The Judicial Leap into the Glass-Steagall Thicket

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In *Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, the Supreme Court of the United States, in a six to three decision, overruled a Federal Reserve Board's determination that a commercial bank, within the constraints of the Glass-Steagall Act, could deal in private, third-party commercial paper [8]. In so doing, the majority, relying on its interpretation of the events that preceded passage of the Act, and the perceived legislative purpose, declined to follow the ordinarily invoked judicial doctrine that a tribunal should defer to a reasonable administrative interpretation of an act administered by an agency. The purpose of this paper is to explore the nature of commercial and investment banking, examine the events in the financial sector that precipitated enactment of Glass-Steagall, look at the terms of the Act, and analyze the Supreme Court's plunge into the role of arbiter of the restraints Glass-Steagall imposes on commercial banks to assure that investment banking remains distinct from commercial.

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COMMERCIAL BANKING AS A DISTINCT TYPE OF BUSINESS

Beginning with the first bank chartered by the national and state governments, banking has been viewed as a distinct type of business. However, commercial and investment banking have not always been classified as falling within two distinct business categories. The first state charter was granted in 1782. In 1791 Congress chartered the first national bank. By the mid-1830's a number of state-chartered institutions were involved in investment banking.

New York was the first state to enact a general bank incorporation law, putting an end to the need for the legislature to grant individual charter requests. The statute was the precursor of other state bank incorporation laws as well as the federal National Bank Act of 1864.

Under the New York Act, banks were vested with the

> power to carry on the business of banking, by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their ... [charter]; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business...

The powers conferred under the Act were "based on the historical activities of deposit taking, credit granting, and credit exchange."

The National Currency Act was passed by Congress in 1863. In 1874 its name was changed to the National Bank Act of 1864. Like the New York legislature, Congress recognized banking as a distinct type of business. A bank holding a charter under the 1864 Act was granted

> power to carry on the business of banking by obtaining and issuing circulating notes in accordance with the provisions of ... [the Act]; by discounting

> bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins, and bills of exchange; by loaning money on real and personal security, in the manner specified in their ... [charters], and by exercising such incidental powers as shall be necessary to carry on such business ....

The Supreme Court of the United States in 1872, describing the banking business, noted that:

> Banks in the commercial sense are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking the word bank implies a place for deposit of money .... Originally the business of banking consisted only in receiving deposits, ... but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even three of those functions... [7]

By the end of the nineteenth century, national- and state-chartered banks, through their bond departments, were involved in buying and selling stocks for their customers and their own accounts. However, in 1897 the Supreme Court ruled that the 1864 Act did not empower national banks to carry on the business of underwriting or trading in corporate stocks [5]. In 1902 the United States Comptroller ruled that national banks could not conduct broad investment banking activities, but could trade in corporate and government debt instruments.

Confronted with limitations on directly and freely carrying on investment banking, beginning in 1908, numerous commercial banks established securities affiliates. In form a distinct entity, in substance an affiliate carried on a bank's investment banking business. By the 1920s many commercial banks, through their affiliates, were committed to investment banking. Proponents of this linkage contended that such an arrangement promoted the nation's industrial development by providing enterprises with a means of quickly gathering large amounts of required capital.

Several months after the flurry of bank failures that occurred subsequent to the 1929 stock market crash, President Hoover, responding to the belief held by some that the collapse of securities affiliates undermined confidence in the solvency of commercial banks, recommended that Congress consider adopting legislation separating commercial from investment banking. In 1933 Congress acted, passing the Glass-Steagall Act, also known as the Banking Act of 1933. The law bars national banks from directly engaging in investment banking. It also makes it illegal for a commercial bank to affiliate with an organization engaged in investment banking. The statute abolishes security affiliates of commercial banks.

Sections 16 and 21 of the Act are the portions of the law that deal with the linkage of commercial and investment banking. Section 16, consistent with the long-established view of what constitutes commercial banking, empowers a bank to discount and negotiate promissory notes, drafts, bills of exchange, coin, and bullion, lend money on personal security, obtain, issue, and circulate notes as permitted by law, and engage in other lawful incidental activities "necessary to carry on the business of banking." A bank's dealings with persons interested in trading in investment securities is expressly "limited to purchasing and selling such securities without recourse, solely upon order, and for the account of, customers." Banks are barred from underwriting any issue of securities. Purchases of securities for a bank's own account, except for governmental obligations, are severely restricted. Section 21 of the Act makes it unlawful

> [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor.

