

THE ENTRANCE OF BANKS INTO THE FIELD OF MUTUAL FUNDS

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The banking industry has watched jealously the dramatic growth of mutual fund assets during the past several decades.¹ Regulations issued by the Federal Reserve Board, however, have prohibited banks from engaging in activity similar to that conducted by the mutual funds.² Nonetheless, a realignment of regulatory powers in 1962 provided the banking industry with an opportunity to apply the investment expertise of bank trust departments to mutual fund activities. First National City Bank of New York (Citibank) was the first bank to avail itself of this new regulatory freedom, establishing a commingled investment fund (CIF) comprised of numerous agency investment accounts. Recently however, the entrance of banks into the field of mutual funds was at least temporarily thwarted when the United States Supreme Court, in *Investment Company Institute v. Camp*,³ held that a commingled investment fund violates Sections 16 and 21 of the Glass-Steagall Act.⁴ This article will analyze the *ICI* decision and will suggest approaches available to those banks interested in applying the investment expertise of their trust departments to mutual fund activities.

I. THE BACKGROUND

Mutual funds provide relatively small investors with the benefits of expert investment advice which they could not individually afford. The ability of *banks* to provide similar investment advice to small investors is hampered by the fact that the cost of managing an account, an expense that must be paid out of the investment income of the account, does not decrease markedly with a decrease in account assets.⁵ Accounts of less than \$500,000 are subject to this inflated

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¹ See Hearings on S. 1659 Before the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess., pt. 1, at 3 (1967) (testimony of SEC Chairman Manual F. Cohen).

² 2 Fed. Reg. 2976 (1937); SEC Reg. F, 12 C.F.R. § 206.10(c), .17 (1939); see 42 Fed. Res. Bull. 228 (1956); 41 Fed. Res. Bull. 142 (1955); 26 Fed. Res. Bull. 390, 393 (1940).

³ 401 U.S. 617 (1971).

⁴ 12 U.S.C. §§ 24, 378 (1970).

⁵ First National City Bank, SEC Investment Company Act Release No. 4538 (March 9, 1966), [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77332 at 82,587 (1966) reprinted in Hearings on S. 2704, Collective Investment Funds Before a Subcomm. of the

management cost,⁶ and accounts of less than \$200,000 do not lend themselves to efficient independent management because the management fees become prohibitive.⁷ To mitigate this impediment, the banking industry turned to the common trust fund, an arrangement whereby a number of small trust accounts is commingled and managed as a single trust corpus.⁸ The common trust fund thus became the vehicle for banks wishing to expand their activities into the field of mutual funds.⁹

Progress in this direction, however, was limited by Regulation F¹⁰ of the Board of Governors of the Federal Reserve System, which restricted the scope of common trust fund participation to situations involving a "bona fide fiduciary purpose."¹¹ One writer noted that "the practical effect of [the Board's] rulings was to prohibit banks from offering participation in the common trust fund as a vehicle for investment."¹² A proposed amendment¹³ to these rulings, which would have further restricted the types of trusts manageable in a common trust fund, was forestalled by the successful banking industry effort¹⁴ to

Senate Comm. on Banking and Currency, 89th Cong., 2d Sess. 81, 83 [hereinafter cited as 1966 Hearings].

⁶ This amount has been suggested as the maximum for commingling. Wolfe, *Wider Horizons for Common Trust Funds*, 101 *Trusts & Estates* 1075, 1076 (1962).

⁷ Citibank considers this the smallest managing agency account economically acceptable. First National City Bank, SEC Investment Company Act Release No. 4538 (March 9, 1966), [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶77332 at 82,587 (1966), reprinted in 1966 Hearings, *supra* note 5, at 81, 83; Brief of Citibank, before the SEC at 4-5 reprinted in 1966 Hearings, *supra* note 5, at 197, 200-01. The minimum may be substantially lower outside New York City.

⁸ 3 A. Scott, *Trusts* § 227.9 at 1829 (3d ed. 1967).

⁹ See Comment, *Banks, Trusts and Investment Companies: The Commingled Investment Fund*, 115 U. Pa. L. Rev. 1276, 1278 (1967) [hereinafter cited as Comment, *Commingled Investment Fund*].

¹⁰ 2 Fed. Reg. 2976 (1937); SEC Reg. F, 12 C.F.R. § 206.10(c), .17 (1939); see 42 Fed. Res. Bull. 228 (1956); 41 Fed. Res. Bull. 142 (1955); 26 Fed. Res. Bull. 390, 393 (1940).

¹¹ For example, the most recent ruling provided:

Authorization of revocable trusts for common trust fund participation should be preceded by particularly careful determination of the bona fides of their use and purpose to avoid improper use of the common trust fund as a medium attracting individuals primarily seeking investment management of their funds.

42 Fed. Res. Bull. 228 (1956).

¹² Comment, *Commingled Investment Fund*, *supra* note 9, at 1278.

¹³ 25 Fed. Reg. 12479 (1960). The amendment would have provided:

The funds of an inter vivos trust revocable by the settlor and providing for the payment of the principal of the trust to the settlor's estate at his death may not be invested in a Common Trust Fund established and maintained under this section.

Id. The form of trust which this amendment would have prohibited is "well-suited to do little more than obtain financial management services for its beneficiary-owner." Comment, *Commingled Investment Fund*, *supra* note 9, at 1279.

¹⁴ See Hearings on H.R. 12577 & 12825 Before a Subcomm. of the House Comm. on

transfer regulatory authority of the trust powers of national banks to the Comptroller of the Currency.¹⁵ Under this newly acquired authority, the Comptroller proposed to amend Regulation 9¹⁶ (the successor to Regulation F) by deletion of the requirement of a "bona fide fiduciary purpose,"¹⁷ thereby permitting "a common trust fund maintained by the bank exclusively for the collective investment and re-investment of monies contributed thereto by the bank in its capacity as managing agent. . . ."¹⁸ The proposed revision prompted the Commissioner of Internal Revenue to question the applicability of the pass-through treatment accorded common trust funds by Section 584 of the Internal Revenue Code.¹⁹ A ruling by the Internal Revenue Service that the CIF monies must be "received by the bank in trust"²⁰ in order for the fund to qualify for Section 584 treatment was acquiesced to by the Comptroller and Regulation 9 was revised accordingly.²¹

II. THE DECISION IN *Investment Company Institute v. Camp*

In 1965, pursuant to revised Regulation 9, the First National City Bank of New York submitted a plan for the establishment of a collective investment fund.²² Citibank apparently encountered some difficulty with "[t]he concept of a managing agent holding funds in

Banking and Currency, 87th Cong., 2d Sess. 19 (1962) (statement of F. A. Gunther on behalf of the American Bankers Association).

