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## SEC RULE 3b-9 STRUCK DOWN AS IN CONFLICT WITH THE EXCHANGE ACT: *AMERICAN BANKERS ASSOCIATION v. SEC*

The Securities Exchange Act of 1934,<sup>1</sup> which created the Securities and Exchange Commission (“SEC” or “Commission”),<sup>2</sup> gave that Commission broad authority over securities transactions and the persons who engage in them.<sup>3</sup> Among those subject to the

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<sup>1</sup> Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78kk (1982 & Supp. III 1985)) [hereinafter Exchange Act]. The Exchange Act was passed “to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce . . . to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.” H.R. REP. NO. 1383, 73d Cong., 2d Sess. 1 (1934), reprinted in 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 Item 18 (J. Ellenberger & E. Mahar comp. 1973) [hereinafter LEGISLATIVE HISTORY]; see *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (purpose of Exchange Act is to protect investors). The bill that eventually became the Exchange Act was introduced into Congress after thorough congressional investigations had detailed the abuses that were taking place in the securities markets. See 1 L. LOSS, SECURITIES REGULATION, 119-21 (2d ed. 1961 & Supp. 1969); Tracy & MacChesney, *The Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025, 1036 n.22 (1934); Article, *The Securities Exchange Act of 1934*, 23 CALIF. L. REV. 1, 23-24 (1934). For a good discussion of the principal “evils” that were found to exist in stock exchanges—short selling, margin trading, and manipulation—see Tracy & MacChesney, *supra*, at 1027-33.

Despite the fact that various reforms had been proposed as a result of earlier investigations of exchange practices, no concrete federal action was taken until the 1930’s. See *id.* at 1033-36. The stock market crash of 1929 and the depression that followed “brought the long movement for federal securities regulation to a head.” See 1 L. LOSS, *supra*, at 120-21. While securities regulation existed at the state level for more than 80 years before the federal government finally stepped into the picture, state regulation had ultimately proved to be an inadequate means of dealing with the problems prevalent within the securities markets. See *generally id.* at 23-107 (overview of state laws and their provisions).

<sup>2</sup> See 15 U.S.C. § 78d(a) (1982). The Exchange Act created the Securities and Exchange Commission [hereinafter SEC or Commission] and provided that it be composed of five commissioners appointed by the President, subject to Senate confirmation. See *id.* In addition, commissioners were not allowed to hold any other employment or engage in any outside business. See *id.*

<sup>3</sup> The Exchange Act granted the SEC authority to regulate the securities field in a comprehensive manner. See, e.g., 15 U.S.C. § 78f (1982) (regulation of national securities exchanges); § 78i (1982) (control of price manipulation); § 78k (1982 & Supp. III 1985) (regulation of trading by exchange members, brokers, and dealers); § 78o (1982 & Supp. III 1985) (broker and dealer regulation); § 78p (1982) (regulation of corporate directors, officers, and stockholders); § 78u (1982 & Supp. III 1985) (investigations and court actions). See *generally* Tracy & MacChesney, *supra* note 1, at 1037-68 (analyzing various sections of Exchange Act and discussing attempts to deal with market abuse).

SEC's authority are any persons who are securities brokers or securities dealers,<sup>4</sup> categories for which the SEC has implemented extensive regulations.<sup>5</sup> Banks, whose activities in the securities business are restricted by other legislation,<sup>6</sup> are specifically ex-

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While the scope of the original Exchange Act was sweeping, subsequent amendments have granted the SEC additional powers. *See, e.g., Securities Acts Amendments of 1975*, Pub. L. No. 94-29, 89 Stat. 97 (codified as amended in scattered portions of 15 U.S.C.) [hereinafter 1975 Amendments]; *see also Greenberg, Banks and the Federal Securities Laws: Some Recent Developments*, 49 S. CAL. L. REV. 665, 675-93 (1976) (discussing amendments and their effect on SEC's powers); Note, *Legislation: Securities Acts Amendments of 1975*, 29 OKLA. L. REV. 462, 462-75 (1976) (same). Moreover, the SEC administers several statutes in addition to the Exchange Act. *See L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION* 38-42 (1983 & Supp. 1984).

<sup>4</sup> *See* 15 U.S.C. §§ 78o to 78o-4 (1982 & Supp. III 1985). As defined in the Exchange Act, "broker" refers to "any person engaged in the business of effecting transactions in securities for the account of others, *but does not include a bank.*" 15 U.S.C. § 78c(a)(4) (1982) (emphasis added). A "dealer" is defined as "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, *but does not include a bank.*" 15 U.S.C. § 78c(a)(5) (1982) (emphasis added). The definition of "person" within the Exchange Act includes "a natural person, company, government, or political subdivision, agency, or instrumentality of a government." 15 U.S.C. § 78c(a)(9) (1982).

