Conglomerate Commercial Banking: Issues and Policies

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THE ONE-BANK HOLDING COMPANY MOVEMENT

Expansion of product lines and geographic markets by commercial banks has been a major feature of their new-found dynamism in the decade of the 60's. More recently, large banks have seized upon the one-bank holding company (hereinafter referred to as OBHC) as a convenient device to advance their efforts at conglomerate growth. In 1965 less than 5 percent of total commercial bank deposits were to be found in 550 OBHCs. Four years later, by the end of 1969, the number had jumped to 890 — with almost 43 percent of all deposits. The first OBHC with over $1 billion in deposits was announced by Union Bank of California on March 10, 1967. No major bank followed Union Bancorporation until First National City Bank came forward with plans on July 3, 1968. Nine of the 12 largest commercial banks announced a contemplated OBHC in the second half of 1968; a tenth, First National Bank of Chicago, became one effective August 15, 1969. Another giant, Bankers Trust Company, was already the keystone of a multiple-bank holding company. The only eligible one of the top dozen to remain outside a OBHC is Security Pacific, in ninth place nationally. By the end of 1969, all but 9 of the 21 largest commercial banks (the smallest of which had over $2 billion in deposits) had opted to become OBHCs; 4 of the 9 are already part of a multiple-bank holding company structure.

Corporations owning but a single bank were deliberately excluded from the scope of the Bank Holding Company Act of 1956 despite opposi-

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1 Various aspects are discussed in THE ONE-BANK HOLDING COMPANY (H. Prochnow ed. 1969). Of the 61 OBHCs proposed as of Nov. 30, 1968, 59 percent had deposits exceeding $250 million; fewer than 5 percent had less than $50 million in deposits. Federal Reserve Bank of Cleveland, Economic Commentary, Dec. 7, 1968, at 4.


4 Am. Banker, Jan. 9, 1969, at 13, col. 3.


7 Id.

8 Id. supra note 2, at 2.
tion of the Board of Governors of the Federal Reserve System. A decade later the Board again reasoned that

if it is contrary to the public interest for banking and nonbanking businesses to be under the same control, the principle is applicable whether a company controls one bank or a hundred banks, and the possibility of abuses from such common control is the same.

In the absence of "substantial evidence of abuses" in OBHCs, the Senate Committee on Banking and Currency saw no reason to follow the House-passed bill by agreeing to remove the exemption, particularly in view of the problems it would create for bankers who wished to become owners of small banks. Organizers of OBHC's in recent years were thus acting in the knowledge that on two occasions — most recently in 1966 — Congress, ignoring the Board of Governors, had excluded OBHCs from the rules to which multiple-bank holding companies have been subject since 1956.

The chief attraction of the device is the freedom of action the OBHC seems to offer a bank. National banks entering new activities approved by the Comptroller of the Currency found themselves challenged by competitors' litigation. A corporate subsidiary could move into these fields without impediment — at least until new legislation is enacted. This very freedom has become the target of opponents of expansion by sizable commercial banks. Within nine weeks of his inauguration President Nixon requested legislation to control OBHC activities. The administration bill diverges significantly from the one passed by the House of Representatives on November 5, 1969; the Senate may take some kind of action in 1970.

13 S. REP. No. 1179, 89th Cong., 2d Sess. 5 (1966). Chairman Robertson of the Senate Committee on Banking and Currency pointed out that he had deliberately written the exemption for OBHCs in 1956 and he continued to believe in 1966 that it was justified. Hearings on S. 2353, S. 2418 and H.R. 7371 Before a Subcomm. of the Comm. on Banking and Currency of the Senate, 89th Cong., 2d Sess. 279 (1966). The bill as reported out by the House Committee on Banking and Currency did not include OBHCs. Rep. Bennett's amendment to include them was carried, see 111 Cong. Rec. 24,936, 24,939-40 (1965). For a list of OBHCs which the House-passed bill would have reached, see Senate Hearings 1966, supra note 11, at 313-36.
14 Senator Bennett pointed out that the "most important thing the Senate bill does... is to correct a major and potentially damaging provision of the House bill which would have denied to any holding company the privilege of holding even one bank." 112 Cong. Rec. 12,396 (1966). Arguments against eliminating the OBHC exemption were made by the Independent Bankers Association of America, and the American Bankers Association. See Senate Hearings 1966, supra note 11, at 119-20, 264.
Chairman Patman of the House Banking and Currency Committee has characterized the proliferation of OBHCs in the last few years to be "as dramatic as it is alarming." That the OBHC movement has been dramatic in scope and speed is readily granted. Much less obvious is the justification for the great uneasiness of those hostile to the OBHC, particularly as used by large banks. An evaluation of their position will be the main purpose of this paper, and indeed, it will be argued here that there is little (if any) cause for alarm.

THE CASE AGAINST THE ONE-BANK HOLDING COMPANY

President Nixon has warned: "Left unchecked, the trend toward the combining of banking and business could lead to the formation of a relatively small number of power centers dominating the American economy." Secretary of the Treasury Kennedy also foresaw a threat of domination of our economy by "some 50 to 75 huge centers of economic and financial power." And Undersecretary of the Treasury Charles E. Walker, referring in his testimony before the House Committee on Banking and Currency to "a new type of concentration of economic power, where you blend banking and commerce," stated his belief that the existing antitrust laws are inadequate to cope with this Zaibatsu menace.

On a less global level than the widely used Zaibatsu argument, it has been pointed out that problems of bank supervision, "especially supervision of loan policies and solvency," may be increased by the OBHC. Walker, however, conceded that problems of bank supervision were not the motivation of the administration bill; existing powers were ample, except for situations where bank management might seek to ward off raiders by reaching out for riskier business.

The fact that different agencies regulate banks and insurance, for example, would be a source of "enormous regulatory difficulties," according to one legal expert. Examination of widely dispersed nonbank operations in order to discover their impact on the bank involved also raises certain

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19 Kennedy headed the eighth largest American bank, now a Chicago OBHC, before going to Washington. Treasury Department Press Release, Mar. 24, 1969; Letter to President of the Senate transmitting Administration's OBHC Bill, at 2. In his testimony, Kennedy used the quoted language but omitted the numerical estimate. House Hearings 1969, supra note 2, pt. 1, at 85.
20 Id. at 471. Before joining the Treasury, Walker was Executive Vice-President of the American Bankers Association (A.B.A.). Contra, id. pt. 2, at 893, Stewart, head of Bank of America, and id. at 902, Volk, head of Union Bancorp.
21 Id.
22 Id. at 25 (remarks of Professor Louis B. Schwartz, University of Pennsylvania Law School).
23 Id. at 424-25. The problem will be discussed at note 166, infra.
24 Id. at 50 (remarks of Professor Schwartz).
practical problems. But to the extent that dealings between banks and other subsidiaries of the holding company are severely restricted by law, such impact may be negligible.

Bank supervision does become more complex as subsidiary relationships become more involved. Rather than new federal legislation, this suggested the need for "improved supervisory capabilities." Depositors may become concerned with a bank's soundness if another subsidiary of the holding company is in trouble. The President of the Federal Reserve Bank of Minneapolis has argued that an affiliate's "financial downfall . . . would have, to some degree, an adverse effect on the bank itself — if only out of guilt by association." If there is a significant danger of such unfavorable repercussions, the holding company would presumably tend to avoid those courses of action which threaten the solvency of the nonbank subsidiary, in the interest of preserving the good reputation of the affiliated bank. In the event that unwarranted depositors' suspicion leads to massive withdrawals, the bank could turn to the Federal Reserve for temporary accommodation.

Many fear that a bank might be tempted to make unsound loans to subsidiaries. Some recall such behavior on the part of banks in the 1920's. Similar concerns were expressed at the time holding company legislation was being considered in the mid-1950's. The 1956 legislation flatly prohibited upstream and cross-stream credit between a subsidiary bank and the parent company or another subsidiary. Prompted by the Board of Governors, which considered this prohibition "unnecessarily severe," Congressional amendments in 1966 now allow secured loans to affiliates, with a maximum equal to 20 percent of the bank's capital to all affiliates. It is noteworthy that in 1966 this was made applicable to all insured commercial banks, whether or not part of a multiple-bank holding company. Thus, at the most, less than 1.5 percent of a bank's assets, on the average, would be at stake in loans to subsidiaries. Nonbank subsidiaries would hardly
find the conditions required by the 1966 provision appealing; for example, Carte Blanche (then owned by First National City Bank) was sent to another bank for funds, "where they could get a better deal."³³ It is not surprising therefore that the president of Union Bancorporation was prepared to endorse a provision prohibiting a bank from making any loan whatsoever to its holding company or to any of its affiliates.³⁴

The law, however, does not apply to credit extended to customers of affiliates, as Chairman Martin pointed out, adding that it "probably is not feasible to draft legislation that would deal adequately with the many subtle but powerful pressures that would arise in those areas if banks had many commercial affiliates."³⁵ Moreover, customers might be aided in an effort to bail out a weak affiliate.³⁶ Yet, weak loans are of course subject to supervisory criticism. And again, it is difficult to see what advantage the holding company would gain from shifting losses from an owned nonbank subsidiary to the owned bank subsidiary.