¹⁵ Authority was transferred by the Act of Sept. 28, 1962, Pub. L. No. 87-722, 76 Stat. 668, codified at 12 U.S.C. § 92a (1970).

¹⁶ 28 Fed. Reg. 1111 (1963).

¹⁷ Compare 27 Fed. Reg. 9764, 9767 (1962), promulgating 12 C.F.R. § 917 (which superseded 12 C.F.R. § 206 without substantive change) with 28 Fed. Reg. 3309, 3311 (1963), promulgating 12 C.F.R. § 918. The "bona fide fiduciary purpose" requirement had been the cause of some confusion. The Federal Reserve Board maintained that "trusts created and used for bona fide fiduciary purposes are to be distinguished from trusts created by individuals primarily seeking the benefits to be derived from corporate fiduciary investment management." 41 Fed. Res. Bull. 142 (1955). However, Comptroller Saxon stated that "[n]o one has ever been able satisfactorily to explain that term to me. . . . The net effect of this vague term has been to introduce a great amount of legal and practical uncertainty." Common Trust Funds—Overlapping Responsibility and Conflict in Regulation, Hearing Before a Subcomm. of the House Comm. on Government Operations, 88th Cong., 1st Sess., 67 (1963) [hereinafter cited as 1963 Hearing].

¹⁸ 12 C.F.R. § 9.18 (a)(3) (1971).

¹⁹ Int. Rev. Code of 1954, § 584 (b).

²⁰ Rev. Rul. 64-59, 1964-1 Cum. Bull. 193-94.

²¹ 29 Fed. Reg. 1719 (1964). See 1966 Hearings, *supra* note 5, at 599 for a comparison of Regulation 9 as originally adopted and the current version as amended in response to Rev. Rul. 64-59.

²² For other descriptions of the Citibank plan, see *The Mutual Fund Industry: A Legal Survey*, 44 Notre Dame Lawyer 732, 868-70 (1969); Brief of Citibank, before the SEC at 4, reprinted in 1966 Hearings, *supra* note 5, at 197, 200; First National City Bank, SEC Investment Company Act Release No. 4538 (March 9, 1966), [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77332 (1966), reprinted in 1966 Hearings, *supra* note 5, at 81.

trust,"²³ because the bank sought and obtained an exemption from this requirement.²⁴ The Citibank plan was approved by the Comptroller²⁵ and, in 1966, Citibank registered the fund with the Securities and Exchange Commission (SEC) in accordance with the Investment Company Act of 1940;²⁶ Citibank also filed a registration statement with the SEC pursuant to the Securities Act of 1933.²⁷ The fund was to be managed through the bank's Trust Investment Division. Three of the five members of the managing committee were to be Citibank officers.²⁸ Under the plan, customers would designate the bank as their

²³ Comment, *Commingle Investment Fund*, supra note 9, at 1280 n.26 (emphasis in original).

²⁴ *Wall Street Journal*, Aug. 26, 1965, at 6, col. 2.

²⁵ *Investment Co. Inst. v. Camp*, 401 U.S. 617, 622 (1971).

²⁶ 15 U.S.C. §§ 80a-1 et seq. (1970). The banking industry claims an exemption under § 3 (c)(3) of the Act, which exempts "any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian . . ." 15 U.S.C. § 80a-3(c)(3) (1970). The SEC has insisted that this exemption is inapplicable. See 1963 Hearing, supra note 17, at 4-5, 9 (statement of William L. Cary, Chairman of the SEC). The legislative history of this section makes it clear that the actively promoted CIF contemplated by Regulation 9 is not the passive common trust fund of the 1930's, which the section was intended to exempt. Note, *Commingle Investment Accounts: Banks v. Securities Industry*, 45 *Notre Dame Lawyer* 746, 776 (1970).

²⁷ 15 U.S.C. §§ 77(a) et seq. (1970). The SEC also maintained that this Act was applicable, 1963 Hearing supra note 17, at 4, 9 (statement of William L. Cary, Chairman of the SEC). The Comptroller dissented strongly. *Id.* at 162-64 (statement of James J. Saxon, Comptroller of the Currency). Citibank apparently chose to bear the expenses of registration rather than contest the issue with the SEC. *Wall Street Journal*, Aug. 26, 1965, at 6, col. 2. See Note, *Commingle Investment Accounts: Banks v. Securities Industry*, 45 *Notre Dame Lawyer* 746, 781-90 (1970).

²⁸ Section 32 of the Glass-Steagall Act prohibits the simultaneous employment of any person by a bank and an organization "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail . . . of stocks, bonds, or other similar securities. . ." 12 U.S.C. § 78 (1970). Although the term "securities" is not defined by the Act, it has been suggested "that officers of the bank might be deemed to be working for both the bank and the CIF, and, further, that the sale of participations might constitute the issuance, underwriting or distribution of securities. . ." in violation of the Act. Comment, *Commingle Investment Fund*, supra note 9, at 1292. See 12 C.F.R. § 218.101 (1971). Citibank requested an interpretation from the Federal Reserve Board. Interpreting § 32 as only prohibiting employment by two separate entities, the Board viewed Citibank and its CIF as a single entity, the CIF being nothing more than a department of the bank, and concluded that § 32 would not be violated. The ruling is codified at 12 C.F.R. § 218.111 (1971). Compare 12 C.F.R. § 218.101 (1971). The Supreme Court found this approach reasonable. 401 U.S. at 625 n.12. While this ruling allowed Citibank employees to serve as employees of the CIF, § 10(c) of the Investment Company Act of 1940 prohibited a majority of an investment company's board from serving as officers or directors of any one bank—limiting to 2 the number of Citibank officers who could serve on the CIF's board. 15 U.S.C. § 80a-10(c) (1970). Citibank requested an exemption from this requirement. The SEC granted the exemption so that, under § 10(a) of the Act, Citibank officers could comprise a maximum of 60% of the CIF's board or, in this case, 3 of the 5 man board. However, Citibank was not allowed to avail itself of § 10(d), which would have allowed 4 of the CIF's 5 man board to be affiliated with the bank because of the bank's inability to register as an investment

agent and deposit a minimum of \$10,000 into a common investment pool. All monies collected were to be invested and managed by the managing committee as one account, each individual investor, in turn, receiving "units of participation" which could be purchased or redeemed at specified intervals.²⁹