<sup>5</sup> *See* 17 C.F.R. §§ 240.0-1 to .31-1 (1986). The bulk of the regulatory scheme promulgated by the SEC under the Exchange Act encompasses the rights and duties of securities brokers and dealers, and is extraordinarily complex. *See id.*; *see also S. JAFFE, BROKER-DEALERS AND SECURITIES MARKETS, A GUIDE TO THE REGULATORY PROCESS* (1977 & Supp. 1986) (manual on law governing broker-dealers); Securities Indus. Ass'n, *Public Policy Issues Raised by Bank Securities Activities*, 20 SAN DIEGO L. REV. 339, 358-59 (1983) (mentioning regulatory requirements imposed on broker-dealers). In addition, the SEC has specifically provided that any rule or regulation issued under the Exchange Act which prohibits practices involving the use of the mails or interstate commerce is applicable to any registered broker or dealer, whether or not the mails or interstate commerce are involved. *See* 17 C.F.R. § 240.0-8 (1986).

<sup>6</sup> *See* Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified as amended at scattered sections of 12 U.S.C. (1982 & Supp. III 1985)) [hereinafter Glass-Steagall Act].

Congress passed the Glass-Steagall Act in the wake of the financial collapse of the late 1920's—early 1930's in order to effect a partial separation between the commercial and investment banking fields. *See Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46, 61-62 (1981); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 629-30 (1971); Pitt & Williams, *The Glass-Steagall Act: Key Issues for the Financial Services Industry*, 11 SEC. REG. L.J. 234, 235-40 (1983); Note, *Regulation of State Nonmember Insured Banks' Securities Activities: A Model for the Repeal of Glass-Steagall?*, 23 HARV. J. ON LEGIS. 211, 211-16 (1986). Congress sought to avoid the "hazards" it believed might occur if commercial banks exceeded the scope of their "fiduciary or managing agent" roles and were exposed to the "temptations" of investment banking. *See Camp*, 401 U.S. at 629-34.

The designation "Glass-Steagall Act," though often applied to the entire Banking Act, is properly used to refer to only four sections of the statute: sections 16, 20, 21, and 32. 12 U.S.C. §§ 24(Seventh), 377, 378, and 78 (1982 & Supp. III 1985). *See Note, supra*, at 211 n.1. Section 16 of the Glass-Steagall Act prevents a national bank from directly engaging in certain securities activities, including underwriting and purchasing securities "for its own account." *See* 12 U.S.C. § 24(Seventh) (Supp. III 1985). Section 20 prohibits member banks, that is, banks which are members of the Federal Reserve System, *see* 12 U.S.C. § 221 (1982),

empted from the Exchange Act's definitions of "broker" and "dealer."<sup>7</sup> As a result of recent, less restrictive interpretations of the banking legislation,<sup>8</sup> banks have become increasingly involved in the securities business.<sup>9</sup> In response, the SEC promulgated Rule

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from affiliating with organizations "engaged principally" in securities transactions. See 12 U.S.C. § 377 (1982). Section 21 bars organizations "engaged in" the securities business from undertaking banking activities, thus approaching the section 16 restrictions from the opposite angle. See 12 U.S.C. § 378 (1982). Finally, section 32 precludes individuals in the securities business from working simultaneously in the banking industry, subject to limited exceptions. See 12 U.S.C. § 78 (1982).

<sup>7</sup> See *supra* note 4 ("broker" and "dealer" defined). The Exchange Act defines a "bank" as a "banking institution organized under" federal law, a bank that is a member of the Federal Reserve System, or "any other banking institution . . . doing business under the laws of any State or of the United States," which, as a significant part of its business, receives deposits or exercises fiduciary powers similar to those of national banks. See 15 U.S.C. § 78c(a)(6) (1982).

<sup>8</sup> In the 1970's, bank regulatory authorities began construing the Glass-Steagall Act as permitting bank affiliation with subsidiary companies engaged in various aspects of the securities business; these administrative decisions were generally upheld by the courts. See *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 207, 209, 216-21 (1984) (upholding Board determination that bank holding company acquisition of discount brokerage company did not violate Glass-Steagall); *Investment Co. Inst. v. FDIC*, 606 F. Supp. 683, 684-86 (D.D.C. 1985) (sustaining FDIC regulations permitting state non-member bank ownership of affiliates and subsidiaries in securities business); *New York Stock Exchange v. Smith*, 404 F. Supp. 1091, 1096-1101 (D.D.C. 1975) (upholding Comptroller's opinion that national banks may purchase securities for customers on a "continuous and widespread basis"), *vacated on other grounds sub nom. New York Stock Exchange v. Bloom*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); see also *FDIC Gen. Couns. Op. No. 6*, 48 Fed. Reg. 22,989, 22,990-91 (1983) (nonmember bank may directly offer and advertise discount brokerage services). *But see Investment Co. Inst. v. Camp*, 401 U.S. 617, 619-20 (1971) (striking down, as violative of Glass-Steagall Act, Comptroller's regulation authorizing national bank sale of interests in bank-established investment fund).