Holding company situations do create additional possibilities of self-dealing. Although the danger exists, some actual practices to the contrary are worth noticing. Thus, Pan American Bank of Miami does not extend loans to the parent, Atico Finance Corporation, "in order to avoid the appearance of self-dealing and to eliminate any possible conflicts of interest."³⁷ Similarly, the by-laws prohibit the Goodyear Bank from lending to directors and employees, and in addition, customers of the tire and rubber company have not been granted loans in recent years.³⁸ Indeed, the head of the world's largest commercial bank, noting that "restraint against self-dealing has long been a tradition of banks,"³⁹ has stated that the Bank of America has "scrupulously avoided any dealings with either trust assets or bank assets where there is even a slight suspicion of divided loyalty."⁴⁰ While it would be excessively optimistic to believe that all banks are likely to follow such ethical principles, it is also worth bearing in mind that self-dealing (like most other malpractices suspected of OBHCs) could exist in a bank without holding company links. In fact, the Federal Deposit Insurance Corporation (FDIC) reported in 1955 that the latter type of bank had suffered more losses from self-dealing than banks owned by a holding

at the end of 1968, FDIC, ANNUAL REPORT 1968, at 187. For a striking example of confusion on this subject, see House Hearings 1969, supra note 2, pt. 1, at 519 (remarks of Hansen, I.B.A.A.).

³⁵ Id. pt. 1, at 197. Martin is referred to by the title he held on the Board of Governors at the time he spoke. His term expired January 31, 1970.
³⁶ Galusha, supra note 25, at 10.
³⁷ Senate Hearings 1966, supra note 13, pt. 1, at 363 (remarks of President Wilson, Pan American Bank). (Atico is engaged in mortgage servicing, title insurance, etc.)
³⁸ Id. pt. 2, at 735 (Goodyear).
³⁹ House Hearings 1969, supra note 2, pt. 3, at 996 (Bank of America).
⁴⁰ Hearings S. 280, supra note 11, at 100.
company. Moreover, a holding company with a substantial investment in a bank is less likely to engage in self-dealing than a handful of individuals who control a bank with a small stock ownership.\textsuperscript{41} Conflicts of interest may also arise where individuals control other businesses directly or through unrelated corporations.\textsuperscript{42} There is simply no ready legislative solution to the problem.

Discrimination by the bank in favor of other subsidiaries of the holding company and against competitors of the latter is another source of apprehension.\textsuperscript{43} A leader in the Independent Bankers Association of America is convinced that a banker with a stake in other businesses could not give "objective, unbiased consideration of a request for a loan by a . . . customer who might be a competitor of a subsidiary."\textsuperscript{44} Chairman Martin too fears that competing firms might be denied credit, while customers of the subsidiary are favored.\textsuperscript{45} The problem is said to be accentuated in periods of tight money.\textsuperscript{46} Removal of the temptation to discriminate becomes all the more important given the impossibility of enacting effective all-embracing antidiscrimination laws relating to the extension of credit.\textsuperscript{47} Adequate statutory protection against discriminatory loans between banks and other subsidiaries of the holding company exists presently according to Secretary Kennedy, but he recognized that it does not cover customers of the subsidiaries.\textsuperscript{48}

Despite the unavailability of legislative protection, a bank dare not alienate present or potential customers by discriminatory policies if it hopes to flourish.\textsuperscript{49} As the fourth largest of eleven banks in the Parkersburg, West Virginia, metropolitan area explained:

Wood County Bank simply cannot afford to deny justified credit to competitors of non-bank subsidiaries of its largest corporate stockholder. Neither has it in the past exerted pressure on borrowers to do business with such non-bank subsidiaries nor can it now afford to do so. To en-

\textsuperscript{41} Hearings on H.R. 2674 Before the House Comm. on Banking and Currency, 84th Cong., 1st Sess. 232-33 (1955).
\textsuperscript{43} House Hearings 1969, supra note 2, pt. 1, at 2 (remarks of Representative Patman); id. at 296 (remarks of Representative Bennett); H.R. 609, supra note 30; Staff Report, supra note 29.
\textsuperscript{44} House Hearings 1969, supra note 2, pt. 1, at 68 (remarks of President Milner, First National Bank, Athens, Georgia).
\textsuperscript{45} Id. at 196-97.
\textsuperscript{46} Id. at 58 (remarks of Milton Shapp, founder Jerrold Electronics); id. at 93 (remarks of McLaren).
\textsuperscript{47} Id. at 22 (remarks of Professor Schwartz).
\textsuperscript{48} Id. at 482. On § 23A limits, see note 31 supra.
\textsuperscript{49} House Hearings 1969, supra note 2, pt. 3, at 1333 (remarks of Chairman Renchard, Chemical New York Corp.).
gage in such practices would be simply to drive business to competing banks or other financial institutions.\textsuperscript{50}

Additionally, banks must reckon with the possibility that discrimination might lead customers to organize financial subsidiaries, such as acceptance corporations. Not infrequently, new banks are formed when existing institutions fail to give satisfaction.\textsuperscript{51}

In the leading instance of a OBHC originated by a nonbank firm, Meadowbrook National Bank (now National Bank of North America) canceled CIT’s line of credit when that finance company acquired the bank. The head of CIT recently stated that “we have absolutely no intercompany relationship that would involve us in preferential or even in non-preferential treatment.”\textsuperscript{52} Holding company-owned banks “will bend over backward to avoid even a hint of conflict of interest . . . [and] will make every effort not to discriminate against unaffiliated nonbank institutions,” according to a leading banker involved in a OBHC.\textsuperscript{53} It has also been argued that “bankers don’t like to be managed by nonbankers, particularly if the result is the destruction of a sizable portion of the bank’s earning base, to the putative benefit of the corporate whole.”\textsuperscript{54}

The tying-in of other subsidiaries’ services with bank credit is the most frequently cited threat anticipated from OBHCs.\textsuperscript{55} The National Association of Mutual Insurance Agents generalized that “there is overwhelming evidence that wherever the lender has the opportunity to purvey insurance to the borrower, coercion is inherent and inescapable.”\textsuperscript{56} Indeed, according to the Association of Data Processing Service Organizations, “in these days of very tight money” banks were compelling customers to buy electronic data processing services as well.\textsuperscript{57} The American Society of Travel Agents cited one instance in which clients of an independent travel agency were said to have been granted a loan on condition that they deal through the Colorado bank’s own travel department.\textsuperscript{58} On the other hand, testimony before the House Committee on Banking and Currency indicated that the Bank of America does not believe in tying two different services together.\textsuperscript{59}

\textsuperscript{50} Senate Hearings 1966, supra note 13, pt. 1, at 385. Stern Bros., a family corporation, operates family clothing stores.


\textsuperscript{52} House Hearings 1969, supra note 2, pt. 2, at 987 (remarks of Lundell, CIT).


\textsuperscript{54} Rose, supra note 33, at 345.

\textsuperscript{55} House Hearings 1969, supra note 2, pt. 1, at 2 (remarks of Representative Patman); \textit{id.} at 25 (remarks of Prof. Schwartz); \textit{Staff Report}, supra note 29.

\textsuperscript{56} House Hearings 1969, supra note 2, pt. 2, at 789 (remarks of Rue); \textit{id.} at 792-93 (remarks of Stringfellow).

\textsuperscript{57} \textit{Id.} at 569 (data processing).

\textsuperscript{58} \textit{Id.} at 814 (travel agents).

\textsuperscript{59} \textit{Id.} at 979 (Bank of America).
Similarly, a small Kansas OBHC testified to a policy of "absolutely no tie-ins between insurance sales and bank operations." Voluntary tie-ins are a special concern of Assistant Attorney General McLaren, Chief of the Antitrust Division:

"The bank's economic power vis-a-vis the potential borrower will have the inherent tendency to cause the borrower voluntarily to patronize bank-affiliated enterprises in the hope of improving his chances to obtain credit from the bank on favorable terms." Present antitrust legislation is apparently ineffective whenever the "action of the purchaser in recognizing that his overall self-interest may be served by favoring the bank-affiliated enterprise" is "entirely voluntary."