The Investment Company Institute (ICI), an association of open-end investment companies,³⁰ sought a declaratory judgment invalidating Regulation 9.³¹ ICI challenged the authority of the Comptroller to issue the revised regulation and directly attacked the Citibank plan. ICI claimed that the fund's activities would be in direct violation of the Glass-Steagall Act³² and argued that, since no true fiduciary purpose existed, the bank could not commingle its customers' accounts.³³ The Comptroller answered that the fund did involve a true fiduciary relationship and that the units of participation were not securities within the meaning of the Glass-Steagall Act.³⁴ The District Court for

adviser under § 10(d)(2). First National City Bank, SEC Investment Company Act Release No. 4538 (March 9, 1966), [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,332 at 82,588-92 (1966), reprinted in 1966 Hearings, supra note 5, at 84-88. For a complete treatment of the exemption issue, see Comment, Commingled Investment Fund, supra note 9, at 1299-1306. The propriety of these exemptions was at issue in the companion case of National Ass'n of Securities Dealers, Inc. v. SEC, 401 U.S. 617 (1971). However, because the Court resolved *ICI* on the basis of the Glass-Steagall Act's prohibitions, the Court did not reach the issue concerning the propriety of the exemptions granted by the SEC.

²⁹ First National City Bank, SEC Investment Company Act Release No. 4538 (March 9, 1966), [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,332 at 82,586 (1966), reprinted in 1966 Hearings, supra note 5, at 82.

³⁰ ICI is a national association representing 177 mutual funds and their 88 investment advisers, and 78 principal underwriters. National Ass'n of Securities Dealers, Inc. v. SEC, 420 F.2d 83, 104 (D.C. Cir. 1969). As of April 17, 1972, ICI membership had increased to 370 mutual funds, 166 investment advisers and 125 principal underwriters. Letter from Robert L. Augenblick, President, Investment Company Institute, to the Boston College Industrial and Commercial Law Review, April 17, 1972.

³¹ Investment Co. Inst. v. Camp, 274 F. Supp. 624, 627 (1967). For a complete treatment of the standing of the ICI to challenge this regulation see Comment, Standing: Suits Against Federal Regulatory and Administrative Agencies—Investment Company Institute v. Camp, 13 B.C. Ind. & Com. L. Rev. 289 (1971).

³² Banking Act of 1933, 48 Stat. 162 (1933) (codified passim in 12 U.S.C.). See Statement of Joseph E. Welsh of the Investment Company Institute, 1966 Hearings, supra note 5, at 63.

³³ 12 C.F.R. § 9.12 (1971) is designed to prevent any purchases by a bank when it has an interest which might improperly affect its judgment. A bank is prohibited from having "any interest in such fund other than in its fiduciary capacity. . . ." 12 C.F.R. § 9.18(b)(8)(i)(a) (1971). See also 15 U.S.C. § 80a-17(a); Comment, Commingled Trust Funds and Variable Annuities: Uniform Federal Regulation of Investment Funds Operated by Banks and Insurance Companies, 82 Harv. L. Rev. 435, 442-43 (1968). Cf. the Federal Reserve Board's repeated rulings that participations or shares in mutual funds are securities for purposes of the Glass-Steagall Act, and the Board's similar characterization of units of participation in a bank-sponsored CIF. 27 Fed. Res. Bull. 399 (1941); 37 Fed. Res. Bull. 645 (1951); 49 Fed. Res. Bull. 1637 (1965).

³⁴ 401 U.S. at 627 n.13. See Hearings on H.R. 8599 & 4410 Before the Subcomm. on

the District of Columbia ruled that the relationship between the bank and an individual fund participant was an agency rather than a trust relationship.⁸⁵ The fund was therefore held to be beyond the scope of fiduciary powers which the Comptroller could authorize.⁸⁶ Moreover, the court found that the units of participation in the fund were securities which Citibank, as a national bank, was prohibited from selling under Sections 16 and 21 of the Glass-Steagall Act.⁸⁷ The Comptroller and Citibank appealed from this decision.

The appeal was consolidated in the Court of Appeals for the District of Columbia Circuit with a petition filed by the National Association of Securities Dealers (NASD). The NASD had sought review of an SEC order which partially exempted Citibank from certain provisions of the Investment Company Act of 1940. The court of appeals reversed the district court decision and affirmed the SEC order.⁸⁸ The Supreme Court granted certiorari in both cases.⁸⁹

The Supreme Court held that the operation of a commingled investment fund, comprised of agency accounts, involves a bank in the underwriting, issuance, selling and distribution of securities in violation of Sections 16⁴⁰ and 21⁴¹ of the Glass-Steagall Act.⁴² The Court apparently determined that the purchase of stock by the bank for the CIF portfolio would not be a purchase on behalf of the individual participant but rather a purchase for Citibank's own account, the fund participant's interest in the purchase being an indirect one only. Moreover, the Court apparently found that the fund participations were

Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess., 46 (1964).

⁸⁵ 274 F. Supp. at 639.

⁸⁶ *Id.* at 640-41.

⁸⁷ *Id.* at 642-48.

⁸⁸ *National Ass'n of Securities Dealers, Inc. v. SEC* 420 F.2d 83 (D.C. Cir. 1969). See Note, 49 Texas L. Rev. 134 (1970).

⁸⁹ 397 U.S. 986 (1970).

⁴⁰ 12 U.S.C. § 24 (1970).

The business of dealing in securities and stock by the association [bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock

¹² U.S.C. § 24 (1970).

⁴¹ 12 U.S.C. § 378 (1970).

[I]t shall be unlawful—(1) For 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 to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor

Id.

⁴² 401 U.S. at 639.

securities, so that the bank was held to be engaged in the issuance, underwriting or distribution of securities in contravention of the Glass-Steagall Act.