In the 1950s Congress retreated somewhat from the philosophy of segregating commercial banking from any other type of business. The Bank Holding Company Act of 1956 permits a holding company to operate a bank and engage in other businesses, so long as such businesses are closely related to banking. Gradually, banks and bank holding companies proceeded to expand their activities. As they did, other actors in the marketplace, seeing their turf invaded, proceeded to challenge the newcomers.

THE UNITED STATES SUPREME COURT STIRS

In *Investment Company Institute* v. *Camp* [6] (*ICI I*) the Supreme Court of the United States for the first time explored the import of Glass-Steagall. It did so in the context of a challenge to a national bank operating a closed-end mutual investment fund. The majority, speaking through Justice Stewart, found the bank's activity unlawful.

The Court acknowledged that commercial banks may act as trustees. In 1927 the first common trust fund was established. A Federal Reserve Board Regulation promulgated in 1937 specifically authorized operation of such a fund. So, "[f]or at least a generation," the Court noted, there was "no reason to doubt that a national bank ... [lawfully could, consistent] with the banking laws, commingle trust funds on the one hand, and act as a managing agent on the other." Although under banking law a national bank could pool trust funds, act as a managing agent for its customers, or buy stock for its customers' accounts, could it legally operate a closed-end investment trust that required that these powers be exercised simultaneously? The majority's response was a resounding "no"!

Justice Stewart did not point solely to Sections 16 and 21 of Glass-Steagall. He took into account two other sections of the law, 20 and 32. The former prohibits affiliation between banks that are members of the Federal Reserve System and organiza-

tions "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities." Section 32 bars any officer, director, or employee of a bank in the Federal Reserve System from simultaneously serving as an officer, director, or employee of an association primarily engaged in an activity described in Section 20.

The linchpin of the Court's analysis was its perception of why Congress enacted Glass-Steagall. Justice Stewart found that the proponents of the statute believed that commercial banks were adversely affected by the investment banking activities of their securities affiliates. This was especially so when they dealt in or owned speculative securities. The Act's advocates concluded that the "hazards" and "financial dangers" inherently present when commercial banks are connected with investment activities "outweighed" any benefits that might result when commercial banks engage in investment banking.

Justice Stewart spoke of legislative concerns that went beyond the obvious risk present when commercial banks significantly invest in securities. He spoke of "the more subtle hazards" that may arise when they are involved in investment banking. To successfully conduct its investment banking business, a commercial bank is prone to succumb to debilitating pressures and temptations. To ward off loss of public confidence in the bank that might follow failure of its securities affiliate, a bank would be tempted to aid the affiliate, extending it questionable or unsound loans or render some other sort of insidious assistance. So as to promote a particular security and help its affiliate, a bank might extend credit to the affiliate without exercising the degree of care that usually marks a lending transaction. The bank's "salesman's" interest might impair its ability to function as an impartial source of credit.

The Court noted that bank depositors, when they make investment decisions, may be influenced by a commercial bank's link with its securities affiliate. Such unwarranted reliance could cause customer injury. A bank's determination not to lose cus-

tomer good will "might become an important handicap to a bank during a major period of security market deflation." To promote its affiliate, a bank might cloak the affiliate with its "reputation for prudence and restraint." This could undercut the bank's reputation should the securities marketed by the affiliate prove to be of little if any value. To promote its affiliate, a bank may be tempted to make unsound loans to the affiliate's customers. Justice Stewart pointed to the Act's prime advocate, Senator Glass, who asserted that commercial bank facilities should not be "diverted into speculative operations by the aggressive and promotional character of the investment banking business." The Justice spoke of the conflict of interest that necessarily arises when commercial and investment banking are intertwined. Investment banking entails promoting persons to partake in securities transactions while the duty of commercial bankers is to give "disinterested investment advice." Advice offered by a banker is more likely to be grounded on concern for the safety of the depositor's investment when the banker has nothing to sell the depositor than when the depositor is viewed as a potential purchaser of securities offered for sale by the bank or its affiliate. A securities affiliate, seeking to move its products, may turn to the commercial bank's trust department for help. Having a pecuniary interest in the affiliate, desiring it to be successful, the department may be tempted to buy securities from the affiliate that otherwise it would not purchase.