The National Society of Public Accountants fears that some banks would be tempted "to take a position, subtle as it may be, that the availability of loan funds will be predicated on, or at least influenced by, the bank being able to provide accounting and record-keeping services to the prospective borrower." In time, the practice of bank affiliates steering borrowers to other affiliates "would become as accepted a practice as the maintenance of minimum balances," the founder of Jerrold Electronics predicted. As the National Association of Insurance Agents explained: "The bank need not make the purchase of insurance a condition of a loan. It needs only to mention the existence of its agency." In fact, certain North Carolina banks are said to have informed construction companies seeking loans that they must give their insurance business to the bank affiliate. And in some instances, real estate agents have allegedly been informed that the bank will be unable to handle mortgage loans unless it gets related insurance business.

Business reciprocity arrangements are yet another possible adverse consequence of OBHCs. American Radiator (90th largest industrial corporation in 1968) placed deposits after the company had received business from commercial bank construction. Tax moneys were deposited "after the busi-

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60 Id. pt. 3, at 1187 (remarks of President Stevens, First National Bank of Wakeeny).
61 Id. pt. 1, at 98 (remarks of McLaren).
62 Id. pt. 2, at 735 (remarks of Professor Pitofsky, New York University Law School).
63 Id. at 1166 (insurance).
64 Id. pt. 1, at 60 (remarks of Shapp).
65 Id. pt. 2, at 718.
67 Chairman Patman added that "actual proof of some of these supporting facts is hard to secure"; a great deal of information was collected on a confidential basis. Id.
69 House Hearings 1969, supra note 2, pt. 1, at 338. Dr. Mueller did not name the firm in his April testimony.
ness is placed and with no prior promise of such recognition," according to the trade relations department policy. The favored bank would be expected to recommend American's products to other customers. Bankers would notify the plumbing supply firm of new mortgage loans, so that it could try to get the business.\textsuperscript{70}

In contrast, a survey of banks belonging to conglomerates turned up only a nominal amount of referral business from the parent.\textsuperscript{71} One Southwest banker indicated that the parent's reluctance was traceable to antitrust fears.\textsuperscript{72} At the request of the parent, this bank no longer seeks the business of several suppliers to the affiliate group, "even though they used to be good customers of the bank" before it was acquired.\textsuperscript{73}

OBHCs, considered to be a convenient vehicle for price discrimination, have been accused of loss-leader pricing in connection with their electronic data processing services.\textsuperscript{74} Independent travel agents also fear they will be underpriced by banks with lower overhead and diverse sources of income.\textsuperscript{75}

Additionally, banks often gain confidential information about their customers which may be used to competitive advantage.\textsuperscript{76} Travel agents have testified to this effect before the House Committee on Banking and Currency. One Indianapolis agent feared that his deposits furnished his bank with the names of his best clients.\textsuperscript{77} Some North Carolina banks are said to approach insurance agents' customers when renewals fall due, using the policies on file in connection with various credit transactions as the sources of information.\textsuperscript{78} One banker observed a sharp drop in credit extended to competitors of the parent holding company: "Maybe they no longer want to give us confidential financial data . . . or it could be they just don't want to patronize a competitor's affiliate. It's hard to say."\textsuperscript{79}

Discrimination in loan access and loan rates, tie-ins, access to trade secrets — all these aspects of unfair competition have been stressed in the arguments against the OBHC, but they by no means exhaust the list. The very fact that a bank can represent to a potential customer that "the EDP service is but part of a larger 'complete financial service' which will save the customer time, effort and money because everything is handled by the same supplier," has been mentioned as an "unreasonable advantage banks enjoy over specialized data processing competitors."\textsuperscript{80} Banks have been


\textsuperscript{71} Id.

\textsuperscript{72} Am. Banker, Jan. 22, 1969, at 24, col. 2.

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} \textit{House Hearings 1969, supra} note 2, pt. 2, at 569 (E.D.P.).

\textsuperscript{76} Id. at 810, 851 (travel agents).

\textsuperscript{77} Id. at 641 (remarks of Professor Dewald, Ohio State University).

\textsuperscript{78} Id. at 814 (remarks of Keesling); \textit{see also} id. at 810 (remarks of Grimes); id. pt. 1, at 72 (remarks of Grueninger Travel Service).

\textsuperscript{79} 115 CONG. REC. 10,570 (daily ed. Nov. 5, 1969).

\textsuperscript{80} Am. Banker, Jan. 22, 1969, at 24, col. 2.

\textsuperscript{81} \textit{House Hearings 1969, supra} note 2, pt. 2, at 569 (remarks of Goldstein).
accused of pirating key employees and accounts. The independent feels threatened even though expansion-minded banks have been buying agencies in the travel and insurance fields.

Accentuating the feeling of unfairness is the widespread view that just as banks are protected against nonbanks performing banking services, banks should be precluded from competing freely with every other sector of the economy. According to so eminent and qualified an observer as Vice-Chairman Robertson of the Board of Governors, banking has become a business of restricted entry, and one possessing a monopoly of an indispensable resource. . . . [T]he most elementary fairness demands that a bank stick to the business of banking . . . and not foray from a protected sanctuary to compete . . . with enterprises which operate in a free-entry environment and which must use banking services.

Protection of small business as part of the American way is closely linked with the attack on the OBHC. Attendance at the hearings of the House Committee on Banking and Currency convinced Representative St. Germain that small businessmen faced a "serious threat . . . as a result of their being forced to compete with large and powerful banks and bank holding companies." Another committee member, Representative Gonzalez stated that one of the most glaring examples of unfair competition in our economy today is the fact that banks . . . are allowed to compete unfairly with predominantly small businessmen engaged in the travel agency, data processing, insurance, and accounting fields.

In fact, the combination of banking and nonbanking activities was viewed by 12 of the 20 Democrats on the House Banking Committee as a threat to "the economic health and perhaps the existence of thousands of small businesses" in an environment of unfair competition.

Yet, as Representative Brock aptly pointed out to his colleagues, the various accusers testifying against OBHCs before this Committee were "talking about the spectre of potential abuse . . . not demonstrated . . . ."

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82 Id. at 810-11 (remarks of President Grimes, Association of Retail Travel Agents).
83 Id. at 803, 810.
87 Id. at 10,572 (remarks of Representative Gonzalez). Representative Gonzalez referred to banks, whether or not owned by holding companies.
88 Bank Holding Companies, supra note 5, at 19. This represents the "additional views" of Representative Patman and 11 other committee members, including Representative St. Germain and Representative Gonzalez.
abuse." Chairman Martin made reference to "potential evils" without being able to offer any evidence of abuses in his testimony, and Vice-Chairman Robertson could not cite for the record any actual case of conflict of interest. Thus, Representative Stanton rightly emphasized that the Board of Governors had not cited "one single case for the immediate need of this legislation."

Comptroller of the Currency Camp made it a point to state that he knew of no OBHC abuses; Chairman Randall of the FDIC associated himself with this observation, adding that "these legislative processes are dealing only in anticipation of what may or may not be abuses." Nor had supervisory authorities in Kansas, a state with many OBHCs, found a single instance of abuse. Understandably, then, the American Bankers Association stressed the preventive nature of the proposed legislation: "There has been no evidence of abuses" either by long-standing or recent OBHCs. The record of the 13 years since the explicit exemption in the 1956 Bank Holding Company Act was one of nonabuse by OBHCs, the head of CIT testified.

In 1966, when amendments to the 1956 Act were under consideration, Senator Miller of Iowa (a state with 48 OBHCs at the time) stressed that the Board of Governors had not furnished any actual examples of abuse. Senator Paul Douglas agreed that the Board argument for removing the OBHC exemption was "purely conjectural." And Comptroller of the Currency Saxon felt that elimination of the exemption was not justified on the basis of "imaginary possibilities of abuse." In the intervening years no adverse evidence has been accumulated.