In reaching this conclusion, the Court initially observed that, "[o]n their face, §§ 16 and 21 of the Glass-Steagall Act appear clearly to prohibit [the operation of a CIF] by national banks."⁴³ The Court, however, did not reach its conclusion simply by applying the ordinary meaning of the statutory language. The Court apparently recognized that some ambiguity might exist in the statutory language which could justify a different, perhaps narrower, reading of the word "security." Indeed, in application, the term, under the Securities Act of 1933, has posed numerous problems. Moreover, no logical imperative requires that the word be defined in the Glass-Steagall Act precisely as it is under the 1933 Act.⁴⁴ The possibility of such ambiguity prompted the Court to investigate the legislative history of the Act.

It is submitted that the Court's inquiry was undertaken for the limited purpose of justifying a narrower reading of the word security than that initially given it by the Court. The Court was not searching for a congressional intent to *include* an arrangement such as the Citibank fund within the prohibitions of the Glass-Steagall Act. Moreover, a finding of a congressional intent to include such funds within the prohibitions of the Act was unnecessary, since Citibank's activity was embraced within the plain meaning of the language Congress had used to express its prohibitions. In order to justify a departure from the ordinary meaning of the statutory language, the Court sought, but did not find, a congressional intent to *exclude* from the scope of the Act's prohibitions activity of the type engaged in by Citibank.⁴⁵

⁴³ 401 U.S. at 625.

⁴⁴ See Mundheim & Henderson, *Applicability of the Federal Securities Laws to Pension and Profit-Sharing Plans*, 29 *Law & Contemp. Prob.* 795, 824-25 (1964). But see Comment, *Commingled Trust Funds and Variable Annuities: Uniform Federal Regulation of Investment Funds Operated by Banks and Insurance Companies*, 82 *Harv. L. Rev.* 435, 448-49 (1968).

⁴⁵ The Court noted that:

[T]here is nothing in the phrasing of either § 16 or § 21 that suggests a narrow reading of the word "securities." . . .

Indeed there is direct evidence that Congress specifically contemplated that the word "security" includes an interest in an investment fund. . . . [T]here is reason to believe that Congress explicitly intended to prohibit a national bank from operating an investment trust.

But, in any event, we are persuaded that the purposes for which Congress enacted the Glass-Steagall Act leave no room for the conclusion that a participation in a bank investment fund is not a "security" within the meaning of the Act.

401 U.S. at 635-36. The Court further noted that "[b]ecause the potential hazards and abuses that flow from a bank's entry into the mutual investment business are the same basic hazards and abuses that Congress intended to eliminate almost 40 years ago, we cannot but apply the terms of the federal statute as they were written." *Id.* at 639.

In analyzing the legislative history, the Court noted that the Glass-Steagall Act was enacted in response to abuses flowing from the use by banks of "securities affiliates"⁴⁶ in order to engage in the underwriting of speculative securities. The purpose of the Act was to limit commercial banks to commercial banking—*i.e.*, to separate them from the investment banking industry.⁴⁷ The Court conceded that there were many sound arguments for allowing banks to enter the mutual fund field, including considerations of competition, convenience and expertise.⁴⁸ Moreover, it may be observed that banking practices which represented a potential for abuse in the 1930's do not necessarily possess the same potential today, due to enactment of extensive banking regulations in the interim.⁴⁹ The Court nevertheless determined that a significant similarity existed between the potential abuses of the Citibank commingled investment fund and those of the securities affiliates to which the prohibitions of the Glass-Steagall Act were directed.⁵⁰ It would appear that this similarity prevented the Court from finding a congressional intent to exclude from those prohibitions an arrangement such as the Citibank fund.

The Court noted a number of potential abuses common to both the commingled investment fund and securities affiliates:

- (1) Banks might invest their own assets in frozen or otherwise imprudent investments.⁵¹
- (2) The bank and the fund would be closely associated in the public mind and, if the fund should fare badly, public confidence in the bank might be impaired.⁵²
- (3) Banks could misuse their credit facilities to shore up the fund through unsound loans or by making credit more freely available to companies in whose stock the fund had invested.⁵³

⁴⁶ Security affiliates "enjoy[ed] identity of ownership and management with the bank, but [were] incorporated separately under State law and could freely operate as security companies." Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency, 71st Cong., 3d Sess. 999 (1931) [hereinafter cited as 1931 Hearings]. Affiliates were to "carry on for the account of the bank's stockholders . . . the making of an investment profit from holdings in stocks and speculative securities." 1966 Hearings, *supra* note 5, at 486 n.56.

⁴⁷ 75 Cong. Rec. 9912 (1932) (remarks of Senator Buckley). "If we want banking service to be strictly banking service, without the expectation of additional profits in selling something to customers, we must keep the banks out of the investment security business." *Id.* See also 1931 Hearings, *supra* note 46, at 40, 237.

⁴⁸ 401 U.S. at 636.

⁴⁹ See, e.g., the Securities Act of 1933, 15 U.S.C. §§ 77(a) et seq. (1970); the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 et seq. (1970); the Bank Holding Act, 12 U.S.C. §§ 1841 et seq. (1970).

⁵⁰ 401 U.S. at 639.

⁵¹ *Id.* at 630.

⁵² *Id.* at 631.

⁵³ *Id.*

- (4) Bank customers could suffer losses in the fund which could destroy goodwill and this, in turn, could "become an important handicap to a bank during a major period of security market inflation."⁵⁴
- (5) The banks' promotional needs might lead them to lend their reputation for prudence and restraint to the enterprise of selling particular stocks and securities, and this could not be done without that reputation being undercut by the risks necessarily incident to the investment banking business.⁵⁵
- (6) Conflicts of interest could develop between the promotional interest of the investment banker and the commercial banker's obligation to render disinterested investment advice.⁵⁶

While this enumeration of potential abuses would alone have been sufficient to justify the Court's refusal to do other than "apply the terms of the federal statute as they were written,"⁵⁷ it is significant that the Court's analysis of the Act's legislative history failed to disclose any evidence supporting the argument that commingled investment fund participations should not be considered securities within the meaning of the Act. To understand why the Court found that these participations should be treated as securities, it may be helpful to compare the activity involved in the management of a commingled investment fund with two other forms of activity, long undertaken by banks, which do not involve dealing in securities.