The Court rejected the argument that buying or selling an interest in a closed-end investment fund does not involve a securities transaction. Justice Stewart insisted that when the term "securities" was used in Sections 16 and 21 Congress meant it to include both equity and debt securities. He did not find that Congress sought to distinguish between the sale of an interest in a business engaged in buying, holding, and selling stocks for investment and the sale of an interest in an industrial or commercial enterprise. As he read Glass-Steagall, "security" includes "an investment in an investment fund." Justice Stewart remarked that when the Act was passed Congress was aware of the fact that bank affiliates were involved in selling interests in investment trusts. Congress, determined to divorce commercial from invest-

ment banking, did not indicate that it sought to allow a national bank to operate an investment trust. So far as the Court was concerned, the very same hazards and temptations are present when a commercial bank is involved in an investment trust as is the case with other investments commonly considered securities transactions.

Justice Blackmun, dissenting, did not find that a closed-end investment fund was blemished by the hazards and temptations feared by Justice Stewart. He insisted that Congress did not intend to preclude commercial banks from operating such a fund. In his opinion, the fund was simply a trust, "akin to the traditional bank function." Glass-Steagall permits large investors to request a commercial bank to purchase securities for their accounts. The fund simply offers small investors a like opportunity.

In *Board of Governors of Federal Reserve System* v. *Investment Company Institute* [4] (*ICI II*), the Supreme Court had the opportunity to review the import of *ICI I*. It was asked to decide whether the Board could promulgate a regulation that permitted a bank holding company and its nonbanking subsidiaries to serve as an investment advisor to a closed-end investment company. According to the Court, an investment advisor's tasks are to organize and manage an investment company under a contract with its customer. For a management fee, the advisor chooses the company's investment portfolio and supervises most of the company's business. The Board distinguished open-end from closed-end companies as follows. The former issue securities, commonly engage in continually selling the company's shares, stand ready to redeem the shares, and issue new shares to avoid shrinkage due to redemption. A closed-end company seldom issues shares after its initial organization and does not stand ready to redeem them. Shareholders sell their shares in the marketplace. Under the regulation in question a bank holding company could not sponsor, organize, or control an open-end investment company but, within specified restrictions on share issuance, share ownership, sale and distribution of shares, and extension of credit, it could sponsor a closed-end investment company. The regulation

was challenged as authorizing a service not "closely related" to banking and therefore contrary to Glass-Steagall. A unanimous Supreme Court sustained the regulation.

Justice Stevens delivered the Court's opinion. He found that an investment advisor's services do not substantially differ from commercial bank's traditional fiduciary advisory role. Banks ordinarily serve as executors, trustees, manage funds entrusted to them, buy and sell securities from customers, and operate trust funds in which customers' interests are commingled. Advisory services are closely related to commercial banking. Glass-Steagall does not bar a bank or its affiliates from offering such services to a closed-end investment company. The act is directed at dissociating commercial banks from investment banking so that they will not partake in dangerous underwriting ventures, stock speculation, or allocation of bank resources to assure a market for an issuer's securities. The risks that mark investment banking are absent when a bank serves as an advisor.

ICI I does not militate a different result. The mutual fund before the Court in that instance, although spoken of as closed-end, "was the functional equivalent of an open-end investment company." Those hazards that concerned Justice Stewart are not present here. To comply with the objected-to regulation, an investment advisor may not issue, sell, or underwrite the closed-end investment company's securities. In *ICI I* the bank engaged in such activities. The temptations mentioned by Justice Stewart do not confront an advisor serving a closed-end fund. Not being subjected to the sort of pressures noted in *ICI I*, the advisor has no reason to do the sort of things abhorred by Congress. Receipt of advisory fees would give "little incentive to a bank or its holding company to engage in promotion activities."

THE SUPREME COURT STANDS PAT

In *A. G. Becker Incorporated* v. *Board of Governors of the Federal Reserve System* plaintiffs, one a securities broker and

dealer, and the other an organization representing over 500 securities brokers and dealers, challenged the legality of a decision by the Board permitting Bankers Trust Company to market commercial paper issued by third parties. Bankers Trust agreed to lend the issuers money equal to the amount of the unsold paper. Plaintiffs contended that the Board's action was barred by Glass-Steagall because Bankers Trust, a commercial bank, had been authorized to engage in commercial banking. The Board insisted that the paper, for purposes of the act, was not a security and Bankers Trust when marketing it, would not be conducting investment banking.