These interpretations of the Glass-Steagall Act by the regulatory agencies reflected a more relaxed approach by those agencies towards increased bank participation in the securities business. See Note, *National Banks and the Brokerage Business: The Comptroller's New Reading of the Glass-Steagall Act*, 69 VA. L. REV. 1303, 1312-22 (1983). An early opinion by the Comptroller of the Currency construed section 16 of the Glass-Steagall Act as limiting banks to handling securities transactions only on order and for the account of customers whose relationship with the bank existed independently of the particular securities transactions. See *Ruling of the Comptroller*, Treas. Dep't Bull. (Oct. 27, 1936), *quoted in* 4 Fed. Banking L. Rep. (CCH) ¶ 49,202, at 28,207 (Nov. 4, 1983). Moreover, the bank was prohibited from making a profit on the transaction by collecting a commission. See *id.* The Comptroller subsequently authorized the receipt of "compensation" by the transacting bank. See *Digest of Op. of the Comptroller*, ¶ 220 (Apr. 1, 1960), *quoted in* 4 Fed. Banking L. Rep. (CCH) ¶ 49,202, at 28,206 (Nov. 4, 1983).

<sup>9</sup> See Peters & Powers, *Functional Regulation: Looking Ahead*, 18 LOY. L.A.L. REV. 1075, 1082-83 (1985); *Securities Indus. Ass'n*, *supra* note 5, at 339-40, 347-52; Note, *A Banker's Adventures in Brokerland: Looking Through Glass-Steagall at Discount Brokerage Services*, 81 MICH. L. REV. 1498, 1498-1501 (1983). In 1985, the SEC believed that at least one thousand banks were engaged in the active promotion of brokerage services to the public, receiving in return for these services a portion of the commissions paid by the cus-

3b-9, which attempted to regulate banks engaged in certain securities activities.<sup>10</sup> This rule effectively subjected any bank which received "transaction-related compensation" for brokerage services to the SEC's broker-dealer regulations if the bank in question either "publicly solicited" the brokerage customer or performed the service for an account to which it also provided advice.<sup>11</sup> Recently, in *American Bankers Association v. SEC*,<sup>12</sup> the United States Court of Appeals for the District of Columbia Circuit held Rule 3b-9 invalid as an attempt by the SEC to expand its own authority beyond the limits expressly set by the Exchange Act.<sup>13</sup>

In *American Bankers*, the American Bankers Association instituted an action in the United States District Court for the District of Columbia, seeking a declaratory judgment that Rule 3b-9 was invalid and an injunction prohibiting SEC enforcement of the rule against members of the plaintiff-association.<sup>14</sup> The district

tomor to the entity actually executing the securities transaction. *See* Adoption of Rule 3b-9, 50 Fed. Reg. 28,385, 28,393 (1985).

<sup>10</sup> *See* Adoption of Rule 3b-9, *supra* note 9, at 28,386-87; *see also* 48 Fed. Reg. 51,930, 51,931-32 (1983) (SEC discussion of proposed Rule 3b-9's effect on expanded bank involvement in securities business). Rule 3b-9 provides in pertinent part:

(a) The term "bank" as used in the definition of "broker" and "dealer" in section 3(a)(4) and (5) of the Act [15 U.S.C. § 78c(a)(4), (5)] does not include a bank that:

- (1) Publicly solicits brokerage business for which it receives transaction-related compensation. . . .
- (2) Directly or indirectly receives transaction-related compensation for providing brokerage services for trust, managing agency or other accounts to which the bank provides advice. . . .
- (3) Deals in or underwrites securities.

17 C.F.R. § 240.3b-9 (1986) [hereinafter Rule 3b-9]. The rule exempts from its coverage several designated securities transactions that may be engaged in by banks, as well as situations where brokerage services are offered, by a bank, through "a broker-dealer registered under the [Exchange] Act." *See* Rule 3b-9(a), (b). The effect of Rule 3b-9 is to bring banks under the coverage of the rules and regulations governing broker-dealers. *See* Adoption of Rule 3b-9, *supra* note 9, at 28,388; *see generally supra* note 5 and accompanying text (discussing broker-dealer rules and regulations).

<sup>11</sup> *See* Rule 3b-9(a)(1), (2), *supra* note 10; Adoption of Rule 3b-9, *supra* note 9, at 28,388-91. In adopting Rule 3b-9, the SEC noted several examples of situations where "a disparity in the regulation of functionally equivalent activities performed by banks and broker-dealers" existed. *See* Adoption of Rule 3b-9, *supra* note 9, at 28,387. Broker-dealers engaging in securities activities were subjected to heavier regulatory burdens in areas such as examination requirements, employee supervision responsibilities, and advertising guidelines. *See id.* at 28,387-88. However, the SEC explicitly avoided taking a position on the legality of bank brokerage activities when it promulgated Rule 3b-9. *See id.* at 28,386 n.3.

