), Republic Financial Corp. ("Financial"), and their holding company, Republic Bancorp., Inc. ("Bancorp"). Id. at 4 ¶ 3.1, 22 ¶ 6.1. The plaintiffs alleged that the defendants misrepresented the financial condition of the three companies; that defendant Republic Bank and Trust Company (a related bank) and its directors (also defendants) manipulated loan portfolios and transferred accounts among the companies, moving non-performing loans to Trust, Financial and Bancorp and moving good loans to Republic Bank; and that these defendants induced persons to purchase securities from the three companies by advertising "Republic Companies as one cohesive group with total assets in excess of $190,000,000 * * *," and using the "exact same logos" and "deceptively similar names" for the related entities. Id. at 32-33 ¶ 6.4(1). In September 1984, the three issuers filed for reorganization under the Bankruptcy Code. Id. at 28 ¶ 6.

PROCEEDINGS IN THE DISTRICT COURT

The case was submitted to the district court for decision on motions to dismiss and for summary judgment. In support of their motions the defendants argued, inter alia, that all three issuers were subject to sufficient federal and state regulation (Oklahoma trust company, Oklahoma securities and federal bank holding company regulation) so as to preclude application of the federal securities laws. The district court, viewing Marine Bank v. Weaver, 455 U.S. 551 (1982), as controlling, regarded that decision as establishing a general test of whether instruments issued by any regulated company are subject to the federal securities laws. According to the district court, that test turns on whether investors are "abundantly protected" under the regulatory scheme applicable to the issuer. Jan. 2, 1987 Order at 2-3; see Sept. 23, 1985 Order at 21.

In this connection, the court concluded that federal regulation did not provide sufficient protection to purchasers of instruments of any of the three issuers. Because Bancorp had been a holding company for Republic Bank and Trust Company, a state bank, all three issuers were at one time subject to certain regulation by the Federal Reserve Board. However, as the district court observed, the purpose of this oversight was to preserve the financial stability of the bank and to protect the bank's depositors, not to protect purchasers of debt instruments issued by related companies. Moreover, after June 29, 1984 even that regulation was terminated. The Federal Reserve Board ordered the divestiture of Republic Bank and Trust on the ground that Bancorp's non-bank subsidiaries were in "dire financial condition," and that their activities endangered the financial soundness of the bank. See Jan. 2, 1987 order at 3-5.

Likewise, the district court had no difficulty in concluding that the instruments issued by Bancorp and Financial did not come under the Marine Bank exception by virtue of state regulation. Bancorp was not regulated by any state agency. And Financial was regulated, as other Oklahoma business corporations, only by the Oklahoma Securities Commission. Jan. 2, 1987 Order at 5-8. 3/

In contrast, the district court concluded that Oklahoma law did provide purchasers of virtually-identical debt instruments issued by Trust sufficient protection to oust jurisdiction under the federal securities laws. Although Trust, as a state-chartered trust company, was not subject to the comprehensive regulatory scheme applicable to state-chartered banks, it was regulated by the Oklahoma State Banking Department. According to the district court, Trust was examined by the banking department "in a manner very similar to the examination of banks," and the regulation was designed to protect purchasers of the instruments from the trust company's insolvency. Id. at 7.

In response to the defendants' request for clarification of the district court's decision, the court issued a further order stating that all of the debt instruments involved in this case (including the Trust instruments it believed to be within the Marine Bank exception) would be securities under the investment-commercial test. The order pointed out that the instruments were sold through solicitations to the general public, that "they had the characteristics of an investment rather than a commercial loan transaction because purchasers were individuals seeking a

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3/ The Oklahoma Securities Commission has authority to inspect a corporation's financial records and to prohibit it from selling securities without adequate disclosure. The district court observed that, while this regulation was designed to protect persons from purchasing securities without the benefit of full disclosure, it did not protect them from the risk of insolvency. Jan. 2, 1987 Order at 5-7.

passive source of income," and that the investors assumed the risk of the issuer's insolvency. Feb. 6, 1987 Order at 2.

Both the plaintiffs and the defendants have appealed.

ARGUMENT

THE INSTRUMENTS ISSUED BY THE THREE COMPANIES ARE SECURITIES.

A. The Instruments Issued by Bancorp, Financial and Trust Fall on the Investment Side of the Investment-Commercial Dichotomy.