The first of these two activities involves the management of an individual agency account. The 1935 amendments to the Glass-Steagall Act⁵⁸ clearly permit a bank to manage portfolios in an agency capacity; the legislative history of these amendments reinforces this conclusion.⁵⁹ Furthermore, traditional interpretations of the word security have not encompassed simple agency relationships.⁶⁰ The second activity involves the operation of a commingled trust fund. Trust powers are expressly granted to national banks⁶¹ and, under Regulation F of

⁵⁴ *Id.*, quoting from 1931 Hearings, *supra* note 46, at 1064.

⁵⁵ 401 U.S. at 632.

⁵⁶ *Id.* at 633. A banker should not have the opportunity to influence the bank's customers in regard to investments on which he is to receive any profit. See 75 Cong. Rec. 9912 (1932) (remarks of Senator Buckley).

⁵⁷ 401 U.S. at 639.

⁵⁸ See *id.* at 623 n.10. Banks remain prohibited from trading in securities for their own account.

⁵⁹ S. Rep. No. 1007, 74th Cong., 1st Sess. 17; H. R. Rep. No. 742, 74th Cong., 1st Sess. 18.

⁶⁰ See, e.g., *Milnarik v. M-S Commodities, Inc.*, [Current] CCH Fed. Sec. L. Rep. ¶ 93,355 at 91,904.

⁶¹ Federal Reserve Act § 11, 38 Stat. 261 (1913).

the Federal Reserve Board⁶² the commingling of trust funds has been practiced for at least a generation . . . consistently with the banking laws"⁶³ It may be observed that common trust funds are specifically exempted from the statutory definition of securities given in the Securities Act of 1933⁶⁴ and the Investment Company Act of 1940.⁶⁵ Thus the traditional definition of a security and the legislative history of the Glass-Steagall Act would both permit this second type of activity.

In contrast, the Court found that the type of activity involved in the management of a commingled investment fund comes within the prohibition of the Act. The Court suggested that although this activity is a "union" of the permissible powers to commingle trust assets and manage agency accounts, it nonetheless "gives birth to an investment fund whose activities are of a different character."⁶⁶ While the Court did not elucidate this point, reference to the Court's definition of a security as set forth in *SEC v. Howey*⁶⁷ is instructive. In *Howey*, the Supreme Court defined a security as a "scheme [which] involves an investment of money in a common enterprise with profits to come solely from the efforts of others."⁶⁸ By analogy this definition protects the banks' powers to manage agency accounts and to commingle trust funds, since neither activity involves *both* the common enterprise and the profit motive whose realization is solely dependent upon others' efforts. The individual yet simultaneous management of several agency accounts has been found to lack "the element of commonality."⁶⁹ The operation of a common trust fund is excluded from the *Howey* definition because it involves a "fiduciary purpose," rather than a mere *profit* or *investment* motive.⁷⁰ In fact, Regulation F of the Federal Reserve Board was issued because the Board of Governors believed that such a fiduciary purpose was necessary in order to distinguish the common trust fund from a security, so that the prohibitions of the Glass-Steagall Act would be avoided.⁷¹ On the other hand, both of the

⁶² See Report on Commingled or Common Trust Funds Administered by Banks and Trust Companies, H.R. Doc. No. 476, 76th Cong., 2d Sess. 4-5 (1939).

⁶³ 401 U.S. at 624.

⁶⁴ 15 U.S.C. § 77c(a)(2) (as amended by the Investment Company Amendments Act of 1970, § 27(b), 84 Stat. 1413) (1970).

⁶⁵ 15 U.S.C. § 80a-3(c)(3) (1970).

⁶⁶ 401 U.S. at 625.

⁶⁷ 328 U.S. 293 (1946).

⁶⁸ 401 U.S. at 301 (emphasis added).

⁶⁹ *Milnarik v. M-S Commodities, Inc.* [Current] CCH Fed. Sec. L. Rep. ¶ 93,355 at 91,902.

⁷⁰ See the Federal Reserve Board's repeated rulings that participations in a common trust fund which lack a "bona fide fiduciary purpose" are securities within the meaning of the Glass-Steagall Act. 27 Fed. Res. Bull. 399 (1941); 37 Fed. Res. Bull. 645 (1951); 49 Fed. Res. Bull. 1637 (1965).

⁷¹ See sources cited in note 70 *supra*.

elements required by the *Howey* definition are present in the case of a commingled agency account. The requisite element of commonality is present, as is the profit or investment motive, unviewed to any fiduciary purpose. This third type of activity, then, is a hybrid whose characteristics bring it within the *Howey* definition of a security.

In his dissent, Justice Blackmun observed that the two former activities, which the majority declined to view as involving securities, carried a potential for abuse similar to that inherent in the third type of activity, and hence required regulation as much as did that third activity.⁷² Justice Blackmun then reasoned that the existence of such similar potential for abuse in the two activities, which admittedly are *not* prohibited by the Glass-Steagall Act, justified exclusion of the third type of activity from the scope of the statute. This argument misses the point, however, and an analogy to the Securities Act of 1933 may be helpful. Potential for abuse may exist in arrangements outside the securities field, for example, in such areas as real estate transactions or consumer affairs, to which the antifraud provisions of the *securities* laws are not applicable. Nevertheless, similar abuses in the securities field *are* regulated by these provisions. Accordingly, the fact that individual agency accounts and commingled trust funds are not prohibited does not necessarily lead to the conclusion that a *commingled agency* account is permitted. Rather, the traditional interpretation of the word security leads to the conclusion that this arrangement involves securities and that it is prohibited by the Glass-Steagall Act when engaged in by a national bank.

Although supported by the legislative history, the Supreme Court's decision in *ICI*, holding bank activity in commingled investment funds to be unlawful, is regrettable in light of the many benefits the investing public would have reaped from the entrance of banks into the field of mutual funds. One major benefit of banking industry participation in the mutual field would have been increased competition. The expertise which bank trust departments would have applied to the role of the investment adviser would have raised the standards of performance by which mutual funds are judged. Mutual fund advisers would in turn have been forced to meet these higher performance criteria, for, although most advisers are "locked-in" to their fund, the sales of fund securities could reflect the adverse performance of the adviser, thus prompting action by the directors of the investment company.