<sup>12</sup> 804 F.2d 739 (D.C. Cir. 1986).

<sup>13</sup> *See id.* at 755.

<sup>14</sup> *See id.* at 740. "The American Bankers Association is a national trade association of

court, holding that Exchange Act section 3(a)'s "context" clause as well as section 3(b) of that Act empowered the SEC to issue Rule 3b-9 notwithstanding the rule's contradiction of express statutory definitions, granted summary judgment for the SEC and dismissed the complaint.<sup>15</sup>

On appeal, the circuit court reversed.<sup>16</sup> Writing for a unanimous court, Chief Judge Wald analyzed the language and legislative history of both the original 1934 Exchange Act and its 1975 amendments, as well as some relevant case law.<sup>17</sup> Based on this analysis, the court concluded that Rule 3b-9 was an invalid attempt by the SEC to expand its own jurisdiction in violation of explicit statutory language and the congressional intent that this language expressed.<sup>18</sup> The court reasoned that the "context" clause and section 3(b), which the district court had utilized to uphold Rule 3b-9, did not provide the SEC with the authority to alter terms expressly defined in the Exchange Act.<sup>19</sup>

While the court's invalidation of Rule 3b-9 appears to be correct and in conformity with the language of the Exchange Act, the statutory analysis used to reach this result was flawed in its failure to more thoroughly address the "context" clause and section 3(b), the statutory bases upon which the SEC and the lower court had depended to sustain this rule. Specifically, it would have been preferable for the court of appeals to compare those provisions to other relevant Exchange Act sections in order to refute the argument that the SEC had authority to promulgate Rule 3b-9 and thereby redefine statutory terms. This Comment will examine the Exchange Act provisions relied upon by the SEC and the lower court,

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the commercial banking industry, representing over 12,000 commercial banks in the United States." Brief of the Plaintiff-Appellant at i, *American Bankers*, 804 F.2d 739 (D.C. Cir. 1986) (No. 85-6055).

<sup>15</sup> See *American Bankers*, 804 F.2d at 740, 743. The two provisions at issue were the Exchange Act section 3(a)'s opening phrase, which states that the definitions contained within that section are to apply "unless the context otherwise requires," see 15 U.S.C. § 78c(a) (1982); and Exchange Act section 3(b), which gives the SEC authority to define "terms used in this" statute. See 15 U.S.C. § 78c(b) (1982); *American Bankers*, 804 F.2d at 753; *infra* notes 20-24 and accompanying text.

<sup>16</sup> See *American Bankers*, 804 F.2d at 740.

<sup>17</sup> See *id.* at 743-55.

<sup>18</sup> See *id.* at 740, 755.

<sup>19</sup> See *id.* at 753-55. For discussion of these statutory provisions, see *supra* note 15 and accompanying text; *infra* notes 20-24 and accompanying text; Adoption of Rule 3b-9, *supra* note 9, at 28,392; Brief of the Securities and Exchange Commission at 39-44, 50-52, *American Bankers*, 804 F.2d 739 (D.C. Cir. 1986) (No. 85-6055).

and will contrast the language contained therein with language used in other Exchange Act sections where Congress did, in fact, explicitly allow the SEC to alter statutory requirements.

#### THE CLAIMED STATUTORY BASIS FOR RULE 3b-9

The two statutory provisions which the SEC claimed provided it with the authority to modify Exchange Act definitions are both contained in the Exchange Act's definitional section. The SEC's principal statutory argument was premised on the "context" clause which qualifies all the definitions contained in section 3(a) by stating that the meaning of a specific term is as provided in the statute, "unless the context otherwise requires."<sup>20</sup> The SEC contended that the "context" referred to in section 3(a) is the "factual" context which exists outside the statute.<sup>21</sup> The other statutory provision relied on was section 3(b), which authorizes the SEC "to define technical, trade, accounting, and other terms used in" the Exchange Act.<sup>22</sup> The SEC argued that this provision empowered the Commission to redefine terms already defined in the Exchange Act.<sup>23</sup> Although the *American Bankers* court rejected the SEC's construction of both statutory provisions,<sup>24</sup> it is submitted that,

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<sup>20</sup> See 15 U.S.C. § 78c(a) (1982 & Supp. III 1985). In discussing the statutory basis upon which it relied in promulgating Rule 3b-9, the SEC emphasized the fact that bank involvement in securities activities had expanded significantly in the period since 1934 when Congress adopted the bank exclusion in the "broker" and "dealer" definitions. See Adoption of Rule 3b-9, *supra* note 9, at 28,392-93; see also *supra* notes 8-9 and accompanying text (discussing increase in bank brokerage activities).

The Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (1982 & Supp. III 1985)) [hereinafter Securities Act] has the same clause in its definitional section. See 15 U.S.C. § 77b (1982).

<sup>21</sup> See *American Bankers*, 804 F.2d at 753; *infra* notes 25-29 and accompanying text.