On their face, the debt instruments issued by Bancorp, Financial and Trust come within the definition of a "security" in the form of a "note" or "evidence of indebtedness." Section 2(1) of the Securities Act, 15 U.S.C. 77b(1). 4/ The instruments all evidence a promise to pay a specified sum of principal and interest to the payee at a specified time. They thus fit the description of an "evidence of indebtedness," which has been defined by this Court to include "all contractual obligations to pay in the future for consideration presently received." United States v. Austin, 462 F.2d 724, 736 (10th Cir.), cert. denied, 409 U.S. 1048 (1972).

The definitional sections of both the Securities Act of 1933 and the Securities Exchange Act are preceded by the phrase "unless the context otherwise requires * * *." This language allows the court to look beyond the statutory definitional language in those

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4/ While Section 3(a)(10) of the Securities Exchange Act of 1934 does not include the term "evidence of indebtedness," the Supreme Court has "consistently held that the definition of 'security' in the 1934 Act is essentially the same as the definition of 'security' in § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77(b)(1)." Marine Bank v. Weaver, 455 U.S. 551, 555 n.3 (1984)(citing United Housing Foundation v. Forman, 421 U.S. 837, 847 n.12 (1975)). See also Landreth Timber Co. v. Landreth, 471 U.S. 681, 686 n.1 (1985).

cases in which there is evidence that the type of transactions involved was not intended to come within the scope of the securities laws. Particularly in cases involving notes, which can be issued in a variety of consumer, commercial or investment contexts, courts examine the circumstances surrounding the particular transaction. This approach permits the court to determine whether a note represents an investment covered by the securities laws, as opposed to a conventional business or consumer loan, which is not covered. In making this determination, this Court and most other courts use the so-called "investment-commercial" test. Zabriskie v. Lewis, 507 F.2d 546, 551 (10th Cir. 1974). See also McGovern Plaza Joint Venture v. First of Denver Mortgage Investors, 562 F.2d 645, 647 (10th Cir. 1977). 5/

The ultimate question in applying the investment-commercial test "is whether the plaintiffs are simply borrowers [or lenders] in a commercial transaction who are not protected by the [securities laws] or investors in a securities transactions who are protected." C.N.S. Enterprises v. G. & G. Enterprises, 508 F.2d 1354, 1359 (7th Cir. 1975), cert. denied, 423 U.S. 825 (1975). In resolving this question in a particular context, courts consider such factors as: (i) whether the obligations are issued to a single party or to a large class of investors; (ii) how the instrument is charac-

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5/ This test, which "seeks to protect investors," "accords with the exalting of economic reality over form * * *." Zabriskie, 507 F.2d at 551 (citations omitted). Cf. McCown v. Heidler, 527 F.2d 204, 208 (10th Cir. 1975); American Fletcher Mortgage Co. v. United States Steel Credit Corp., 635 F.2d 1247, 1254 (7th Cir. 1980), cert. denied, 451 U.S. 911 (1981) ("Congress did not intend to regulate commercial loan transactions that would have no impact on the securities markets").

terized in the business community or by the parties themselves; (iii) whether the proceeds are to be used to purchase specific assets or services (commercial) or for general financing purposes (investment); 6/ and (iv) the extent of reliance on efforts of others, since "placing funds at great risk, giving note payee extensive collateral rights, making repayment of funds contingent upon some event, all tend to indicate security rather than loan" (C.N.S. Enterprises, 508 F.2d at 1361). Particularly significant to this analysis is the public offering aspect. Notes that are part of a large offering to the general public or to unsophisticated investors with no access to the issuer's books are almost invariably securities. See, e.g., United States v. Farris, 614 F.2d 634, 641 (9th Cir. 1979), cert. denied, 447 U.S. 926 (1980); McClure v. First National Bank of Lubbock, Tex., 497 F.2d 490, 493 (5th Cir. 1974). See also Zabriskie, 507 F.2d at 551 n.9. 7/

Under this test, the debt instruments purchased by the plaintiffs in this case are investments. According to the complaint, these instruments were offered and sold in various

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6/ See, e.g., Zabriskie, 507 F.2d at 551 n.9; C.N.S. Enterprises, 508 F.2d at 1361; Great Western Bank & Trust v. Kotz, 532 F.2d 1252, 1258 (9th Cir. 1976).

