

University of Miami Law Review

Volume 33
Number 4 1978 *Developments in Florida Law*

Article 3

6-1-1979

Banking Law

Scott L. Baena

Kevin Murray

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Scott L. Baena and Kevin Murray, *Banking Law*, 33 U. Miami L. Rev. 757 (1979)
Available at: <https://repository.law.miami.edu/umlr/vol33/iss4/3>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Banking Law*

SCOTT L. BAENA** AND KEVIN MURRAY***

With the congressional enactment of the Financial Institutions Regulatory Act and the International Banking Act, 1978 can justifiably be labeled a landmark year in terms of banking legislation. The author discusses these important federal enactments and analyzes their impact upon the Florida banking market. Special emphasis is given to the interrelationship between state and federal banking regulations in light of the new federal legislation and recent decisions. In addition, significant judicial and legislative developments occurring on a state level during the survey period are considered.

I.	INTRODUCTION	758
II.	FINANCIAL INSTITUTIONS REGULATORY ACT	759
	A. Supervisory Authority Over Depository Institutions	760
	B. Interlocking Directorates	761
	C. Foreign Branching	763
	D. Credit Union Restructuring	763
	E. Change In Control	764
	F. Correspondent Accounts	766
	G. Disclosure of Material Facts	767
	H. Federal Financial Institutions Examination Council	767
	I. Right to Financial Privacy	768
	J. Electronic Fund Transfers	771
III.	THE FEDERAL INTERNATIONAL BANKING ACT	773
	A. Federal Branches and Agencies	774
	B. Interstate Banking Operations	775
	C. Edge Act Corporations	775
	D. National Banks	777
IV.	ACTIVITIES OF INTERNATIONAL BANKS IN FLORIDA	777
V.	STATE LIMITATIONS ON OUT-OF-STATE BANKS	779
	A. <i>BT Investment Managers, Inc. v. Lewis</i>	779
	B. Federal Reserve Board Consideration of State Legislation	783
	C. Direct Mortgage Lending by Out-of-State Banks	785
VI.	CREDIT UNION SHARE DRAFTS	786
VII.	DOCUMENTARY STAMP TAXES	787
VIII.	PREPAYMENT CHARGES	789
IX.	PURCHASE MONEY SECURITY INTERESTS	789
X.	PRODUCTION OF EXAMINATION REPORTS	790
XI.	CONCLUSION	791

* This survey covers significant federal legislation enacted during 1978, the 1978 Regular Session of the Florida Legislature and other developments in the field during the calendar year of 1978.

** Partner in the firm of Stroock & Stroock & Lavan, Miami, Florida.

*** Former Articles and Comments Editor, *University of Miami Law Review*.

I. INTRODUCTION

The political and economic emergence of the Florida banking industry continued in 1978, although there was a significant lapse in legislative activity on the state level. National banking associations are still being attracted to the city of Miami in impressive numbers, to such an extent that Miami is now second only to New York City in terms of the number of domiciliary Edge Act banks.¹ Additionally, many foreign banks have recently immigrated to Miami as a result of the International Banking Law enacted by the Florida Legislature last year.²

On the horizon is the prospect of even more activity of this sort in view of the enactment by Congress of the International Banking Act.³ There is also some indication that present restrictions on the acceptance of deposits by international banking agencies in this state will be relaxed.⁴

The growth and prosperity of domestic institutions, however, was thwarted during 1978 due to an economic downturn. While the country's economy has remained stubbornly buoyant, interest rates have soared. During the month of November, the discount rate set by the Federal Reserve Board reached a record high.⁵ As a result, virtually all segments of the economy, including both public and private sectors, have been forced to pay dearly for the use of money. For banks and savings and loan associations the tight money situation has reached grave proportions.

During 1978 the sentiment of bankers across the state was that there was little or no profitability in lending money given the slight margin that existed between the institutions' cost for money and the

1. An Edge Act bank is a federally chartered institution organized for the purpose of engaging in international or foreign banking. See 12 U.S.C. §§ 611-631 (1970). There are presently 14 Edge Act banks located in the city of Miami and more are expected. See Russell, *State Bankers Fear Competition From Large U.S., Foreign Banks*, Miami Herald, Mar. 17, 1979, § C, at 7, col. 3.

2. FLA. STAT. § 659.67 (1977). As of this writing, 12 international banking corporations have obtained approval to open representative offices or agencies in the state. See Baron, *State Foreign-Bank Dilemma: Change Law or Lose Control*, Miami Herald, Feb. 11, 1979, § F, at 1, col. 1.

3. International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 (to be codified in scattered sections of 12 U.S.C.).

4. Conversation with Gerri R. Dolan, Deputy Comptroller of Florida (Nov. 14, 1978); see Baron, *supra* note 2, at 1. For the Florida statute under which international banks within the state are regulated, see FLA. STAT. § 659.67 (1977).