<sup>22</sup> See 15 U.S.C. § 78c(b) (1982) (emphasis added). The Board of Governors of the Federal Reserve System, a banking regulatory authority, is given similar authority in section 3(b). See *id.* The Board is granted certain powers by other provisions of the Exchange Act. See, e.g., 15 U.S.C. § 78g (1982 & Supp. III 1985) (authority to set margin requirements); § 78h (1982 & Supp. III 1985) (authority over borrowing).

<sup>23</sup> See *American Bankers*, 804 F.2d at 755-56; Adoption of Rule 3b-9, *supra* note 9, at 28,392 n.61; *infra* notes 33-36 and accompanying text.

<sup>24</sup> See *American Bankers*, 804 F.2d at 753-55. Chief Judge Wald did not consider the SEC's arguments regarding these two provisions until near the end of the *American Bankers* opinion. See *id.* Since, however, the SEC placed particular emphasis on the "context" clause and section 3(b), the lower court specifically relied on those two provisions as a basis for its decision, and an affirmation of the SEC's interpretation of either provision would have had the effect of sustaining the Commission's authority to redefine statutory terms, it is submitted that the consideration of these two statutory provisions was the most significant aspect of the court's analysis, and that a larger portion of the opinion should have been

while this conclusion was proper, it was reached by means of an analysis that was neither compelling nor complete.

### "FACTUAL CONTEXT" VS. "TEXTUAL CONTEXT"

In rejecting the SEC's "context" clause argument, the *American Bankers* court endorsed the view that this clause refers only to the context in which a particular defined term is used within the statute itself, that is, the "textual context," rather than to an external "factual context."<sup>25</sup> To buttress this position, the court attempted to distinguish a case relied on by the SEC, *Marine Bank v. Weaver*,<sup>26</sup> which dealt with the definition of "security" in the Exchange Act.<sup>27</sup> A careful reading of *Marine Bank* shows, however, that the Supreme Court's acceptance in that case of the "factual

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devoted to such issues.

<sup>25</sup> See *American Bankers*, 804 F.2d at 753-54. The circuits are divided on the issue of whether the "context" clause in the Exchange Act (or the clause's Securities Act counterpart) refers to the factual context or to the textual context. For support of the "factual context" position, see *Emisco Indus. v. Pro's Inc.*, 543 F.2d 38, 39-41 (7th Cir. 1976); *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1137-38 (2d Cir. 1976); *C.N.S. Enter. v. G. & G. Enter.*, 508 F.2d 1354, 1358 (7th Cir.), *cert. denied*, 423 U.S. 825 (1975). For support of the "textual context" viewpoint, see *Ruefenacht v. O'Halloran*, 737 F.2d 320, 330-32 (3d Cir. 1984), *aff'd sub nom. Gould v. Ruefenacht*, 471 U.S. 701 (1985); see also 4 L. LOSS, SECURITIES REGULATION 2485 (Supp. 1969) (assuming clause refers to "textual context").

The Supreme Court has adopted a "factual context" approach in determining whether particular transactions are within the definition of "security" as found in the Exchange Act, 15 U.S.C. § 78c(a)(10) (1982), or in the Securities Act, 15 U.S.C. § 77b(1) (1982), but has generally applied this approach without even discussing the "context" clause contained in either statute. See *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 848-58 (1975); *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 69-73 (1959); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 297-301 (1946); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-52, 355 (1943). *But see Marine Bank v. Weaver*, 455 U.S. 551, 555-60 (1982) (using "factual context" and relying in part on "context" clause), discussed *infra* notes 26-29 and accompanying text. Moreover, the Court, when considering other definitions in the securities laws, has stated the issue in terms of the textual context in which the terms appear but nevertheless has analyzed the factual context of the transaction in question. See *SEC v. National Sec., Inc.*, 393 U.S. 453, 464-69 (1969) (interpreting "the words 'purchase or sale' in the context of section 10(b)" of the Exchange Act). The Court's position on the "factual context" versus "textual context" dispute, while apparently favoring the former view, is thus not entirely clear.

<sup>26</sup> 455 U.S. 551 (1982); see Brief of the Securities and Exchange Commission at 41-44, *American Bankers*, 804 F.2d 739 (D.C. Cir. 1986) (No. 85-6055); Adoption of Rule 3b-9, *supra* note 9, at 28,393.

<sup>27</sup> See *American Bankers*, 804 F.2d at 753 & nn.23-24; *Marine Bank*, 455 U.S. at 555-61. The issue in *Marine Bank* was "whether . . . a conventional certificate of deposit and a business agreement . . . could be considered securities under the antifraud provisions of the federal securities laws." *Marine Bank*, 445 U.S. at 552.

context" argument was not "unnecessary to the Court's holding," as the *American Bankers* court asserted,<sup>28</sup> since the Court actually utilized the "factual context" of the transaction in question to resolve the issue involved.<sup>29</sup>

After pointing out what it perceived as additional shortcomings of the "factual context" position,<sup>30</sup> the *American Bankers* court qualified its rejection of that position by indicating that an examination of the "factual context" might be appropriate in other

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<sup>28</sup> See *American Bankers*, 804 F.2d at 753 (footnote omitted).