7/ The Second Circuit applies a similar test in determining whether notes are securities. Under that test, a note is a security if it does not bear "a strong family resemblance" to certain enumerated types of notes. Exchange National Bank v. Touche Ross & Co., 544 F.2d 1126, 1138 (2d Cir. 1976). Essentially, the notes that are not securities are those issued in consumer transactions or brokerage customer loans, and those evidencing certain bank loans and conventional business loans, where the context does not require the protection of the securities laws. See, e.g., Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930 (2d Cir.), cert. denied, 469 U.S. 884 (1984).

denominations 8/ to the general public and were purchased by more than 10,000 investors (Amended Complaint at 4 ¶ 3.4). Moreover, the record shows that at least some of the offering materials used to induce purchases of instruments issued by Trust and Financial referred to the instruments as "investments," expressly disclaiming that they were "deposits" (e.g., Exh. J to Plaintiff's Motion for Partial Summary Judgment); and that Financial filed prospectuses with the Oklahoma Securities Commission, characterizing the instruments it issued as "securities." Jan. 2, 1987 Order at 5. 9/ In addition, the risk of investment was high -- the certificates bore legends making it clear that none of the issuers was insured by any federal or state agency. 10/ Finally, redemption was contingent on the general financial condition of the issuer. The Republic company issuing the particular instrument reserved (i) the right to require thirty-days' written notice of intent to redeem; (ii) the right to limit redemption in any

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8/ The complaint specifies the named plaintiffs' purchases of instruments in denominations ranging from approximately $100 to $100,000, with most transactions falling in the $1500 to $10,000 range.

9/ Instruments offered or sold to the general public on the representation that they are an attractive investment are generally deemed to be securities. As the Supreme Court has emphasized, courts should consider "'the plan of distribution * * * and the economic inducement held out to the prospect. In the enforcement of an act such as [the Securities Act] it is not inappropriate that promoters' offerings be judged as being what they were represented to be.'" SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 211 (1967)(quoting SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352-53 (1943)).

10/ In fact, Trust's application for FDIC insurance was rejected. See In re Republic Trust & Savings Co., 59 B.R. 606, 607 (Bankr. N.D. Okla. 1986).

calendar month to fifty percent of the issuer's net cash flow for the previous month; and (iii) in the event the issuer chose to so limit redemption, the right to redeem certificates in the order presented for payment. Assuming these facts to be true, the debt instruments involved in this case meet the test of securities in the form of notes. Cf. Meason v. Bank of Miami, 652 F.2d 542, 548-51 (5th Cir. 1981), cert. denied, 455 U.S. 939 (1982)(criticizing Hamblett v. Board of Savings & Loan Ass'ns, 472 F. Supp. 158 (N.D. Miss. 1979), and Hendrickson v. Buchbinder, 465 F. Supp. 1250 (S.D. Fla. 1979), relied on by the defendants in the court below, on the ground that the courts had failed to use the investment-commercial test in considering whether debt instruments issued by financial institutions were securities. 652 F.2d at 551 n.20). 11/

B. Those Instruments with Maturity Dates of Less than Nine Months Are Not Thereby Excluded from the Definition of "Security."

The fact that certain of the instruments had short maturity dates does not affect this analysis. Although the Exchange Act provides that debt instruments with maturity dates of less than nine months are excluded from the definition of "security" (Section 3(a)(10), 15 U.S.C. 78c(a)(10)), and the Securities

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11/ The court in Canadian Imperial Bank of Commerce v. Fingland, 615 F.2d 465, 469-70 (7th Cir. 1980), also cited by the defendants, used the investment contract test -- erroneously in our view -- to analyze certificates of deposit issued by a Bahamian banking and trust entity, relying on the analysis in Hamblett and Hendrickson. See Hunssinger v. Rockford Business Credit, Inc., 745 F.2d 484, 488 (7th Cir. 1984), a subsequent decision by the Seventh Circuit applying the investment-commercial test in a case involving notes, correcting the misapprehension in its earlier opinion that the investment contract test is the exclusive test of a security. See infra at Part C.

Act provides that such instruments are exempt from registration (Section 3(a)(3), 15 U.S.C. 77c(a)(3)), the courts have refused to read this language literally. Rather, consistent with the remedial purpose of the securities laws, they have concluded unanimously that the exclusion and exemption are limited to "'prime quality negotiable [commercial] paper of a type not ordinarily purchased by the general public, that is, paper used to facilitate well-recognized types of current operational business requirements and of a type eligible for discounting by Federal Reserve banks.'" Zabriskie, 507 F.2d at 550, quoting Securities Act Release No. 4412, 26 Fed. Reg. 9158 (1961). 12/ As one court has noted:

> It is inconceivable that Congress intended § 3(a)(3) [of the Securities Act] to exempt from registration a periodic public offering of the issuer's own notes to small investors simply because their maturity was less than nine months. It is almost equally unlikely that Congress meant that an issuer soliciting broad public investment in notes issued for general corporate purposes should be able to avoid the anti-fraud provisions of the 1934 Act simply by arranging that they should have "a maturity at the time of issuance of not exceeding nine months."