Competition in the field of mutual funds could also be manifested in the area of sales loads. The ready availability of a no-load fund at a local bank would likely force load funds to reduce their load charges and to offer significantly better performance than bank-operated funds,

⁷² 401 U.S. at 644. (Blackmun, J., dissenting).

in order to justify any residual load charges. Bank competition would also put pressure on investment advisers to reduce their advisory fees, the magnitude of which has long been subject to criticism. Furthermore, the investment advisory expertise of bank trust departments, the stimulus for increased competition in the area of adviser's performance and sales loads, is itself a benefit to the small investor when applied to a mutual fund. This expertise, traditionally available only to relatively large investors, would have become available to small investors as well, thereby significantly expanding the small investor's investment choices. Finally, the convenience afforded the small investor by a bank-operated mutual fund would have provided a further significant benefit to the investing public. In light of the numerous advantages that a commingled investment fund provides, alternative methods of bank participation in the mutual fund field should be investigated.

III. OTHER MODES OF BANK PARTICIPATION IN THE FIELD OF MUTUAL FUNDS

In view of the *ICI* decision, it would appear that banks have available at least four approaches by which to enter the mutual fund field. The first entails vigorous industry lobbying efforts to effect a legislative change that would permit banks to enter the field directly, through the vehicle of an open-end fund. As the *ICI* Court admitted, there exist many sound arguments for allowing banks to enter the field through an open-end fund; however, legislative exemption of such funds from the Glass-Steagall Act's prohibitions appears necessary in light of the decision in *ICI*. Lobbying for legislative reform has been suggested in the past but it has not generated strong support—apparently because of the time and expense involved.⁷³ In the long run, however, legislative reform may be the most viable alternative and the one conferring the most benefit upon the small investor.

A second approach entails a more active promotion by banks of their present "mutual" funds—*i.e.*, the common trust fund.⁷⁴ However, the viability of this approach depends on whether the participants in the fund are found to have a bona fide fiduciary purpose in establishing the trust. Such a purpose is difficult to establish, however, without the assistance of definite standards. Aggressive promotion of

⁷³ See Comment, Banks, Trusts and Investment Companies: The Commingled Investment Fund, 115 U. Pa. L. Rev. 1276, 1306 (1967) [hereinafter cited as Comment, Commingled Investment Fund]; cf. Note, Commingled Investment Accounts: Banks v. Securities Industry, 45 Notre Dame Lawyer 764, 807-12 (1970); Comment, Of Banks and Mutual Funds: The Collective Investment Trust, 20 Sw. L.J. 334, 344-46 (1966).

⁷⁴ See Lovell, Trust New Business, 104 Trusts & Estates 1164 (1965); Vunderink, Contest for Trust Business, 103 Trusts & Estates 652 (1964).

the common trust fund may lead to the inference that the bank made no attempt to assess the purpose of its customer. As a result, the arrangement may be invalidated on its face as a violation of the Glass-Steagall Act, despite the fact that a trust rather than an agency account is the commingled investment vehicle. Even if an arrangement utilizing the common trust fund as a form of investment vehicle does not on its face violate the terms of the Glass-Steagall Act, the issue is still not resolved. Conceivably, a court could turn to the legislative history of the Act to find a congressional intent to include such an arrangement within the Act's prohibitions. One commentator has observed that, since the Act was directed at securities affiliates, it should matter little that the affiliate takes the form of a trust.⁷⁶

The foregoing discussion emphasizes the importance of using care in constructing the common trust so that the arrangement will not be considered a sham. This result can be accomplished most effectively by avoiding the use of preprinted trust instruments, by not demanding the accumulation of income, and by "selling" the fund not as an investment vehicle but as part of a total financial planning service. Although these precautions would serve to counter the inference of a sham and to promote the credibility of the arrangement as a true trust relationship possessing a bona fide fiduciary purpose, they also make the arrangement less profitable for the bank. An additional risk inherent in this approach is the danger that banks would be accused of overreaching by attempting to expand the scope of legislation that permits banks to commingle trust funds.⁷⁶

The third approach, which may involve a type of activity outside the scope of the Glass-Steagall Act and which, in addition, may eliminate the abuses noted in *ICI*, is the use of "no load" closed-end funds. Once established, the closed-end fund, unlike the open-end fund, does not issue or redeem shares.⁷⁷ Customarily, closed-end fund shares are listed on leading exchanges, with prices established by willing buyers and sellers in the same manner that prices are established for other

⁷⁶ Comment, Commingled Investment Fund, *supra* note 73, at 1298.

⁷⁶ "At common law there was objection to the mixture of the funds of two or more trusts, or of trust and non-trust property, in a single investment or group of investments because such action violated the rules about segregation and earmarking of trust property and also involved conflicting interests and hence disloyalty." G. Bogert, *Handbook of the Law of Trusts* § 105 at 277 (4th ed. 1963). Enabling legislation was necessary to overcome this rule. Restatement (Second) of Trusts § 179 (1959). For a compilation of state laws on this point, see *Common Trust Funds—Overlapping Responsibility and Conflict in Regulation*, Hearing Before a Subcomm. of the House Comm. on Government Operations, 88th Cong., 1st Sess. 169-76 (1963). This approach was successfully employed in the past by Girard Trust Bank but the practice was discontinued when the problems presented were found to be overwhelming.

⁷⁷ See *The Mutual Fund Industry: A Legal Survey*, 44 *Notre Dame Lawyer* 732, 742, 749 (1969) for a comparison of open-end and closed-end funds.

stocks. Open-end shares, on the other hand, are mechanised by the fund's underwriter, a practice which requires the purchaser to pay a commission, or load charge, to the underwriter. A holder of open-end fund shares usually sells them to the fund, which will redeem the shares for their net asset value. This distinction between funds is reflected in the type of activity engaged in by the fund's management company. In the case of an open-end fund, the management company is constantly involved in the buying and selling of participations. On the other hand, since a closed-end fund usually issues a fixed number of shares through underwriters, the management company has nothing to do with the buying or selling of participations and is only interested in the holders from the standpoint of remitting dividends and statements. Since the closed-end fund has nothing to do with the buying or selling of participations, as General Motors has nothing to do with the buyers and sellers of its shares, or their price, arguably the closed-end fund would not violate the terms of the Glass-Steagall Act. It can also be argued that the intent of Congress was not to prohibit a fund of this type and that its potential for abuse is not a practical reality in the 1970's. Faced with the question of the legality of such a fund, it is possible that a court would not feel compelled to find the arrangement prohibited.⁷⁸