<sup>29</sup> See *Marine Bank*, 455 U.S. at 555-61. As *Marine Bank* resolved the issue of whether particular transactions were "securities" under the securities laws by analyzing the circumstances of those transactions, it is related to the line of Supreme Court cases which used a "factual context" analysis to decide whether an instrument or transaction is a "security" without relying on the "context" clause. See *supra* note 25. It differs from those cases, however, in that the Court in *Marine Bank* twice mentioned the "context" clause as one of the bases of support for its analysis, and assumed without discussing the point that the clause referred to the factual context surrounding a transaction. See *Marine Bank*, 455 U.S. at 555-61. To assert, then, that *Marine Bank's* mention of the "context" clause was simply "unnecessary to the Court's holding" seems to indicate a less than full consideration of all aspects of the *Marine Bank* opinion.

<sup>30</sup> See *American Bankers*, 804 F.2d at 754. The court pointed to the difficulty of determining when a factual situation would require "deviation from the statutory definition," and also noted that Congress ultimately adopted the "context" clause contained in the Securities Act (which is almost identical to the "context" clause incorporated into the Exchange Act one year later) rather than a Senate-approved version that referred instead to the "text" but made no mention of this change in the Conference Report. See *id.* Compare S. 875, 73d Cong., 1st Sess. § 2 (1933) (Senate version—"unless the text otherwise indicates"), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 1, at Item 28 with H.R. 5480, 73d Cong., 1st Sess. § 2 (1933) (House version—"context" clause), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 1, at Item 26 and H.R. CONF. REP. No. 152, 73d Cong., 1st Sess. 24 (1933) (discussing definitional change with no mention of "text" deletion), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 1, at Item 19. This legislative history led the court to infer that the change was not significant. See *American Bankers*, 804 F.2d at 754.

The court, in rejecting the "factual context" approach, seemed to accept the SEC's assumption that use of that approach allows a modification in statutory definitions when the "context" seems to warrant. See *American Bankers*, 804 F.2d at 753-54; *supra* notes 20-21 and accompanying text. This assumption, however, appears to be a misstatement of the "factual context" approach. Cases interpreting the "context" clause as referring to "factual context" have focused on whether a particular transaction or instrument was intended to be covered by the securities laws enacted, not on whether a changing context meant that statutory definitions themselves could be modified. See *Emisco Indus. v. Pro's Inc.*, 543 F.2d 38, 39-41 (7th Cir. 1976); *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1137-39 (2d Cir. 1976); *C.N.S. Enter. v. G. & G. Enter.*, 508 F.2d 1354, 1358-63 (7th Cir.), *cert. denied*, 423 U.S. 825 (1975). So applied, the "factual context" interpretation would not authorize the SEC to amend statutory definitions by regulation. It is therefore suggested that it was unnecessary for the court in *American Bankers* to enter into the "factual context"/"textual context" debate in deciding whether to strike down Rule 3b-9. Moreover, the court's failure to correct the SEC's misunderstanding of the "factual context" position further undermined the court's analysis.

circumstances.<sup>31</sup> The court reasoned that a “factual context” analysis could not sustain Rule 3b-9 because allowing such a result would, in effect, permit the SEC to unilaterally expand its own jurisdiction beyond the statutory boundaries.<sup>32</sup>

It is submitted that the *American Bankers* court’s discussion of whether the “factual context” or “textual context” approach should be adopted was largely irrelevant. Discussion of this topic should have focused simply on an examination of the applicability of the “factual context” position to the *American Bankers* scenario. The unique situation presented by the SEC’s promulgation of Rule 3b-9 made it unnecessary to take sides in the “factual context”/“textual context” dispute, since, as the court noted, even acceptance of the “factual context” view would not support a rule which effectively expanded statutory boundaries.

#### THE POWER TO DEFINE “OTHER” TERMS

The SEC contended that section 3(b) of the Exchange Act, which empowers the Commission to define “technical, trade, accounting, and other terms,” conferred authority to modify statutory definitions.<sup>33</sup> The *American Bankers* court proffered several reasons why this section did not empower the SEC to enact a rule such as 3b-9.<sup>34</sup> However, the court’s reasoning reflected an acceptance of the SEC’s basic position that section 3(b) permitted the Commission to alter the statute, but rejected the extension of this

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<sup>31</sup> See *American Bankers*, 804 F.2d at 754. The court stated that even though “some other occasion might justify interpreting a statutory definition in light of changing market conditions,” in this instance the “unambiguous language” used in the Exchange Act’s definitions of “broker,” “dealer,” and “bank” showed a congressional intent to mark off the jurisdictional lines between the SEC and the banking authorities. See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *American Bankers*, 804 F.2d at 754-55; Brief of the Securities and Exchange Commission at 50-52, *American Bankers*, 804 F.2d 739 (D.C. Cir. 1986) (No. 85-6055). The word “other” was added to section 3(b) as part of the 1975 Amendments to the Exchange Act. See 1975 Amendments § 3(7) (codified at 15 U.S.C. § 78c(b)). According to the SEC, the phrase “other terms” was “a catch all for any needed definitions.” See Adoption of Rule 3b-9, *supra* note 9, at 28,392 n.61. The SEC essentially argued that section 3(b) gave it the authority to define any terms, whether already defined in the statute or not. See Brief of the Securities and Exchange Commission at 50-51, *American Bankers*, 804 F.2d 739 (D.C. Cir. 1986) (No. 85-6055).