ADVANTAGES OF THE ONE-BANK HOLDING COMPANY

Reorganization of an erstwhile commercial banking corporation into a OBHC is both time consuming and costly: Chase Manhattan had expenses amounting to $750,000; Morgan Guaranty, $500,000; and the First National Bank of Chicago, $200,000. Increasing numbers of banks seeking to escape...
from the shackles of litigation and restrictive regulation have found such outlays warranted.\textsuperscript{99}

Above all else, the OBHC promises flexibility—"a greater choice of business and organizational alternatives than is available to or feasible for the Bank itself," as Morgan Guaranty told its shareholders.\textsuperscript{100} Through the OBHC, nonbank subsidiaries can readily expand geographically.\textsuperscript{101} The bank proper continues to face all existing obstacles to branching set up by 50 state jurisdictions—including the ban on interstate banking offices.\textsuperscript{102}

Another crucial consideration in the decision to organize a OBHC centers around management factors. The hope is to be in a better position to recruit and retain dynamic executives\textsuperscript{103} as a result of creating "a new exciting image for banking. . . ."\textsuperscript{104} Subsidiaries also provide opportunities for several chief executives in the same holding company.\textsuperscript{105} Employees in different types of enterprise can more easily receive remuneration appropriate to their skills. Unlike ordinary bank officers, mortgage officers, for example, draw a substantial portion of their earnings in the form of incentive bonuses.\textsuperscript{106}

As the profit and cost center concept (long used in industry) is increasingly applied by banks, incorporation of various activities becomes a convenient, logical organizing device.\textsuperscript{107} With decentralization of decision-making, intermediate management in the various subsidiaries is given greater responsibility.\textsuperscript{108}

Incorporating subsidiaries which are separated from the commercial

\textsuperscript{99} Id. at 1395. Con. Ill. would be "less circumscribed," counsel for the Continental Illinois National Bank affirmed. Counsel for Chemical Bank, New York saw the OBHC as a device "to increase the flexibility of management." Id. at 1405. J. Fred Weston cites five advantages of the financial conglomerate, a firm which provides funds, rather than management expertise, and is ultimately responsible financially for the subsidiaries. Weston, \textit{Comment on Professor Shepherd's Conglomerate Mergers in Perspective}, \textit{2 Antitrust L. & Econ. Rev.} 40-41 (1968).

\textsuperscript{100} \textit{House Hearings 1969, supra note 2}, pt. 3, at 1473 (proxy statement); see also id. at 1545 (Manufacturer's Hanover); id. at 1581 (First National Bank, Chicago); id. at 1030, 1046-47 (Chase Manhattan); id. at 1555 (First National Bank, Atlanta); id. pt. 2, at 951 (remarks of Chairman Fine of the $41 million Commonwealth National Bank, Boston).

\textsuperscript{101} Geographic obstacles are mentioned in the Manufacturer's Hanover proxy statement, id. pt. 3, at 1545; Barron's, Mar. 24, 1969, at 11, 22.

\textsuperscript{102} For details, see Board of Governors of the Federal Reserve System, Legal Division, Compilation of Federal and State Statutes Relating to Branch Banking, Oct. 1967.


\textsuperscript{104} Bunting, \textit{supra} note 53, at 103.

\textsuperscript{105} \textit{House Hearings 1969, supra note 2}, pt. 3, at 1191 (remarks of President Cummings, Industrial Bancorporation, Providence).


\textsuperscript{107} \textit{House Hearings 1969, supra note 2}, at 563 (A.B.A.); id. at 1554 (remarks of Smith, First National Bank, Atlanta); see also Bunting, \textit{supra} note 53, at 104.

bank also serves to protect bank creditors against losses. Where undue risk to depositors is the only reason for considering it inappropriate for a bank to engage directly in a particular activity, a wholly-owned subsidiary of a bank or an affiliate in a holding company could be granted the authority.\textsuperscript{109} By giving banks anxious for earnings growth an alternative to making riskier loans and investments, the OBHC may actually render banking safer.\textsuperscript{110} One banker after another testified persuasively before the House Committee on Banking and Currency that the OBHC would safeguard the depositor from risks, particularly those arising out of innovative diversification efforts.\textsuperscript{111} As cases in point, certain types of real estate, leasing, and small loan transactions were mentioned.\textsuperscript{112} In contrast, former Federal Reserve Governor Mills stated that banks "cannot honorably escape a moral and financial responsibility."\textsuperscript{113} However, exactly why it could not be made perfectly clear to all who do business with the OBHC that the bank's assets are unavailable for settling claims on the other separately incorporated subsidiaries is something of a mystery.\textsuperscript{114}

Moreover, when additions to bank capital are called for, a holding company may be in a better position than an ordinary bank to make them.\textsuperscript{115} Over the past decade the price-earnings ratio for bank stock averaged only 80 percent of industrials in the Standard and Poor Index; at the beginning of 1968 it was only 60 percent.\textsuperscript{116} Banks are severely restricted as to the extent they may issue debt securities; the holding company faces only the limits set by the market place. OBHC stockholders can anticipate an increased return from the leverage factor.\textsuperscript{117}

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\item \textsuperscript{109} Id. pt. 1, at 208 (remarks of Robertson).
\item \textsuperscript{110} Bunting, supra note 55, at 106.
\item \textsuperscript{111} House Hearings 1969, supra note 2, pt. 2, at 934 (remarks of Stewart); id. at 951-52 (remarks of Fine); id. at 955 (remarks of Volk); id. pt. 3, at 1206-07 (remarks of Cumnings); id. pt. 2, at 1345 (remarks of Chairman William Moore, Bankers Trust); id. pt. 3, at 1555 (remarks of Smith); see also id. pt. 1, at 423-24 (remarks of Secretary Kennedy).
\item \textsuperscript{112} Id. pt. 5, at 1031 (remarks of Vice-Chairman Roeder, Jr., Chase Manhattan).
\item \textsuperscript{113} Id. pt. 1, at 906 (remarks of Mills).
\item \textsuperscript{114} Id. (remarks of Abbott). See Hall, supra note 42, at 77. Even if it is accepted that "there is a tacit understanding in terms of weak affiliates being helped by the other holding company affiliates," this "commingling of capital" could not involve the bank subsidiary, given the 20 percent aggregate loan limit and supervisory restraints. Contra, House Hearings 1969, supra note 2, pt. 2, at 634 (remarks of DeWald). Cf. id. at 915, 997. The impossibility of milking banks through dividends is discussed in Rose, supra note 33, at 310, 314.
\item \textsuperscript{115} House Hearings 1969, supra note 2, pt. 2, at 901.
\item \textsuperscript{116} Id. at 908. During 1962-1964 the two categories approximated each other. Id. The ratio for leading banks jumped in 1968 from 12.6 to 16.6, but the latter was still below the Dow Jones multiple, 17.7 times, the Standard & Poor Industrials, 19.2 times, and the American Exchange Medium, 25.0 times earnings. Bankers Monthly, Dec. 15, 1968, at 10, reprinted in House Hearings 1969, supra note 2, pt. 2, at 676.
\item \textsuperscript{117} Bunting, supra note 55, at 103; Cates, One-Bank Holding Companies — Defining the Issues, Bankers Monthly, Dec. 15, 1968, at 9-10. William M. Weiant contrasted the national bank debt restriction, equal to about 33 percent of shareholders' equity, with the 50-60 percent as a practical possibility in the OBHCs. Eastman Dillon Union Securities
\end{itemize}
Battle Over Product Extension by Commercial Banks

Such were the radical changes which commercial banking had undergone since 1918, that a scholar writing in 1943 described the adjective "commercial" as "strangely inappropriate." To their traditional role of accepting demand deposits and making short-term commercial and industrial loans, banks discerning profitable opportunities added many fields, especially during the 1920's. By the end of that decade many a bank considered itself (or aspired) to be a "department store of finance." Today "financial supermarket" is sometimes used to describe this approach. In line with this notion, the OBHC is to provide the business firm and household with "an improved and expanded package of financial services." Thus, the First National Bank of Chicago contemplates possible expansion by its OBHC into sales and consumer finance, equipment leasing, management consulting, sale, leaseback and other types of real estate financing, as well as foreign financial activities.

As the American Bankers Association has rightly insisted, the dynamism of our economy precludes the inflexible definition of OBHC's subsidiaries' legal activities. The Nixon administration proposed as a test that the activities be in the public interest and "financial or related to finance in nature or of a fiduciary or insurance nature." Under the 1956 Act, multiple-bank holding companies may own subsidiaries of "a financial, fiduciary, or insurance nature . . . so closely related to the business of banking as to be a proper incident thereto. . . ." These are activities "obviously incidental to the business of banking," according to the House Banking Committee Report which accompanied the Bill. All three federal banking agencies agreed that this language in the 1956 law was "unnecessarily restrictive." The 1969 Bill passed by the House would allow nonbanking activities which are "functionally related to banking," thereby presumably broadening the scope of holding company subsidiaries "beyond the rigid standard set forth in the 1956 Act."
The Board of Governors is willing to see the 1956 statute amended to the extent of permitting subsidiaries to operate travel agencies, insurance agencies (where at least half the premium income derives from customers of the holding company), credit insurance, and accounting services "functionally related to banking."\textsuperscript{130} The National Society of Public Accountants was quick to oppose this last provision on the grounds that the subsidiaries would lack professional qualifications and independence.\textsuperscript{131} Similarly, while Comptroller of the Currency Camp visualized commercial banks as being advantageously situated to become "the principal 'financial information utilities',"\textsuperscript{132} the Association of Data Processing Service Organizations predicted that unless OBHCs were "properly regulated" (i.e., restrained), the "yeasty ferment" of the information processing segment of the computer industry would be "replaced by monolithic structures fundamentally hostile to innovation."\textsuperscript{133}