SEC v. American Board of Trade, Inc., 751 F.2d 529, 539-40 (2d Cir. 1984) (footnote omitted). 13/

12/ See, e.g., Zeller v. Bogue Electric Manufacturing Corp., 476 F.2d 795, 800 (2d Cir.), cert. denied, 414 U.S. 908 (1973). See also Sanders v. John Nuveen & Co., 463 F.2d 1075, 1078-1080 (7th Cir.), cert. denied, 409 U.S. 1009 (1972); Anderson v. Francis I. du Pont & Co., 291 F. Supp. 705, 708-709 (D. Minn. 1968).

13/ The Senate Report accompanying the Securities Act identifies the exempted instruments as limited to "short-time commercial paper which * * * is not advertised for sale to the general

(footnote continued)

In short, "'[i]t is the character of the note, not its maturity date, which determines coverage under both the registration provisions of the Securities Act of 1933, and the Securities Exchange Act of 1934. * * * The paramount concern * * * is the nature of the transaction in which the note is issued.'" C.N.S. Enterprises, 508 F.2d at 1361 (quoting SEC v. Continental Commodities Corp., 497 F.2d 516, 525 (5th Cir. 1974)). In the present case, the debt instruments sold to plaintiffs and other members of the public plainly are not the specialized type of high quality paper intended to come within the commercial paper exemption. See United States v. Roylance, 690 F.2d 164, 168-69 (10th Cir. 1982).

C. Since the Instruments Fall on the Investment Side of the Investment-Commercial Dichotomy, It Is Unnecessary To Consider Whether They Are Also Securities in the Form of Investment Contracts.

Contrary to defendant Peat Marwick's contention in the court below, it is irrelevant whether the investment notes are also securities in the form of investment contracts. Conventional instruments, such as "stock," "bond," "debenture" and "note" are specifically enumerated in the statutory definition of "security." 15 U.S.C. 78c(a)(10); 15 U.S.C. 77b(1). The inclusion in that definition of the term "investment contract" was designed to ensure that novel, unconventional, or irregular investments that

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13/ (Continued)

public." S. Rep. No. 47, 73d Cong., 1st Sess. 4 (1933). Similarly, the House Report describes the exemption as applicable to "short-term paper of the type available for discount at a Federal Reserve bank and of a type which rarely is bought by private investors." H.R. Rep. No. 85, 73d Cong., 1st Sess. 15 (1933).

might not be considered securities in ordinary usage would also be covered. See SEC v. Howey Co., 328 U.S. 293, 298-99 (1946); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943). Only if an instrument does not meet the test for one of the other categories would a court need to inquire whether the instrument might nonetheless qualify as a security under a catch-all statutory term such as "investment contract." Hunssinger v. Rockford Business Credits, Inc., 745 F.2d 484, 490-91 (7th Cir. 1984). 14/ As the Supreme Court explained in Landreth Timber Co. v. Landreth, the Howey test for an investment contract

> was designed to determine whether a particular instrument is an "investment contract," not whether it fits within *any* of the examples listed in the statutory definition of "security." * * * Moreover, applying the Howey test to traditional stock and all other types of instruments listed in the statutory definition would make the Acts' enumeration of many types of instruments superfluous.

471 U.S. 681, 691-92 (1985) (emphasis in original; citations omitted). See also Golden v. Garafalo, 678 F.2d 1139, 1144 (2d Cir. 1982). Where, as in this case, an instrument meets the test for some type of security, no additional test need be satisfied to conclude that it is a security. See, e.g., Meason v. Bank of Miami, 652 F.2d at 548.

14/ For example, Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, 756 F.2d 230 (2d Cir. 1985), involved an investment program in which the underlying instruments were certificates of deposit that fell within the Marine Bank exclusion (see infra part D). Under these circumstances, the court's conclusion that the antifraud provisions were nonetheless applicable rested on whether the investment *program* (which came within none of the specific terms in the statutory definiion) was a security in the form of an investment contract.

D. The Limited Exception Created by the Supreme Court for Certificates of Deposit Issued by a Federally-Regulated and Insured Bank Does Not Exempt the Debt Instruments in this Case from the Operation of the Federal Securities Laws.