<sup>34</sup> See *American Bankers*, 804 F.2d at 754-55. In the court’s view, allowing the SEC to promulgate such a rule would encroach on the jurisdiction of banking authorities, would lead to questions as to whether the power to enact such a regulation rested with the SEC or banking regulators, and would be inconsistent with the purposes of the Exchange Act. See *id.*

authority to the case at bar.<sup>35</sup> This view of the court's analysis is illustrated by the fact that the court, when confronted with a statement in the Senate Report on the 1975 Amendments which directly supported the SEC's position that the Commission had the power to redefine statutory terms,<sup>36</sup> merely noted that "the SEC cannot redefine a statutory term *if doing so* would encroach on the jurisdiction of" banking authorities.<sup>37</sup>

In its brief discussion of section 3(b), a section that on its face could arguably have provided the SEC with the authority to promulgate Rule 3b-9, the court overlooked what seemed to be the largest gap in the SEC's reasoning. Despite the broad statement contained in the 1975 Senate Report,<sup>38</sup> neither the original nor the amended section 3(b) contains *any* language permitting the SEC to redefine terms *already defined in the statute*.<sup>39</sup>

By assuming that section 3(b) conferred *any authority at all* on the SEC to rewrite statutory definitions, and by failing to note the absence of any explicit language in section 3(b) supporting such an assumption, it is suggested that the *American Bankers*

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<sup>35</sup> See *id.* The thrust of the court's argument was that the SEC could not expand its own jurisdiction by relying on section 3(b). See *id.*

<sup>36</sup> The Senate Report on the 1975 Amendments stated that the addition of the word "other" to section 3(b) was intended "to broaden the authority of the [SEC] and the Board of Governors of the Federal Reserve System to make clear that they may define any terms used in the Exchange Act, *whether or not it [sic] is already defined in*" the statute. See S. REP. No. 75, 94th Cong., 1st Sess. 94, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 179, 272 (emphasis added).

<sup>37</sup> See *American Bankers*, 804 F.2d at 755 n.25 (emphasis added). The court also reasoned that since Congress, in passing the 1975 Amendments, directed the SEC to study the "bank" exclusion from the "broker" and "dealer" definitions and to recommend any legislation the SEC thought necessary, see 15 U.S.C. § 78k-1(e) (1982), it was "highly unlikely" that the 1975 Amendments had also given the SEC authority to unilaterally change these definitions. See *American Bankers*, 804 F.2d at 755 n.25.

<sup>38</sup> See *supra* note 36 and accompanying text.

<sup>39</sup> Securities Exchange Act of 1934, Pub. L. No. 73-291, § 36, 48 Stat. 881, 884 (original section 3(b)); 15 U.S.C. § 78c(b) (1982).

Additionally, the *American Bankers* court made only fleeting reference to a case which supported a rejection of the SEC's construction of section 3(b). See *American Bankers*, 804 F.2d at 755. In *FAIC Sec., Inc. v. FDIC*, 768 F.2d 352 (D.C. Cir. 1985) (Scalia, J.), Judge (now Justice) Scalia rejected a claim that a statute authorizing the FDIC to define terms used in various statutory sections conferred on the FDIC "power to *redefine* those terms" already defined by the statute itself. See *id.* at 362 (emphasis in original). The *FAIC* court reasoned that an authorization to redefine statutory terms would effectively repeal the original statutory definition. See *id.* Judge Scalia further argued that "[t]here is obviously [no conflict] between a statutory provision defining one term and another provision giving the implementing agency authority to define terms—*i.e., presumably those terms requiring definition.*" *Id.* (emphasis added).

court seriously undermined the effectiveness of its holding regarding the SEC's position on section 3(b). The court, in essence, put itself in the position of having to show why a statute should not be applied as written.