More and more banks have moved into the travel agency field — the number has soared from 55 in 1953 to over 150 by 1968. The logic of giving customers who come for travelers checks, letters of credit, and foreign currencies the opportunity to also make hotel and transportation arrangements in the same place may be persuasive to bankers and to at least certain of their customers, but not to independent travel agencies.\textsuperscript{134} Accordingly, the bill reported out of committee in 1969 was successfully amended on the House floor to exclude bank holding companies from the travel agency business.\textsuperscript{135} The House-passed bill also fulfills the wishes of the National Association of Life Underwriters, the National Association of Insurance Agents, and the National Association of Mutual Insurance Agents, by confining holding companies to credit life, accident and health insurance for individuals in debt to the bank.\textsuperscript{136}

The Board of Governors was willing to see subsidiaries operate no-load mutual funds, but the Investment Bankers Association would ban banks from any kind of mutual fund, on the ground that economic power might be concentrated in banks as a consequence of their further accumulation of

\begin{footnotesize}
\textsuperscript{130} House Hearings 1969, supra note 2, pt. 1, at 220. On travel agencies, see also id. at 229 (remarks of Representative Martin). The American Bankers Association list included travel and insurance, but only certain accounting services. Id. pt. 2, at 578.
\textsuperscript{131} Id. pt. 3, at 1165-66 (National Society of Public Accountants); id. pt. 1, at 300-01 (remarks of Representative Matsunaga).
\textsuperscript{133} House Hearings 1969, supra note 2, pt. 2, at 526 (ADAPSO).
\textsuperscript{134} Id. at 864 (remarks of Representative Widnall); id. pt. 5, at 1283 (National City Bank, Cleveland); id. pt. 2, at 812 (ASTA). Professor Donald Hodgman, University of Illinois, argues against travel agencies for banks. CHICAGO CONFERENCE 1969, supra note 42, at 100. See also House Hearings 1969, supra note 2, pt. 1, at 48 (remarks of Professor Schwartz).
\textsuperscript{135} Bank Holding Companies, supra note 5, at 3; 115 CONG. REC. 10,553, 10,559 (daily ed. Nov. 5, 1969); Wall Street Journal, Nov. 6, 1969, at 2, col. 3.
\end{footnotesize}
"large holdings of stock"; their trust departments already hold 19 percent of all outstanding common stock. The House Committee Bill banned the underwriting, public sale or distribution of mutual funds by bank holding companies. It should be noted in this connection that since 1937 banks have operated common trust funds for collective investment of moneys held in their fiduciary capacity; since 1956 they have been pooling pension trusts for collective investment; and since 1962 they have been pooling retirement trusts for the self-employed.

No proposal under consideration by the Congress would eliminate the 1933 separation of investment from commercial banking. However, Secretary Kennedy, while endorsing the separation, did advocate that commercial banks be allowed to underwrite municipal revenue bonds (as national banks have been doing in recent years).

The House-passed Bill of 1969, then, bars bank holding company subsidiaries from engaging (with minor exceptions) in the following businesses: securities, insurance, travel agencies, accounting, data processing and property leasing. Effective lobbying by these industries gave them a victory—at least at this stage of the legislative deliberations. Chairman Patman hailed the bill as having "clearly separated the business of banking from nonbanking and assured thousands of small businessmen protection from unfair competition." Bank holding companies would be excluded from financial fields they clearly wish to enter: indeed, over one-third of the known OBHCs on September 1, 1968 operated as insurance agents, brokers and service organizations.

Most OBHCs would be content to operate as "congeneric" firms confined to financial operations. A leading spokesman considers the OBHC movement "consistent with the historical spirit of banking legislation—that the proper business of banking is the performance of any financial function that does not threaten the solvency or liquidity of a bank."

As a matter of "prudent self-interest," the Bank of America believes, bankers would stay with finance-related activities. Those going outside this range would have their ignorance and incompetence exposed in the market—

137 House Hearings 1969, supra note 2, pt. 1, at 220 (Federal Reserve Board). The A.B.A. list was silent on mutual funds. Id. pt. 2, at 548, 578 (Investment Bankers Association of America). For a similar argument, see id. pt. 1, at 9 (remarks of Professor Berle); id. pt. 2, at 482-83 (remarks of Representative Patman).
138 Bank Holding Companies, supra note 5, at 3.
139 House Hearings 1969, supra note 2, pt. 1, at 479.
140 Id. at 415. See also id. at 479. Underwriting of municipal revenue bonds by national banks was found unlawful in Port of New York Authority v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968).
141 Wall Street Journal, Nov. 6, 1969, at 2, col. 3; Am. Banker, Nov. 6, 1969, at 1, col. 2.
143 Staff Report, supra note 29, at 49.
144 Martin's definition of congeneric is in House Hearings 1969, supra note 2, pt. 1, at 198; Cameron, in The One-Bank Holding Company 64 (H. Froehnow ed. 1969) (Cameron is Chairman, First Union National Bank of North Carolina and its OBHC).
In this connection it is notable that although bank holding companies were not confined by law, they expanded mainly into financial fields before 1956. Transamerica, owner of a number of manufacturing subsidiaries, was the outstanding exception. The American Bankers Association would not oppose a ban on OBCHs engaging in fields "unrelated to banking and finance..."140

Not all bankers, however, are content merely to add floors to their department stores of finance. The founder of Union Bancorporation (now Union-america) testified that the holding company could apply its own resources to "a variety of diverse businesses," thereby making its stock more attractive to shareholders.147 Union-america views itself as a "capital management corporation" presently interested in "leisure-time firms" as well as "finance-oriented" ones.148

Multiple-bank holding companies affected by the 1956 Act were required to divest themselves of nonbank subsidiaries by 1958. Several exempted in 1956 were reached by the 1966 amendments.149 As of September 1, 1968, the 684 known OBHCs were involved in 99 different nonfinancial areas in agriculture, mining, manufacturing and service industries; 111 OBHCs were operators and lessors of real estate and 28 were real estate agents, brokers and managers, to mention the two most prevalent areas.150 Depending on the provisions in the law which finally emerge, all or most of these affiliates would be subject to divestiture.

Although most of the public debate has centered around bank-originated holding companies, in a number of cases an outside firm has acquired a commercial bank as a subsidiary. In the second half of 1968 alone, four banks with deposits ranging from $130-$415 million were acquired by conglomerates.151 The only instance, of five situations mentioned during the

146 Id. at 541 (A.B.A.); Carter H. Goelme Letter 69-2, at 9 (Feb. 26, 1969). For a list of affiliates of national banks in 1932, see Hearings on S. 4115 Before the Senate Comm. on Banking and Currency, 72d Cong., 2d Sess. 392 (1932). For Transamerica's holding, see Hearings S. 880, supra note 11, at 63.
147 House Hearings 1969, supra note 2, pt. 2, at 901.
148 Id. See also Morris, Clarifying the One-Bank Holding Company Concept, Burrougjms Clearing House, March 1969, at 38-39.
150 Staff Report, supra note 29, at 50-51.
151 House Hearings 1969, supra note 2, pt. 1, at 446-69 passim; Am. Banker, July 8, 1969, at 12; Bank Holding Companies, supra note 5, at 28-30. Five banks owned by nonfinancial corporations are mentioned in Hearings on Amendments to S. 2577 Before the Senate Comm. on Banking and Currency, 84th Cong., 2d Sess. 61 (1956): W. R. Grace owned the Grace National Bank, since merged into the Marine Midland Grace Bank of New York; on The Argo State Bank see Banking, July 1964, at 60; Deere & Co.'s stock in the Moline National Bank was donated to the Deere Foundation in 1958; the First Trust and Savings Bank of Taylorville was sold by the Peabody Coal Company to the PB and GH Large Investment Company (a business credit institution); and the Gimbel Brothers
1956 hearings, where a major corporation continues to own a single commercial bank is Corn Product Refining Co. It bought the Argo (Illinois) State Bank (located in the town with its largest manufacturing plant) in 1931 to save the institution from going under. The Goodyear State Bank (not mentioned in 1956), began in 1933 when the largest Akron bank closed its doors, and is still owned by the rubber products company. Other corporations have opened a new bank with the convenience of their workers in mind.

The conglomerate corporation owning a bank may be in a position to provide special management services used by its other subsidiaries as well. After Greatamerica Corporation acquired First Western Bank and Trust Company, Los Angeles, as part of a divestiture by Western Bancorporation approved by the Justice Department and the banking authorities, it made a thorough survey (including top management) which resulted in a reorientation of the bank's activities. In carving First Western out of United California Bank, the Justice Department hoped to create an effective statewide competitor to the existing California giants. Affiliation with a strongly-financed parent facilitated the 35 percent addition over a three year period to the $40 million capital it began with in 1962.