The federal district court disagreed with the Board. [1] It rejected the Board's rationales that (1) Bankers Trust, by selling the paper, would be engaged in a "traditional banking function," such as selling notes and banker's acceptance to other lenders or issuing certificates of deposit and (2) a functional analysis of the challenged transactions showed that sale of the paper is akin to a loan, rather than a sale of securities.

Citing *ICI I*, the court noted that Section 21 of Glass-Steagall encompasses both equity and debt securities. When the legislature used the terminology "notes and other securities" it intended the section to apply to stocks, bonds, debentures, as well as commercial paper. The phrase "securities or stocks," found in Section 16, communicates Congress's desire to include commercial paper within the section's mandate.

Under the functional-analysis standard espoused by the Board, the agency concluded that when a bank sells commercial paper, in substance it is lending the issuer money. The tribunal scoffed at this view, depicting it as "glossing over" the distinction between a bank purchasing commercial paper for its own account, perhaps for its trust department, and selling such instruments as stocks and bonds to investors so that the issuer could raise capital. The latter activity was described as "unquestionably at the heart of the securities industry." Were banks allowed to transact such business they would be carrying on investment, not commercial, banking. The Board's formulation and use of its functional-anal-

ysis standard was condemned as an improper intrusion into Congress's domain. The agency was engaging in policy-making. This it may not do.

The plaintiff dealer and broker appealed. A divided Court of Appeals reversed. [2]

Judge Wilkey, writing for the court, focused on the characteristics of the commercial paper in question: its prime quality, its very short maturity -- usually 30 to 90 days, the issuers -- ordinarily "large, financially strong corporations" seeking funding for their "current needs," the denominations of the instruments -- averaging not less than one million dollars, the purchasers -- "large sophisticated" investors -- such as money market mutual funds, bank trust departments, insurance companies, and banks. The paper sold by Bankers Trust was highly rated and sold to institutional investor customers who regularly bought short-term instruments from the bank. Although Bankers Trust did not commit itself to buy the unsold paper of any issuer it represented, it did purchase the issuer's paper in the secondary market.

The court shunned the district court's "plain language" approach to the meaning of Glass-Steagall's restriction. It emphasized the limited power of a tribunal to judge the propriety of the Board's conclusion when it is "*sufficiently reasonable* to be" acceptable. Judge Wilkey ruled that the tribunal should defer to the Board's reading of Glass-Steagall. Congress vested the agency with power to administer federal bank regulation policy. The Board possessed expert knowledge of commercial banking practices. The Board's interpretation was predicated on a thorough and expert examination of legal and policy considerations. The agency's decision was consistent with its prior actions. But, cautioned the court, since deference is not synonymous with abdication of judicial responsibility, it was obliged to review the applicability of Glass- Steagall within its limited role.

Judge Wilkey noted the language and legislative history of the statute. Congress enacted the law to avoid the temptations and hazards enumerated in *ICI I*. In Judge Wilkey's opinion, the act's

language does not prohibit a commercial bank from selling commercial paper. Section 16 does not mention notes, speaking only of securities and stock. Although Section 21 forbids banks from underwriting notes, this could, in the context of the law, be construed to mean only long-term debt, such as bonds or debentures. Long-term notes may be treated as bonds or debentures because they too are used to raise capital. Commercial paper, although a note, is different. It matures more quickly, in most instances within nine months, and is used to satisfy short-term credit for current needs. Judge Wilkey concluded that Congress intended Section 21 to apply only to long-term investment securities. This section includes the words "stocks, bonds, and debentures." For purposes of the act, a sale of commercial paper is to be treated as a loan, not a securities transaction.

The majority approved the Board's functional-analysis test. Neither the act's language nor its legislative history is adequately clear to allow formulation of a "foolproof formula" to test the legality of a commercial bank marketing commercial paper. The court sustained the Board's functional-analysis technique. Under it an instrument may be sold by a commercial bank so long as it is "more functionally similar to a traditional commercial banking operation than an investment transaction." If a practice does not pose the hazards spoken of in *ICI I* it is lawful.

The court pointed out that usually only highly solvent corporations with the best possible bond ratings issue these instruments and that their rate of default is extremely low. Only sophisticated investors, capable of evaluating the risks involved, buy commercial paper. As seen by the court, the only difference between a commercial bank extending a loan and marketing commercial paper is that in the former transaction the bank purchases the borrower's commercial paper and when it markets commercial paper it sells a loan.