### THE SEC'S POWER TO MODIFY STATUTORY REQUIREMENTS

Portions of the original Exchange Act and the 1975 Amendments *explicitly* grant authority to the SEC to disregard or modify particular statutory provisions. For example, while one provision of the Exchange Act requires that securities be registered by the issuer,<sup>40</sup> elsewhere in the same section the SEC is given express authority to "exempt" certain securities from the requirements of the section.<sup>41</sup> Additionally, a separate subsection clearly authorizes the SEC to temporarily remove securities from particular registration requirements.<sup>42</sup>

Another explicit grant of authority to the SEC to alter statutory definitions originated in the 1975 Amendments to the Exchange Act. As part of the amendments, a definition of "clearing agency" was added to the statute, along with various exceptions to that definition.<sup>43</sup> With regard to one of these exceptions, however, the SEC was clearly and specifically given the power to make modifications.<sup>44</sup> Similarly, in a new section added by the 1975 Amendments, an unregistered clearing agency is barred from engaging in interstate commerce.<sup>45</sup> The subdivision containing this prohibition, however, explicitly provides that the SEC is authorized, under cer-

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<sup>40</sup> See 15 U.S.C. § 78l(g)(1), (2) (1982).

<sup>41</sup> See 15 U.S.C. § 78l(g)(3), (h) (1982). Subdivision (g)(3) provides that the SEC "may by rules or regulations . . . exempt from this subsection any security . . . if the [SEC] finds that such exemption is in the public interest." 15 U.S.C. § 78l(g)(3) (1982) (emphasis added). Subdivision (h) states that the SEC "may by rules and regulations . . . exempt in whole or in part any issuer or class of issuers from" various requirements of the Exchange Act, and may further "exempt . . . any officer, director, or beneficial owner of securities" from certain requirements. See 15 U.S.C. § 78l(h) (1982) (emphasis added).

<sup>42</sup> See 15 U.S.C. § 78l(e) (1982). Subsection (e) states that "[n]otwithstanding the foregoing provisions of this section, the [SEC] may by such rules and regulations as it deems necessary" extend the time within which securities were required to be registered after the Exchange Act first took effect. See *id.* (emphasis added).

<sup>43</sup> See 15 U.S.C. § 78c(a)(23) (1982).

<sup>44</sup> See 15 U.S.C. § 78c(a)(23)(B) (1982). Subparagraph (B) states that "[t]he term 'clearing agency' does not include . . . (iii) any bank, broker, dealer" or other mentioned parties meeting certain conditions, "unless the [SEC], by rule, otherwise provides as necessary or appropriate." See *id.* (emphasis added).

<sup>45</sup> See 15 U.S.C. § 78q-1(b)(1) (1982).

tain conditions, to exempt any clearing agency from the requirements of the section.<sup>46</sup>

These three sections, as well as other Exchange Act provisions,<sup>47</sup> demonstrate quite clearly that when Congress intended to provide the SEC with authority to modify statutory requirements, it used much more explicit language than that utilized by the SEC to support Rule 3b-9's validity. Accordingly, it is submitted that the *American Bankers* court should have contrasted the language employed in the aforementioned statutory provisions with that contained in the "context" clause and section 3(b).<sup>48</sup> Had the court done so, its analysis would have been more persuasive and its holding that the SEC lacked statutory authority to enact Rule 3b-9 would have been greatly strengthened.

### CONCLUSION

In its attempt to substantiate its authority to promulgate a rule which effected a rewriting of statutory definitions, the SEC relied on the "context" clause as well as on a provision that confers upon the SEC the power to define "other" terms. The SEC asserted that the general language employed in those sections vested in the Commission the power to alter statutory definitions when the circumstances warranted. Although there are Exchange Act sections which do empower the SEC to modify particular Exchange Act provisions, these sections do so in clear and unambiguous language that differs markedly from the wording relied on by the SEC in the instant case. The *American Bankers* court, however, neglected to examine this contrast, and limited itself instead

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<sup>46</sup> See *id.* This subdivision provides that "[t]he Commission, by rule or order . . . may conditionally or unconditionally exempt any clearing agency . . . or any class of clearing agencies . . . from any provisions of this section . . . if the Commission" makes certain findings. *Id.*

<sup>47</sup> See, e.g., 15 U.S.C. § 78k(c) (1982) (SEC may "exempt" an exchange from requirements of section); cf. 15 U.S.C. § 78g(b) (1982) (Board of Governors may set margin requirements "[n]otwithstanding the provisions of subsection (a)").

<sup>48</sup> The *American Bankers* court had precedent to rely on as authority for engaging in such a comparison; courts have performed a similar comparative analysis to determine the reach of particular provisions of the securities laws. See *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 150-52 (1984) (comparing definition of "security" in several statutes); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206-11 (1976) (contrasting various sections of securities laws with Exchange Act's anti-fraud provision); *Sanders v. John Nuveen & Co.*, 463 F.2d 1075, 1077-81 (7th Cir.), *cert. denied*, 409 U.S. 1009 (1972) (contrasting varying definitions of "security" as well as other provisions contained in several statutes).

to a response to the SEC's arguments that failed to refute flawed assumptions basic to those arguments. A more effective method of rebutting the SEC's contentions that "context" clause or section 3(b) vested the Commission with general authority to override the statute which governs its jurisdiction, would have been to make such a contrast.

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