The conclusion that the instruments in this case are securities is not affected by Marine Bank v. Weaver, 455 U.S. 551 (1982). In Marine Bank, the Supreme Court adopted the position, urged in an amicus brief filed by the Government in which the Commission and the federal banking agencies participated, that a certificate of deposit issued by a federally-regulated and insured bank is not a security for purposes of the antifraud provisions of the federal securities laws. Relying on the language "unless the context otherwise requires," which precedes the definitional sections of the 1933 and 1934 Acts, that case carved out an exception for certificates of deposit issued by federally regulated and insured banks. As the Court in Marine Bank pointed out, such banks are subject to a comprehensive scheme of federal regulation (including reserve, reporting and inspection requirements, the regulation of advertising, and deposit insurance through the Federal Deposit Insurance Corporation) designed to ensure financial soundness and to protect depositors against the risk of insolvency. Id. at 558. Indeed, as the Government's amicus brief in that case noted, the fact that the Banking Act of 1933 (commonly known as the "Glass-Steagall Act") was enacted simultaneously with the Securities Act and established a separate regulatory scheme is strong evidence of Congress' intent to regulate the deposit business of banks through the federal banking statutes, not the federal securities laws. See Ayala v. Jamaica Savings Bank, [1981] Fed. Sec. L. Rep. (CCH) ¶ 98,041 (E.D.N.Y. June 15, 1981).

Under these circumstances, the Marine Bank Court found "important differences" between certificates of deposit issued by federally-regulated banks and other debt obligations. 455 U.S. at 557-58. In this connection, the Court observed, "the purchaser of a [bank] certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency." 455 U.S. at 558. 15/ The Court cautioned, however, that "[i]t does not follow that a certificate of deposit * * * invariably falls outside the definition of a 'security' as defined by the federal statutes." 455 U.S. at 460 n.11.

The Ninth Circuit in Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458 (9th Cir. 1984), cert. denied, 469 U.S. 1108 (1985), and subsequently the Fifth Circuit in Callejo v. Bancomer, S.A., 764 F.2d 1101, 1125 n.33 (5th Cir. 1985), extended the Marine Bank holding to exclude from the antifraud provisions certificates of deposit issued by banks subject to the bank regulatory scheme of Mexico. 16/ We disagree with the analysis used in reaching these decisions. As the Commission argued in an amicus brief in Wolf, Marine Bank turned on a determination that investors in

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15/ As the Court stated: "Since its formation in 1933, nearly all depositors in failing banks insured by the FDIC have received payment in full, even payment for the portions of their deposits above the amount insured." Id. at 558 (citing 1980 Annual Report of the Federal Deposit Insurance Corp. 18-21 (1981)).

16/ These decisions were based on the courts' perception that Mexico provides a national bank regulatory scheme equivalent to the federal banking scheme at issue in Marine Bank. See West v. Multibanco Comermex, S.A., 807 F.2d 820, 828 (9th Cir. 1987), cert. denied, 107 S. Ct. 2483 (1987).

domestic bank instruments are adequately protected by a system of bank regulation endorsed by Congress. Marine Bank did not suggest that the Supreme Court intended its ruling to apply to instruments issued by non-U.S.-regulated banks. The determination of whether such instruments are securities should be made on the basis of the investment-commercial dichotomy. In any event, Wolf and Callejo did not consider the status of instruments, like those here, issued by domestic companies subject to less than comprehensive bank regulation.

Finally, we note that "repeals by implication are not favored." TVA v. Hill, 437 U.S. 153, 189 (1978)(quoting Morten v. Mancari, 417 U.S. 535, 549 (1974)). Investors in instruments meeting the statutory description of "security" should not be deprived of antifraud protection under the federal securities laws simply because the issuing corporation was subject to a form of regulation by a state bank department or state securities commission, or because the issuer was regulated as an affiliate of a bank under the Bank Holding Company Act. At least in the case of companies like the finance company and holding company here, which are not even arguably engaged in the banking business, Marine Bank has no applicability and the district court should not have engaged in an analysis of the applicable federal and state regulatory schemes to determine the status of their debt instruments under the federal securities laws. Indeed, we believe that except in those circumstances where an issuer is subject to a comprehensive regulatory scheme primarily directed to the protection of purchasers of the instruments in question, extensive regulatory analysis is not warranted.