Judge Robb dissented. He found Bankers Trust's sale of commercial paper violated Glass-Steagall. Rejecting the functional-analysis test, he took issue with the majority's refusal to distinguish between a commercial bank lending money and selling

a third party's promise to repay a loan. Congress, he maintained, was determined to deny commercial banks the authority to perform the latter function. When a bank lends money, the bank is the investor and its funds are at risk, but when it markets an issuer's commercial paper, the investor's funds are at risk. When extending a loan, a bank has an incentive to use the sort of care it may not exercise when it sells a borrower's promise to repay. It earns its fee by selling the paper and is not injured if the debtor defaults.

The dissenter observed that Penn Central Transportation Company, within the last thirteen years, had defaulted on $82.5 million in commercial paper in $100,000 denominations. Until three weeks prior to default, it had been given a prime rating by Dun & Bradstreet, Inc. The investors in that instance met the sophisticated investors standard.

Judge Robb expressed fear that a bank, selling an issuer's paper, to protect its reputation for sound financial decision-making might be swayed to abandon its usual approach to extending credit and make an unsound loan to the issuer. Sophisticated investors may be among the bank's most influential and important customers. Fear of losing their good will if the investment proved to be unsound could distort the way the bank dealt with them and the issuer. Unpaid, third-party commercial paper could trigger lawsuits against the bank, injuring its reputation for financial prudence.

Expressly recognizing the importance of the outcome of the litigation for the nation's financial markets, the Supreme Court agreed to review the decision of the Court of Appeals. In a six to three vote the Supreme Court reversed. [8]

Justice Blackmun spoke for the majority. He found that Glass-Steagall embodies Congress's conclusion that certain investment banking activities are "fundamentally incompatible with commercial banking." Subtle hazards to a commercial bank behaving properly arise when it "goes beyond the business of acting as a fiduciary or managing agent" and carries on the investment

banking business. In the Justice's opinion, it is "unrealistic to expect" an institution to offer impartial advice to investors when counseling them on securities that, if sold, bring the bank a profit. A bank's behavior is likely to be influenced by its self-interest in successfully selling those securities it markets. Taking an objective view as to how it should use its assets may be impossible when a bank has a stake in the success of its investment banking business.

The Court, like the district court, ruled that Sections 16 and 21 barred Bankers Trust from selling the commercial paper in question. Being of the opinion that Section 21 would be more helpful than Section 16 for purposes of deciding the case, Justice Blackmun focused on the argument that commercial paper is not a security. Since the act defined neither the term note nor security, the words should be given their ordinary meanings. Bankers Trust was trading in unsecured promissory notes. Such an instrument commonly is called a note. Congress gave no signal that the term note should be restricted to include only those instruments that resemble stocks, bonds or debentures. Justice Blackmun observed that neither in Section 16 nor Section 21 did Congress disclose an intent that the term "securities" should be read narrowly. He alluded to the Securities Act of 1933 and Securities Exchange Act of 1934. They define security so as to include commercial paper.

The Board's "cluster" or "functional-analysis" test was unacceptable in light of the "literal meaning" of the act. Were the Court to invoke the Board's standard, it would, in the Justice's view, be acting as a "super-legislature." The Justices were convinced that the Board misapprehended Congress's objective: barring commercial banks from marketing securities. An investment banker has a salesman's interest, a stake in successfully marketing securities. Such an interest is at odds with the need for banks to behave in a "prudent and disinterested" fashion. Justice Blackmun recited the laundry list of concerns found in Justice Stewart's opinion, the decision of the district court, and in Judge Robb's dissent. He attached no importance to the supposed safety of commercial paper, observing that the act does not provide for

distinguishing between prime and other types of notes. A bank could make paper prime simply by extending back-up credit to the issuer. The act draws no distinction between speculative and conservative investments. A commercial bank is prohibited from marketing any type of security.

Justice Blackmun rejected the "sophisticated investor" criterion approved by the Court of Appeals, convinced that "[t]he Act's prohibition on underwriting is a flat prohibition that applied to sales to both the knowledgeable and the naive."