In an interpretation issued pursuant to a revision of Regulation Y, the Board of Governors of the Federal Reserve System has recently stated that "the Glass-Steagall Act provisions, as interpreted by the U.S. Supreme Court, forbid a bank holding company to sponsor, organize or control a mutual fund. However, the Board does not believe that such restrictions apply to closed-end investment companies as long as such companies are not primarily or frequently engaged in the issuance, sale or distribution of securities."⁷⁹ Despite the confidence expressed by the Federal Reserve Board, a number of questions concerning the applicability of the Glass-Steagall Act to this approach remain unanswered. For example, if a bank were both management company and adviser, it might still violate Section 16 of the Glass-Steagall Act, since the bank would be buying securities for its own account rather than for the account of the individual participant. More importantly, a fact perhaps not considered by the Federal Reserve Board is that even a closed-end fund would be at least initially involved in the "issuance" of "securities."⁸⁰ While a closed-end fund would alleviate one of the abuses the Glass-Steagall Act sought to

⁷⁸ See textual discussion of the *ICI* Court's rationale and the purpose for the Court's consideration of the legislative history in *ICI* at pp. 1180-84 *supra*.

⁷⁹ 37 Fed. Reg. 1464 (1972).

⁸⁰ See *Investment Co. Inst. v. Camp*, 401 U.S. 617, 625 n.11 (1971). See also 15 U.S.C. §§ 80a-2(a)(22), -2(a)(36), -3(a)(1), -5(a)(2).

remedy—the constant issuing and redeeming of securities—the fund might still violate the precise terms of the statute because the Act makes no distinction between initial and continuing issuance. Both of these objections are overcome by the fourth alternative.

This approach would restrict the bank to acting as an investment adviser to an independent investment company.⁸¹ Clearly, this approach would avoid the problems encountered in the closed-end fund approach since the bank would not be involved in the issuance of securities nor in the buying or selling of securities for its own account. The bank would merely provide the independent investment company with investment advice.⁸² Furthermore, the problems of the second approach are avoided since a trust is not involved.

In 1956, Congress passed the Bank Holding Company Act,⁸³ which permits banks to operate holding companies.⁸⁴ Empowered to promulgate regulations under the Act, the Federal Reserve Board on August 17, 1971, announced a proposal to amend Section 222.4(a)(5) of Regulation Y.⁸⁵ The amendment would permit a bank holding company to serve “as investment adviser to an investment company registered under the Investment Company Act of 1940.” The Board determined that this activity is so closely related to banking and to the management of banks as to be a proper incident thereto,⁸⁶ and therefore that it is lawful activity under Section 4(c)(8) of the Bank Holding Company Act.⁸⁷ This amendment was approved by the Board effective February 1, 1972, and was accompanied by extensive interpretations.⁸⁸

Under the Board’s interpretations, a holding company may not sell or distribute securities of any investment company for which it acts as investment adviser; nor may it act as investment adviser to

⁸¹ Under this arrangement the bank, as investment adviser, remains distinct from the investment company which actually issues the participations, arranges the underwriting of the issue and manages the fund’s portfolio pursuant to advice received from the investment adviser. It is clear, therefore, that the “single entity” rule of the Federal Reserve Board would not be applicable. In order to avoid a violation of § 32 of the Glass-Steagall Act, none of the investment company’s employees could be employed by the (investment adviser) bank.

⁸² Due to the separation of functions, and most particularly, to the total independence of the investment company’s board of directors from the advising bank, the abuses possible in a CIF or security affiliate are minimized. The independent investment company would scrutinize the investment adviser’s performance. At the same time, the bank would have no greater stake in the success of the fund than in any customer’s account, thus minimizing any salesman’s interest.

⁸³ 70 Stat. 133 (1956).

⁸⁴ 12 U.S.C. §§ 1841 et seq. (1970).

⁸⁵ 36 Fed. Reg. 16695 (1971). Regulation Y, formerly 12 C.F.R. pt. 222, was redesignated 12 C.F.R. pt. 225. 36 Fed. Reg. 21666 (1971).

⁸⁶ 37 Fed. Reg. 1464 (1972).

⁸⁷ 12 U.S.C. § 1843(c)(8) (1970).

⁸⁸ 37 Fed. Reg. 1463-64 (1972).

an investment company having a name similar to that of the holding company or any of its subsidiary banks. Further, a holding company may not (a) purchase for its own account securities of any investment company for which it acts as investment adviser; (b) purchase, at its discretion, any such securities in a fiduciary capacity; (c) extend credit to any such investment company; nor (d) accept the securities of any such investment company as collateral for a loan to purchase securities of the investment company. Moreover, prospectus or sales literature should not be distributed by the holding company, nor should any such literature be made available to the public at any offices of the holding company. Officers and employees of bank subsidiaries should be instructed not to express any opinion with respect to the advisability of the purchase of securities. Upon request, the holding company may furnish bank customers the name and address of the fund and underwriter or distributing company, but it should not furnish the names of the customers to the fund or its distributor. The investment adviser may not have offices in any building which is likely to be identified with the bank holding company. Finally, the Board has indicated that bank holding companies, except to the extent limited by the Glass-Steagall Act, may exercise all functions customarily permitted to investment advisers.⁸⁹

Under the approach contemplated by this regulation, the investment company is treated as an entity separate from the bank or bank holding company acting as the investment adviser. In fact, the investment company would have the power to fire the adviser. The fund would be underwritten by the investment banking community, in the case of a closed-end fund, and sold through an agency of the investment company, in the case of an open-end fund.⁹⁰ The fund itself would be controlled and owned by the independent management company. The bank would not be involved in issuing or buying and selling fund securities; nor would the bank purchase any securities for its own account or for a commingled account; rather, the investment company would purchase portfolio securities based on the bank's advice. It is clear, therefore, that this purely advisory activity would not contravene the Glass-Steagall Act. Furthermore, precautions could be taken, in addition to those noted above, to insure against the abuses enumerated in the *ICI* decision.

One such precaution would be to limit the fund's investment policy to purchases of highly rated nonspeculative securities. Banks are accustomed to this restriction because of the fiduciary responsibilities

⁸⁹ *Id.* at 1464.