FDIC Chairman Randall (who opposes OBHC activities outside finance) nevertheless would allow existing conglomerates to retain their banks, since he is not aware of any situation "where the relationship has been abused to the detriment of the public."

In view of the fact that in a recent 18 month period there were about 20 take-overs by conglomerates involving commercial banks with deposits aggregating $2.4 billion, many bankers are pleased with the prospect that


152 *Amendments S. 2577, supra* note 151.
154 *Id.* at 448.
158 *Senate Hearings 1966, supra* note 13, pt. 2, at 730. All earnings were ploughed back in 1963 and 1964. *Senate Hearings 1966, supra* note 13, pt. 2, at 730-31. Similarly, the Goodyear State Bank had never declared a cash dividend. *Id.* at 734.
160 *Rose, supra* note 33, at 164.
proposed OBHC legislation would prevent such take-overs.\textsuperscript{162} However, the threat of take-over can serve as a protection, especially to small shareholders, that management operate with greater efficiency.\textsuperscript{163} The leadership in a well-run bank is aware, as the head of the Bank of America testified, that

the best protection against a takeover is aggressive and intelligent management which has earned the confidence of the stockholders to such a degree that stockholders will resist any attempt to purchase a controlling interest for the purpose of changing the existing management.\textsuperscript{164}

On the other side, the Nixon administration did not consider it good “for bank management to try to be reaching out all the time to maintain strong profit positions in order to ward off a raid,”\textsuperscript{165} because this would lead bankers into riskier loan commitments. This was not “a big immediate problem” for bank supervision, but one which “would loom very strong.”\textsuperscript{166}

One legislative solution is Senator Sparkman’s proposal that changes in bank control receive advance agency approval. Since 1964 such changes must be reported after the fact; the purpose of thus alerting the supervisory authorities is to help prevent bank failure.\textsuperscript{167} Another problem is that management might attempt self-perpetuation by buying stock in the OBHC for the trust funds which it manages. However, it appears that present supervisory powers could be utilized to eliminate this danger.\textsuperscript{168}

Fear that in the absence of legislation “we will soon see the line between banking and industry erased” was voiced by Federal Reserve Governor Sherrill early in 1969.\textsuperscript{169} With this erasure, Chairman Martin testified, we run “the risk of cartelizing our economy.”\textsuperscript{170} The administration seeks “preventive legislation . . . [which] would . . . stop a trend toward the merging of banking and commerce . . . .”\textsuperscript{171} It wishes “to draw a fair but firm line” between the two.\textsuperscript{172} As President Nixon has insisted: “Banking must not dominate commerce or be dominated by it.”\textsuperscript{173} The House Banking and Currency Committee pointed to the 1933 legislation affirming the principle

\begin{itemize}
\item \textsuperscript{162}Id.
\item \textsuperscript{163}Manne, Mergers and the Market for Corporate Control, 73 Pol. Econ. 117 (1965); see also House Hearings 1969, supra note 2, pt. 1, at 360 (remarks of Professor Gutmann, Baruch College).
\item \textsuperscript{164}House Hearings 1969, supra note 2, pt. 2, at 997 (remarks of Stewart); see also id. at 762 (remarks of Chairman Parsons, Bank of the Commonwealth, Detroit).
\item \textsuperscript{165}House Hearings 1969, supra note 2, pt. 1, at 425.
\item \textsuperscript{166}Id.
\item \textsuperscript{167}On S. 1211 see id. pt. 2, at 915, 996; Staff Analysis of the Comm. on Banking and Currency of the House, Acquisitions, Changes in Control and Bank Stock Loans of Insured Banks 1-2 (1967). For a list of all changes in control from September 12, 1964, when Pub. L. 88-593 went into effect, through the end of 1966, see id. at 42-105.
\item \textsuperscript{168}Comment, One-Bank Holding Companies: The Case Against a Legislative Roadblock, 36 U. Chi. L. Rev. 823 (1969).
\item \textsuperscript{169}Am. Banker, Feb. 21, 1969, at 16, col. 2.
\item \textsuperscript{170}House Hearings 1969, supra note 2, pt. 1, at 197 (remarks of Martin).
\item \textsuperscript{171}Id. at 84 (remarks of Kennedy).
\item \textsuperscript{172}Id. at 86 (remarks of Walker).
\item \textsuperscript{173}115 Cong. Rec. 3180 (daily ed. March 24, 1969) (remarks of President Nixon).
\end{itemize}
of "basic separation of bank and bank-related activities from other business activities." Actually the historic antecedents are far more ancient: the 1791 charter prohibited the Bank of the United States from dealing in or handling goods, a provision traceable to the Bank of England Act of 1694.

Since the fall of 1968, Comptroller of the Currency Camp has required all national bank-originated OBHCs to submit acquisition proposals for his approval; only financial activities have been allowed. An advocate of allowing banks to participate in any activities related to finance which would not imperil their solvency and liquidity, he has stated that for the sake of solvency and depositor safety, national banks have been prohibited "from engaging directly in manufacturing, mining, retailing, or any other enterprise in which a substantial amount of the bank's funds are put at risk." This policy is in accord with Supreme Court interpretations of the National Banking Act permitting banks chartered by the Comptroller of the Currency to take on even totally new functions "reasonably related" to traditional ones, provided the new roles do not involve "any substantial risk to the bank."

The Nixon administration would allow OBHCs to engage in financial activities "which may be beyond the incidental powers of national banks. . . ." Those who urge that holding companies should not enjoy any greater rights of product-line extension than ordinary banks are divided between persons who recognize the desirability of expanding banks' operations, and others (like the Independent Bankers Association of America) who would severely restrict bank functions.

COMPETITIVE CONSIDERATIONS AND ENTRY INTO BANKING

Senator Proxmire has suggested that the basis of the ban on bank participation in nonbank activities is the desire "to maintain free and open

174 Bank Holding Companies, supra note 5, at 2. See also B. Hammond, Banks and Politics in America from the Revolution to the Civil War 129 (1957); Staff Report, supra note 29, at 1-2.
175 Bank Holding Companies, supra note 5, at 2.
176 Camp, supra note 192, at 46-47.
177 Id.
178 Id. at 47. See also his speech before the Texas Bankers Association, in Comptroller of the Currency, Annual Report 1968, at 244, and his A.B.A. Convention talk appearing in House Hearings 1969, supra note 2, pt. 3, at 1238.
182 Id. at 49-50 (remarks of Professor Schwartz).
183 Id. at 491 (remarks of Harris); id. at 498 (remarks of Hansen); id. at 68-69, 500 (remarks of Milner). All three are connected with the Independent Bankers Association of America.
competition in these activities." One of the criteria for deciding which functions should be permissible for banks, he wisely recommends, is the "probable competitive effects of bank entry into nonbanking activities." After all, he reminds us, nonbank activities not closely related to banking may be favorable to competition, whereas bank-related activities might be anticompetitive.

The fact that about ¼ of the OBHCs in 1965 were in one-bank towns was cited by Chairman Martin as an argument for repeal of the 1956 exemption: "In such situations, it is particularly desirable that the bank's credit decisions be based solely on creditworthiness." However, in most one-bank towns, those who control the bank have other business interests as well, which would not be reached by the proposed legislation unless they happened to be part of the same holding company, as Comptroller of the Currency Saxon reminded the Congress.

The point that in thousands of communities banks are local monopolies, with small OBHCs having "[a] much more onerous . . . impact on individuals than some of these larger conglomerates" was brought out in 1969 testimony. The Staff Report for the House Committee on Banking and Currency mentioned that in many places "there are only one or two major banking institutions to which business can turn for substantial amounts of credit." Indeed, half of all local bank markets are one-bank towns, and another 45 percent comprise no more than four banks.

FDIC Chairman Randall found justification for confining banks and OBHCs to financial services in their distinctive status recognized in the bank charter as "special purpose institutions with unique responsibilities to the communities they serve." Also, banks enjoy protection against unrestricted entry. Describing entry as "severely restricted," Senator Proxmire is among those who consider this factor as "furthering the inherent monopoly existing banks have in the supply of bank credit."