Although it was thus unnecessary to the proper resolution of this case, the district court correctly recognized that the Federal Reserve Board's oversight of Bancorp, Financial and Trust was by no means comparable to the comprehensive bank regulatory scheme present in Marine Bank. The Board's involvement with these companies related to its authority to protect depositors and preserve the financial stability of the bank that was then a subsidiary of Bancorp. That oversight was not directed to the protection of purchasers of debt instruments issued by the three companies involved here. In fact, the Board's ultimate response to the unsound financial practices of the affiliated companies was to order their divestiture. See 12 C.F.R. 225.4(a)(2). 17/

Likewise, the court below correctly concluded -- although it was unnecessary to do so -- that the Oklahoma Securities Commission does not have comprehensive regulatory authority over the issuing institutions. Rather, its regulatory authority is directed to the adequacy of disclosure by those selling securities. Certainly, Marine Bank does not stand for the unprecedented proposition that state securities regulation preempts the federal securities laws.

Nor does the presence of Oklahoma trust company regulation justify a different result in the case of the trust company. The fact that Trust is in bankruptcy is itself evidence that it is

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17/ Following divestiture in June 1984, no federal agency "attempted to regulate * * * or assert any sort of jurisdiction or supervision over * * * [Trust]." In re Republic Trust & Sav. Co., 59 B.R. at 609.

not a bank in any traditional sense. 18/ Moreover, while regulation of state-chartered trust companies is administered by the Oklahoma State Banking Department, neither such regulation nor the legal restrictions on their activities are as stringent as those applicable to Oklahoma-chartered banks. 19/ Investors in debt securities issued by Oklahoma trust companies do not have the full protection available under state banking law -- let alone that available

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18/ Section 109(b), 11 U.S.C. 109(b), of the Bankruptcy Code, provides, in relevant part, that "[a] person may be a debtor under chapter 7 of this title only if such person is not * * * (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in Section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)) * * *." In In re Republic Trust & Sav. Co., the bankruptcy court determined that Trust, the same entity involved here, was not excluded from bankruptcy relief by 11 U.S.C. 109(b).

19/ For example, banks (but not trust companies) are prohibited from making new loans or discounts when their capital is impaired (Okla. Stat. Ann. tit. 6, § 220B (West Supp. 1987)); approval for authority to organize a bank (but not a trust company) is contingent on the bank's applying for Federal Deposit Insurance or for membership in the Federal Reserve System (Okla. Stat. Ann. tit. 6, § 310B (West 1984)); banks are subject to greater restrictions than trust companies with respect to the payment of dividends and issuance of indebtedness (Okla. Stat. Ann. tit. 6, §§ 409A, 410, 1001 A(8)(22) (West 1984)); banks must maintain reserves as required by the Federal Reserve Act, by the Board of Governors of the Federal Reserve System or by the Depository Institutions Deregulation and Monetary Control Act (Okla. Stat. Ann. tit. 6, § 801 (West 1984)), but to engage in the trust business, companies must maintain a deposit with the Banking Commissioner as a pledge for faithful performance (Okla. Stat. Ann. tit. 6, § 1004 (West 1984)); and banks are subject to greater restrictions than trust companies as to their commercial activity and investments (Okla. Stat. Ann. tit. 6, §§ 805A, 806, 1008 (West 1984 and Supp. 1987)). See Silkey & Pringle, Trust Companies: Oklahoma's Own Variety of "Nonbank Banks," 9 Okla. City U. L. Rev. 293 (1984)(analyzing the nature of trust companies as compared with banks, and examining the powers, deposit insurance availability, regulation, lending limits, and branching capabilities of each under Oklahoma law).

under the federal bank regulatory scheme. 20/ There is thus no justification for concluding that Oklahoma trust company regulation ousts the protection of the federal securities laws for investors in corporate debt instruments. 21/

CONCLUSION

For the foregoing reasons, the Securities and Exchange Commission urges this Court to hold that the instruments issued by Bancorp, Financial and Trust are securities subject to the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.

Respectfully submitted,

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20/ This case does not present the question of whether full-fledged state bank regulation would warrant an extension of Marine Bank, and we express no view on that question.

21/ The Commission has consistently taken the position that certificates of deposit and similar instruments issued by bank-type institutions (other than those within the Marine Bank exception) are securities. See, e.g., SEC v. Meek, No. 81-227-T (W.D. Okla.), Litigation Release No. 9307, (Mar. 3, 1981)(Oklahoma trust company); SEC v. First American Bank & Trust Co., 481 F.2d 673, 678 (8th Cir. 1973) (North Dakota trust company); SEC v. Liberty Loan Corp., No. 76-304c (E.D. Mo.), Litigation Release No. 7356, 9 SEC Docket 446 (April 13, 1976).