⁹⁰ This agent could be a management company providing other management service, including bookkeeping.

already pervading their trust departments. Since the investment expertise of the trust department will form the basis of the advice given to the investment company, it is likely that the recommendation of highly rated securities will occur spontaneously.⁹¹ As another precaution, the fund should be prohibited from investing in securities for the purpose of exercising control or management over the issuer or for the purpose of participating in a takeover bid.⁹² Furthermore, the majority of the board of the investment company should not be comprised of bank officers.⁹³ This precaution will protect the fund against conflicts between the bank's own interests and its advisory responsibilities. The additional precautions suggested would minimize the risk of such conflicts occurring since these steps would prevent the bank from seeking to obtain the banking business of a firm by acquiring control of it through the mutual fund.

Although banks that provide investment advice to a mutual fund without operating through a holding company are not subject to Regulation Y, they should exercise care to follow the limitations and precautions incorporated in the amendment and its interpretations. The latter represent an arrangement that is likely to avoid the abuses which the Glass-Steagall Act sought to remedy and which influenced the outcome in *ICI*. For example, subsequent to the *ICI* decision, the Provident National Bank (Philadelphia, Pa.) decided to act as investment adviser to Independence Square Income Securities, Inc., a closed-end, diversified management investment company. Eastman Dillon, Union Securities & Co., and Loeb & Rhoades & Co. were underwriters for the 1,700,000 share bond fund offered at \$25 a share, for a total of 42.5 million dollars.⁹⁴ Although Regulation Y is not applicable be-

⁹¹ This situation would minimize the danger of the bank shoring up a company to which the bank had loaned money by advising the fund to purchase stock of that company. It would also minimize the converse danger of the bank making imprudent loans to a company in whose stock the bank had advised the fund to invest.

⁹² This prohibition would eliminate the danger of the bank advising the fund to purchase stock in a company, the bank hoping thereby to obtain the commercial banking business of that company.

⁹³ In fact, unless the Federal Reserve Board is willing to modify its interpretation of § 32 of the Glass-Steagall Act and the "single-entity" doctrine promulgated thereunder, none of the investment company's employees could be bank employees. 12 C.F.R. § 218.111 (1971). If the investment company and investment adviser are a single entity, it would appear logical that §§ 16 and 21 of the Glass-Steagall Act are once again violated. Cf. Comment, *Commingled Investment Fund*, supra note 73, at 1302 n.148.

⁹⁴ Prospectus, Independence Square Income Securities, Inc., Feb. 22, 1972, at 1. There is no association of closed-end investment companies comparable to the *ICI* which would have the incentive to challenge this arrangement. Apparently the *ICI* will not challenge the plan. Duane Vieth, counsel for the *ICI* stated: "In our judgment, the most serious of those conflicts of interest relate to this promotional aspect, this concern by the bank or its affiliates in constantly selling the shares, and that, as I say, is not typical of a closed-end company. So, I would have to be frank to say to you that the serious conflicts that we see are not present with respect to closed-end companies." Transcript of

cause a bank, and not a bank holding company, will act as the fund adviser, the Provident nonetheless intends to comply with the interpretations and limitations of the amendment to Regulation Y. The Provident has scrupulously avoided the potential hazards outlined in *ICI* and, through its conservative selection of a closed-end fund, it has avoided the primary evil of constant promotion. However, in light of the rationale of *ICI*, it should make no difference whether the advised fund is a bond or equity fund, open-end or closed-end.⁹⁵ A bank acting as investment adviser to either an open-end or a closed-end fund does not violate the precise terms of the Glass-Steagall Act and, by limiting its activity to an advisory role, the bank eliminates most of the abuses set forth in *ICI*.

The difficulty with a bank acting as an investment adviser is a practical one. If the bank advises a no-load open-end fund, who will sell it? A bank cannot sell to its own depositors and a broker would have no incentive to sell such a fund. At the same time, if a bank advises an open-end load fund, the small investor's investment choices are not expanded. It should be noted that the bank-advised closed-end fund may be of little benefit to investors because the underwriting commissions amount to approximately as much as the load charge imposed by the open-end mutual funds now available. Furthermore, most closed-end funds sell at a discount from their net asset value. Initial purchasers, although not subsequent purchasers, of a closed-end fund may be penalized to the extent of the discount from net asset value plus underwriting commissions. While the Provident had hoped that its closed-end bond fund would sell on the basis of yield and, therefore, without a discount, the fund shares initially sold at a discount of fifteen to twenty percent. The open-end, no-load fund is more beneficial to investors because the purchaser is not subject to an underwriting commission and shares are redeemable at net asset value. Perhaps if banks demonstrate an ability to operate as advisers to mutual funds,

Hearings before the Board of Governors of the Federal Reserve System, Bank Holding Companies to Serve as Investment Advisers to Investment Companies (Nov. 12, 1971) at 15.

It should be noted that none of the directors of the investment company is an employee of the Provident. Prospectus, Independence Square Income Securities, Inc., Feb. 22, 1972, at 6. However, the Senior Vice-President and Treasurer, and the Vice-President and Secretary of the fund are also officers and employees of the Provident, although they will serve the fund without compensation. *Id.* at 6-7. Because the fund is a closed-end investment company, it may not be "primarily engaged" in the issuance or distribution of securities, and, therefore, § 32 of the Glass-Steagall Act would not be violated. An open-end fund, however, would be so engaged and, therefore no employee, officer or director of an open-end fund can simultaneously be an employee, officer or director of a national bank. 12 C.F.R. § 218.101 (1971). See also note 28 *supra*.

⁹⁵ See text at pp. 1182-83 *supra*.

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without abusing their position, Congress may be persuaded that, in the public interest, new legislation should be passed permitting banks to compete directly with mutual funds.

CONCLUSION

The role of banks operating in the field of mutual funds is presently in a period of rapid change. The Supreme Court's decision in *Investment Company Institute v. Camp* held that First National City Bank's collective investment fund violated the Glass-Steagall Act. Barring legislative change, employment of the commingled managing agency account is no longer available to banks seeking to enter the mutual fund field. The available approaches, therefore, are for banks (1) to promote more actively their common trust funds, (2) to operate no-load, closed-end funds, and (3) to act as investment advisers to both open-end and closed-end funds. None of these alternatives provides the same benefit to small investors that the commingled agency account does. However, successful employment of these approaches, especially that entailing investment advisory activity, may serve as the basis for legislative change. Certainly congressional endorsement of the commingled agency account would benefit the small investor to the greatest extent and would promote beneficial competition in the field of mutual funds.⁹⁶

⁹⁶ See Note, Commingled Investment Accounts: Bank v. Securities Industry, 45 Notre Dame Lawyer 746, 772 (1970).