Such comments overlook the fact that larger borrowers enjoy nonlocal

185 Id.
186 Id. While proposing a temporary freeze on expansion into unrelated activities, Proxmire is critical of the Treasury Department's forces hostile to conglomerates. Id. at 1698.
187 Senate Hearings 1966, supra note 13, at 59.
188 House Hearings 1969, supra note 2, pt. 1, at 194. See also id. at 361 (remarks of Professor Gutmann); id. at 521 (remarks of Representative Brown, Mich.). The Kansas Bankers Association emphasized the identical consequences whether control was by individuals or a holding company in Senate Hearings 1966, supra note 13, pt. 1, at 139.
189 House Hearings 1969, supra note 2, pt. 1, at 25, 36 (remarks of Professor Schwartz).
190 STAFF REPORT, supra note 29, at 2. Representative Bennett made the same statement, without quoting, in House Hearings 1969, supra note 2, pt. 1, at 296.
bank credit alternatives, while smaller borrowers who are consumers, homeowners and farmers generally have nonbank alternatives. Only small business borrowers can be said to be "limited largely to local bank sources of credit." 194

Chairman Patman voiced a widely held view when he stated before the House of Representatives: "Carrying with them their special status as monopolies or quasi-monopolies, the banks can only be 'unfair competitors' in nonbanking areas." 195 Insofar as a problem exists, the solution lies not in further anticompetitive measures which would deny commercial bank affiliates entry into other fields, but rather the easing, if not the elimination of restraints which presently hobble banking competition in many localities: outdated anti-branching laws, and regulatory restraints on the chartering of new banks.

Severe restrictions on new bank entry took effect amidst the psychology of the Great Depression. 196 This policy prevented an estimated 2000 new competitors from appearing. 197 These restrictions were liberalized during the period 1962-1964, but since the end of 1965 the number of banks disappearing through merger has consistently exceeded the number of new banks authorized. Recently a Task Force on Productivity and Competition appointed by President Nixon urged the encouragement of entry of new firms in regulated industries "wherever an absolute contradiction with regulatory goals is not involved." 198 Commercial banking is assuredly a case in point.

To the extent that OBHCs are permitted to diversify broadly, they should present fewer risks to investors. This would put the bank subsidiary in a position to move into areas not presently served, or scantily served because of the small volume of banking business (narrowly construed) in the area.

Over a period of years the "geographic diversification" permitted nonbank subsidiaries could increase significantly the number of effectively competing sources of finance in various local markets. With the increase in the number of alternatives consequent on freer entry into banking markets, OBHCs would lack the power to exploit customers and the misgivings expressed by critics would remain abstractions. 199

196 Peltzman, Bank Entry Regulation: Its Impact and Purpose, reprinted in STUDIES IN BANKING COMPETITION AND THE BANKING STRUCTURE 296 (G. Morris ed. 1966). The net increase would have been some 1519, 11 percent of the total number of banks in existence in 1964. Id. at 297 n.26.
197 Id. at 298.
198 STIGLER TASK FORCE REPORT at 6474.
199 See House Hearings 1969, supra note 2, pt. 2, at 541; Bunting, supra note 53, at 103; Mitchell, What Can We Do About Bank Structure, CHICAGO CONFERENCE 1969, supra note 42, at 113-14; Shull, id. at 106. There would appear to be slight basis for the warning issued by Donald Baker of the Antitrust Division that many "anticompetitive
CONGLOMERATE COMMERCIAL BANKING

THE ONE-BANK HOLDING COMPANY AND COMPETITION FROM OTHER FINANCIAL INTERMEDIARIES

Supporters view the OBHC as a means of strengthening the commercial banking system "by enabling it to compete more effectively against nonbank institutions."200 Today banks face a great deal of competition from regulated nonbank intermediaries, as well as from unregulated nonbank sources. Even if they wished to do so, the federal banking agencies simply cannot protect banks from such competition.201 Thus, the president of the American Bankers Association recently acknowledged that "for too long many bankers have feared" intra- and interindustry rivalry and sought regulation to curb these forces.202 Despite such efforts, there has been a marked increase in competition in banking and related financial markets over the past decade of growth. The overall effect of this development, as Comptroller of the Currency Camp has noted, "was to force bank management to examine every avenue for increased use of the capacity of both facilities and highly skilled manpower."203 The OBHC has become one such avenue.

Expansion of nonbanks into areas considered by commercial banks to be their preserve has prompted one banker to comment that "everybody and his brother [is] going into our business on an unregulated basis."204 Such areas include mobile home loans made by savings and loan associations, which seek authority to make all types of consumer loans; direct involvement in financing consumer cars by more auto manufacturers; the extension of long-term credit to charge customers by an increasing number of stores; corporate use of the commercial paper market for financing; and the acquisition of consumer loan companies by insurance companies.205 Other finan-

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acquisitions . . . might occur in local financial markets.”

\[\text{Id. at 130. He emphasized inadequate enforcement resources. Id. In 1955 Senator Douglas, a leading economist by profession, remarked:}

The possibility of abuse depends almost in direct ratio to the degree of control the holding company has over bank facilities. If there are adequate alternative sources of credit you cannot coerce people into using it, but if there are not alternative sources of credit then you can use your control of credit to get control over manufacturing, too.

\[\text{Hearings S. 880, supra note 11, at 66.}

\[\text{200 Cameron, supra note 144.}

\[\text{201 Alexander, Banking Competition in the '70's, Banking, Jan. 1969, at 25. Alexander is president of the Trenton (Mo.) Trust Company.}

\[\text{202 \text{Id. at 26.}

\[\text{203 Camp, supra note 132, at 38.}

\[\text{204 Unnamed banker quoted by President Cooley, Wells Fargo Bank, in Am. Banker, Nov. 22, 1968, at 4, col. 3. Cf. First National City Chairman Moore’s article in the Wall Street Journal, March 11, 1969, as reprinted in House Hearings 1969, supra note 2, pt. 1, at 121. More restrained is the A.B.A.'s description of “the gradual movement of nonbank institutions into virtually every area of bank operations, with the single exception of demand deposits.” Id., pt. 2, at 540.}

\[\text{205 Am. Banker, Nov. 22, 1968, at 4, col. 3. Commercial paper directly and indirectly accounted for about \( \frac{3}{4} \) of the \$7 billion increase in outside capital raised by nonfinancial corporations in 1969. Chase Manhattan Bank, Business in Brief (Dec. 1969).}
cial institutions as well as commercial banks are interested in developing into "department stores of finance."206

At the beginning of this century, and again as recently as 1945, commercial banks had ⅜ of the total assets of all private financial interme-

diaries.207 Their share declined from 63 percent to 38.3 percent in the two decades after 1945.208 Only with respect to demand deposits can commercial banks be said to have a unique role. Yet in every year since 1956 the net dollar increase in their time deposits has exceeded that in demand deposits.209 While total financial assets more than doubled between 1958 and 1968, net demand deposits rose only 40 percent.210 Demand deposits amounted to almost 60 percent of total financial assets in 1958, but under 40 percent in 1968.211

POSSIBLE ABUSES AND EXISTING STATUTORY POWERS

To require divestiture of subsidiaries only in cases of proven abuses would not be feasible, according to Chairman Martin. He viewed the 1956 Act as designed "to eliminate potential evils by correcting what Congress considered to be unsound corporate structures."212 When Congress placed restraints on multiple-bank holding companies and ordered divestiture, it did not have before it evidence of abuses. Consideration of such evidence would be in order at this juncture, if only to place Congress in a better position to decide what the consequences of "unsound corporate structures" are or might be.

There does not appear to be any pressing need for prompt Congress-

ional action.213 Existing statutes and regulatory powers can cope with the

207 Burns, The Relative Decline of Commercial Banks: A Note, 77 J. Pol. Econ. 126 (1969). Representative Hanna included a table on the relative importance of financial intermediaries showing that the decline of commercial banking’s share was from 62.8 percent of the aggregate ($102.1 billion) in 1930 to 49.7 percent (of $759.2 billion) in 1965. House Hearings 1969, supra note 2, pt. 2, at 674. This is traceable to a marked difference in the intermediaries included. Professor Burns shows 1965 assets of $934 billion, over 20 percent greater than Mr. Hanna’s total. In 1929 the commercial bank share was 53.6 percent of all intermediaries and in 1939, 52.2 percent. Burns, supra.
208 Burns, supra note 207.
210 Id. at Table A71.17.
211 Id. Commercial bank demand deposits as a percentage of assets of private financial intermediaries stood at 49.4 percent in 1945, 38.1 percent in 1952, 30.3 percent in 1958, and 21.3 percent in 1965. Burns, supra note 207, at 127. Governor Mitchell of the Federal Reserve cited figures of the relative roles of demand and time deposits in providing loanable resources. In 1947 the ratio stood at 2.4:1.0; in 1969, 0.8:1.0. Am. Banker, Dec. 10, 1969, at 7, col. 2. Relative to the then current GNP, demand deposits stood at 37 percent in 1947, 25 percent in 1957 and 17 percent in 1967. Id.
213 Contrast Assistant Attorney General McLaren’s testimony that “legislation to close the one-bank holding company loophole is urgently needed. . . .” House Hearings 1969, supra note 2, pt. 1, at 92.
abuses OBHCs are allegedly capable of perpetrating.\textsuperscript{214} The Comptroller of the Currency and the FDIC already have authority to examine any affiliate of banks under their jurisdiction, and the three federal banking agencies can now issue cease-and-desist orders.\textsuperscript{218}