Justice O'Connor, with whom Justices Brennan and Stevens joined, dissented. She described the law governing commercial banking involvement in investment banking as "complicated," "specialized and technical", with the "relevant statutes" neither clear nor easy to interpret. In such a milieu, she asserted, the Court must pay "substantial deference to the Board's interpretation" of Glass-Steagall. The agency not only possesses "expertise and experience" on the subject, but also is charged with administering federal banking law. Accordingly, unless its construction of the statute is unreasonable, it should be followed. Justice O'Connor found the Board's reading of the Act reasonable. She rejected the majority's contention that when Congress used the terms notes and securities they were meant to include commercial paper. Ordinarily, the term commercial paper is defined more narrowly than the word note. It is neither a note nor a security within the meaning of Glass-Steagall. Justice O'Connor insisted that commercial paper could not be classified as an investment security because it is a short-term loan, not an investment such as stocks, bonds, or debentures.

The dissenters asserted that whatever meaning might be ascribed to the terms note and securities in the context of other statutes could play no part in determining what they were intended to mean in the framework of Glass-Steagall. Beginning with the National Bank Act of 1864 commercial banks are authorized to discount and negotiate promissory notes. In Section 21 of Glass-Steagall "notes" is mentioned along with investment instruments: stocks, bonds, and debentures. Commercial paper is not an

investment instrument. For the purposes of Section 16, the Board properly could classify commercial paper as distinct from an investment security. Because commercial paper does not come within either Section 16 or Section 21, the majority's refusal to sustain the Board's functional-analysis test was unjustified.

CONCLUSION

In *ICI II* the Supreme Court abided by the often-voiced admonition that when reviewing an agency's determination, whether it be in the form of an interpretative ruling or decision in an order-making proceeding, that body's decision "is entitled to the greatest deference." [3] Explaining why the Court was invoking the doctrine in this instance, Justice Stevens wrote that an interpretative rule was in question, not an order handed down in a quasi-judicial proceeding. Accordingly, the Board would have to continue to decide, on an ad hoc basis, whether a commercial bank's conduct strayed beyond its traditional fiduciary role of managing customers' accounts. Because of the limited impact of the Board's action in this instance, the Court, not finding that Glass-Steagall plainly required a contrary result, invoked the usual substantial deference principle.

Justice Stewart declined to accord substantial deference to the Comptroller's regulation before the Court in *ICI I*. He acknowledged that "[i]t is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of the statute." Why not abide by the Comptroller's decision in this instance? Because the tribunal found that the Comptroller had not presented an "expressly articulated position" on the question of the applicability of Sections 16 and 21 to a mutual fund. Without the agency explaining how and why it arrived at its decision to promulgate the regulation in question, the regulation could not be treated as an administrative interpretation of Sections 16 and 21. When the expert charged with administering the law offers no ra-

tionale to support the action taken by the agency, the deference principle is inapplicable.

Although in *Securities Industry Association* Justice Blackmun alluded to the deference doctrine, the majority did not defer to the Board's interpretation of Glass-Steagall. The deference doctrine was said to be an appropriate guide when an agency's "interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." However, the deference principle "is not a device that emasculates the significance of judicial review." It "only sets the framework for judicial analysis, it does not displace it." A court, when reviewing an agency's behavior, is at liberty to reject a rule or order that is "inconsistent with the statutory language" or would frustrate congressional policy. At the agency level, the Board took the position that commercial paper was not a "security" under Glass-Steagall. But before the Court, Board's counsel, seeking to sustain the agency's action, argued that commercial paper does not pose the hazards enumerated in *ICI I*. The majority of the Court concluded that this apparent shift of position detracted from the significance of the Board's interpretation of the act, precluding use of the deference rule.

The Supreme Court's reasoning in *ICI I*, *ICI II*, and *Securities Industry Association* displays the Justices' determination to apply Glass-Steagall broadly. The Court is resolute that commercial banking be divorced from investment banking, unless Congress clearly signals to the contrary.

The challenge of protecting the public from the temptations and hazards that inevitably taint commercial banking when it is linked with investment banking could prove to be of such a magnitude that Glass-Steagall may be preserved in its present form for the foreseeable future. Problems raised by deregulation of interest rates appear to be almost inconsequential when compared with the potential difficulties that might accompany the blending of commercial with investment banking.

REFERENCES

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3. *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441 (1947).

4. *Board of Governors of the Federal Reserve System* v. *Investment Company Institute*, 450 U.S. 46 (1981).

5. *California Bank* v. *Kennedy*, 167 U.S. 362 (1897).

6. *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971).

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