According to Assistant Attorney General McLaren, as a result of the April 7, 1969 Supreme Court decision in \textit{Fortner Enterprises, Inc. v. United States Steel Corp.},\textsuperscript{216} it is "clear beyond doubt" that "market power in the supply of money — which is entirely fungible — could support a tying charge."\textsuperscript{217} Legislative proposals (e.g., the Administration or the Patman bill) to deal with tie-ins of credit with other credit, property or services, could have far-reaching adverse repercussions on long-standing commercial banking practices which have been neither analyzed nor investigated.\textsuperscript{218} Indeed, a recent economic analysis of tie-ins concludes that no new legislation is needed. The OBHC use of tie-ins does not present any threat to consumers beyond that already posed by an unaffiliated bank. The exception is where additional market power can be created, and the present antitrust laws are adequate in such situations.\textsuperscript{219}

Dire forecasts of economic power concentrations and \textit{Zaibatsus} in connection with the OBHC movement overlook existing antitrust enforcement policies of the Justice Department. Financial conglomerates are and will be subject to the same tests as their industrial counterparts.\textsuperscript{220} Thus, First National City dropped its plan to acquire Chubb, an insurer with $500 million in assets, 14th nationally in casualty insurance, and a major factor in maritime and aircraft insurance, after the Antitrust Division announced it would file suit opposing the acquisition.\textsuperscript{221}

Presently the Division has 30 days in which to decide whether to prosecute the acquisition of a bank by another bank or by a holding company. Such a time limit would be inadvisable for acquisitions of subsidiaries other than commercial banks.\textsuperscript{222}

\textsuperscript{214}For details, see Camp, \textit{supra} note 176, at 40-43. \textit{See also House Hearings 1969, supra} note 2, pt. 1, at 471 (remarks of Representative Brock, Tenn.).


\textsuperscript{216}394 U.S. 495 (1969). In \textit{Fortner} the Supreme Court found that "tie-ins involving credit can cause all the evils that the antitrust laws have always been intended to prevent, crippling other companies that are equally, if not more, efficient in producing their own products." \textit{Id.} at 509.

\textsuperscript{217}\textit{House Hearings 1969, supra} note 2, pt. 1, at 95 (remarks of McLaren). For earlier cases involving bank tie-ins and exclusive dealing, see G. FISCHER, \textit{AMERICAN BANKING STRUCTURE} 283-66 (1968).

\textsuperscript{218}\textit{House Hearings 1969, supra} note 2, pt. 1, at 544-45 (A.B.A.); \textit{id.} pt. 3, at 1314-16 (Marine Midland).

\textsuperscript{219}Edwards, \textit{Tie-In Sales in Banking and One-Bank Holding Companies}, 14 \textit{ANTI-TRUST BULL.} 587 (1969).

\textsuperscript{220}Am. Banker, Jan. 27, 1969, at 1, 8, col. 2 (citing the remarks of Lionel Kestenbaum, Antitrust Division); \textit{see also House Hearings 1969, supra} note 2, pt. 1, at 99, 167 (remarks of McLaren).

\textsuperscript{221}Am. Banker, June 20, 1969, at 2, col. 1.

\textsuperscript{222}McLaren wanted this made clear in any new legislation. 115 CONG. REG. 10,565-66
Even if no new legislation were enacted, a headlong rush by OBHCs to acquire affiliates is unlikely. For one thing, the securities of many other types of expansion-minded corporations sell at a higher price relative to earnings than does bank stock. For another, holding company management must be drawn largely from the original bank, but OBHCs "are starting with ... important managerial shortages."223 Given these practical considerations, as well as the existing authority of the regulatory agencies, there is hardly any danger from a runaway expansionary movement by OBHCs which would be irreversibly detrimental to the economy. The present-day OBHC phenomenon presents Congress with a challenge to carefully consider afresh basic issues in our contemporary financial system.

NEEDED: A NATIONAL COMMISSION ON BANKING

The attitude so prevalent in federal legislative and executive circles that something needs to be done about OBHCs would have at least one desirable consequence if Senator Proxmire's bill calling for the establishment of a National Commission on Banking224 were enacted. A comprehensive investigation of major issues and trends in the commercial banking industry is long overdue. Such a series of authoritative studies and hearings would form a solid foundation on which to base whatever statutory and procedural reforms are needed to promote a modern, serviceable, competitive banking system for the United States.225 The National Commission on Banking might very well conclude, *inter alia,* that there is no substantial basis for (1) the present degree of restrictions on entry; (2) the insistence on the existing definitive separation of commercial banking from nonbank activities;226 and (3) the continuation of the Great Depression-born severance of investment from commercial banking.227

There are certain similarities between the modern OBHC movement and the inroads of trust companies into commercial banking which occurred in the second half of the nineteenth century. In both cases, the device was of long standing; while a number of "bank & trust" companies were organized under New York's Free Banking Act of 1838,228 banks began to feel the competition only around 1873.229 As the editor of *Bankers Magazine*

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223 Bunting, *supra* note 53, at 105. As Barron's remarked, "few new organizations have been especially aggressive in forming or acquiring subsidiaries." Barron's, Mar. 24, 1969, at 11.

224 S. 1052 would also bring OBHCs under the 1956 Bank Holding Company Act, allowing them to retain any business owned at the start of 1969. 115 CONG. REC. 1699-1700 (daily ed. Feb. 18, 1969).

225 *Id.* at 1698 (remarks of Senator Proxmire).


observed in 1875, the New York City trust companies were doing "a banking business without being subjected to the restrictions of the banking law."\textsuperscript{230} By 1885, complaints of competition from trust companies were general, and New York responded in 1887 by placing them under state supervision.\textsuperscript{231} Despite this, they enjoyed advantages with respect to loans secured by real estate, reserve requirements, and taxation.\textsuperscript{232} By 1909 the trust company had already evolved to a great extent into a department store of finance.\textsuperscript{233} By way of counterattack, national banks sought fiduciary powers as early as 1906,\textsuperscript{234} and succeeded in gaining them by 1913.\textsuperscript{235}

Just as commercial banks were provoked by the trust company invasion, it is not surprising that today competitors are distressed at the prospect of increased rivalry from OBHCs. Chairman Patman, among others, has argued that "the special privileges and rights" which Congress has granted the banks should not be "used to compete unfairly with other segments of the business community."\textsuperscript{236} It would, however, be unwise for Congress to protect those who feel threatened by commercial bank expansion into new fields with legislation unnecessarily restrictive of financial innovation. Instead, all such special provisions should be reexamined in the light of contemporary circumstances, and eliminated unless clearly required in the interest of depositor safety. As an example, discriminatory taxation may be involved.\textsuperscript{237}

The ideal for economic policy stated by Wilson during his 1912 campaign still deserves our allegiance with respect to the OBHC issue: "America stands for a free field and no favor."\textsuperscript{238} Those who oppose the OBHC should recall that the success of retailers in enacting chain taxes and the Robinson-Patman Act in the 1930's did not significantly affect mass distribution.\textsuperscript{239} Industries which feel menaced by conglomerate expansion of commercial banks can survive in the long run only by meeting the challenge of the competitive marketplace, rather than by seeking legislative fetters for commercial bank-related corporations.

\textsuperscript{230} 29 BANKER'S MAG. 676-78 (1875), quoted in, J. SMITH, supra note 229, at 331.
\textsuperscript{231} J. SMITH, supra note 229, at 333.
\textsuperscript{232} Id. at 345.
\textsuperscript{233} Id. at 356.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 381. A 1902 analysis noted that trust companies developed for two main reasons: (1) freedom from lending and investing restraints imposed on national banks, and (2) the variety of financial business in one company "each aiding to build up the other." G. CATO, TRUST COMPANIES IN THE UNITED STATES 65-66 (1902).
\textsuperscript{236} 115 CONG. REC. 4222 (daily ed. May 27, 1969).
\textsuperscript{237} For an analysis of federal taxation of intermediaries, see Keith, The Impact of Federal Taxation on the Flow of Personal Savings through Investment Intermediaries, in PRIVATE FINANCIAL INSTITUTIONS 385-460 (P. Horvitz ed. 1963); HOUSE COMM. ON WAYS AND MEANS, 86TH CONG., 1ST SESS., TAX REVISION COMPENDIUM, pt. 3, at 1776-79, 1797-99 (1959).
\textsuperscript{238} W. WILSON, THE NEW FREEDOM 221 (1913).
\textsuperscript{239} J. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 257 (1955).
part II

ANTITRUST