5. On November 1, 1978, United States authorities implemented various efforts "to correct what President Carter termed 'the excessive decline of the dollar.'" 64 FED. RES. BULL. 939 (1978). Part of the November 1 package included a one percentage point increase in the Federal Reserve discount rate to an historic high of nine and one-half percent. *Id.* at 940-41.

rates which they could charge to accord with the usury statutes.⁶ In response, and with great trepidation, financial institutions scrutinized their options under and, indeed, some employed the interest rate parity law enacted in 1977.⁷ Although this law as originally enacted was intended to promote competitive equality among licensed lenders,⁸ its application served as a cushion during a period of economic downswings.

II. FINANCIAL INSTITUTIONS REGULATORY ACT

Of national importance is the enactment of the Financial Institutions Regulatory and Interest Rate Control Act of 1978.⁹ Dubbed the "Bert Lance Act," the statute became effective in March of 1979,¹⁰ and has as one of its primary objectives the curtailment of insider abuse of financial institutions. The Act emphasizes the duty of insiders with respect to their institutions and increases accountability for breaches of that duty.¹¹ The Act further provides for an extension of federal regulatory authority over interest rates on deposits and accounts in depository institutions.¹² Critics object that the Act "imposes a new layer of regulations on an already overregulated industry without substantially reducing some of the 'problems' the legislation was intended to correct The un-

6. FLA. STAT. §§ 687.01-.12, 516.18-.21 (1977).

7. FLA. STAT. § 687.12 (1977). Under this statute any lender permitted to do business in Florida is authorized to charge interest at "the maximum rate of interest permitted by law to be charged on similar loans or extensions of credit made by any lender or creditor in the State of Florida." *Id.*

8. See Baena & Romanchuck, *Banking Law: Survey of Florida Developments*, 32 U. MIAMI L. REV. 763, 764-65 (1978).

9. Pub. L. No. 95-630, 92 Stat. 3641 (1978) (to be codified in scattered sections of 12 U.S.C.). The Act contains 20 titles which affect the various federal banking agencies: the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Board of Governors of the Federal Reserve; the Federal Home Loan Bank Board; and the National Credit Union Administration. Among other things, the Act seeks to upgrade and sharpen the federal financial regulatory scheme by expanding agency authority and establishing machinery for better coordination among the financial supervisory agencies. Additionally, it attempts to curtail preferential treatment to bank insiders and provide customers of financial institutions with greater substantive rights. See generally HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, REPORT ON H.R. 13471, H.R. DOC. NO. 1383, 95th Cong., 2d Sess. 1, 1-7, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9273 [hereinafter cited as HOUSE REPORT].

10. Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 2101, 92 Stat. 3741 [hereinafter cited as Financial Institutions Regulatory Act]. Generally, provisions of the Act became effective on March 10, 1979; however, certain provisions of the statute had separate effective dates.

11. See HOUSE REPORT, *supra* note 9, at 10-16.

12. See generally *id.*, at 16-26.

scrupulous always will find ways in which to bend regulations to accomplish their purposes."¹³

A. Supervisory Authority Over Depository Institutions

Title I of the Act grants new supervisory powers to federal regulatory agencies which monitor depository institutions.¹⁴ These agencies may now invoke civil money penalties, issue "cease and desist" orders, and remove directors and officers where there is a showing of "personal dishonesty" or "willful or continuing disregard" for the safety of the bank.¹⁵ Previously, supervisory powers were limited in that they could only be employed against institutions and not against individuals.¹⁶

Additionally, title I prohibits a bank from lending or extending credit to insiders, *i.e.*, directors, officers or persons owning or controlling more than ten percent of any class of voting securities of the lender bank in excess of \$25,000, unless the loan is approved in advance by a majority of disinterested directors.¹⁷ Loans above the prescribed limit to companies controlled by insiders or to political committees from which they might benefit are also prohibited.¹⁸ Regardless of the amount, any loan or extension of credit to an insider must be made on substantially the same terms as those prevailing at the time for comparable transactions with others, and may not involve more than the normal risk of repayment or present other unfavorable features.¹⁹ Furthermore, to insure that improper

13. Letter from Congressman Richard Kelly to John Milstead, Executive Vice President of the Florida Bankers Association (Nov. 1, 1978).

14. Financial Institutions Regulatory Act, Pub. L. No. 95-630, §§ 101-112, 92 Stat. 3641 (1978) (to be codified in scattered sections of 12 U.S.C.). The agencies affected are: the Comptroller of the Currency (national banks and banks located in the District of Columbia); the Board of Governors of the Federal Reserve System (state member banks and bank holding companies); the Board of Directors of the Federal Deposit Insurance Corporation (state banks which are not members of the Federal Reserve System but are insured by FDIC); the Federal Home Loan Bank Board (savings and loan holding companies and institutions which insure accounts with the Federal Savings and Loan Insurance Corporation); and the National Credit Union Administration (credit unions which insure accounts with the National Credit Union Administration).

15. *Id.*

16. *See, e.g.*, Federal Reserve Act, 12 U.S.C. § 501a (1976). This section provides for the forfeiture of a national bank's franchise for failure to comply with provisions of the chapter. While the Federal Reserve Board had no authority over the individuals, directors and officers were liable in an individual capacity for all damages sustained in consequence of a violation of the Act.

17. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 104, 92 Stat. 3644 (1978) (to be codified in 12 U.S.C. § 375b).

18. *Id.*

19. *Id.* Prior to the enactment of the Financial Institutions Regulatory Act, a prohibitory

credit extensions do not occur in other forms, the Act mandates an absolute prohibition against the payment of an overdraft on an account of an executive officer or director.²⁰

While the Act attempts to objectify terms on which insiders may obtain credit from their respective institutions, it fails to offer any definition for such terms as "normal risk of repayment." The legislative history indicates that self-dealing and insider abuses are the leading cause of banking problems and failures.²¹ Whether the judiciary will be influenced by the finding and apply a strict level of scrutiny when reviewing insider transactions remains to be seen.

B. *Interlocking Directorates*

Title II of the Act²² attempts to deal with the anticompetitive environment which is fostered by interlocking directorships.²³ In this regard, it expands existing prohibitions on bank interlocks²⁴ to include interlocks between other depository institutions: banks, savings and loan associations, credit unions, trust companies, cooperative banks, industrial banks, homestead associations, building and loan associations, mutual savings banks and their holding companies.²⁵

scheme limiting conditions under which loans could be made to the executive officers of banks did exist. 12 U.S.C. § 375a (1976). Any extension of credit to a bank executive would be permissible only if "the bank would be authorized to make it to borrowers other than its officers" and "on terms not more favorable than those afforded other borrowers." *Id.* The Financial Institutions Regulatory Act supplements the existing regulation in that it adds directors and 10% control persons to its list of insiders. Because conditions are only imposed on loans over \$25,000 under the Act, presumably directors and 10% control persons could still receive favored treatment on credit transactions under the \$25,000 limit.

20. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 104, 92 Stat. 3644 (1978) (to be codified in 12 U.S.C. § 375b).

21. See HOUSE REPORT, *supra* note 9, at 11. The House committee rejected a proposal to exempt state chartered federally insured banks from the insider borrowing restrictions based on a finding that 80% of the failures between 1970 and 1976 were state chartered banks.

22. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 201-209, 92 Stat. 3672 (1978) (to be codified in scattered sections of 12 U.S.C.).

23. The legislative history behind title II suggests an attempt to create a procompetitive environment among financial institutions. The necessity of stimulating competition in an industry where limited chartering and regulatory protection exist was especially considered by Congress. It was determined that interlocks could have an adverse effect on the flow of capital to the detriment of local communities. Additionally, Congress concluded that new competition and innovative banking techniques at the retail level would be of little benefit to the customer "if the financial institutions controlling these services and serving these areas have the same tight membership on their boards of directors, making the same policies, and balancing their conflicting interests." HOUSE REPORT, *supra* note 9, at 14.

24. Clayton Act, § 8, 15 U.S.C. § 19 (1976).

25. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 202, 92 Stat. 3672 (1978).

Focusing on the geography and population of an area in conjunction with the total assets of the subject institutions, the Act prohibits interlocking management when (a) the subject institutions are in the same standard metropolitan statistical area in the case of depository institutions with more than \$20 million in assets,²⁶ or are in the same city, town or village regardless of assets;²⁷ or (b) one of the subject institutions has total assets exceeding \$1 billion and the other(s) in excess of \$500 million, irrespective of the geographical area.²⁸ Existing interlocks are, however, grandfathered for a ten year period.²⁹

Authority to enforce compliance with title II is granted to the primary regulatory agency for each type of depository institution.³⁰ These supervisory agencies are authorized to either issue cease and desist orders³¹ or to refer violations to the Attorney General to enforce compliance with the title.³² Authority is also vested in the agencies to promulgate rules and regulations affecting interlocks.³³ Under this rulemaking authority agencies may exempt interlocks from the statutory prohibitions of title II.³⁴ An exemption to the title should only be granted, however, upon a finding that an otherwise impermissible interlock has a procompetitive effect.³⁵

26. *Id.* § 203(1).

27. *Id.*

28. *Id.* § 204.

29. *Id.* § 206. The grandfather provision, however, does not apply to interlocks which would otherwise be in violation of the title under § 8 of the Clayton Act. 12 U.S.C. § 19 (1970). Section 206 of title II is silent as to interlocks which may violate § 5 of the Federal Trade Commission Act as applied to nonbank depository institutions. 15 U.S.C. § 45 (1976). In its pertinent part, § 5(a)(2) of the Federal Trade Commission Act provides that: "The Commission is empowered and directed to prevent persons, partnerships, or corporations, *except banks*, . . . from using unfair methods of competing in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." (emphasis added).

While it has been the position of the Federal Trade Commission that director interlocks between savings and loan associations and banks in the same city violate § 5, the courts have never squarely decided the issue. Thus it is conceivable that the Commission could proceed against interlocks between nonbank depository institutions under § 5 on grounds that § 206 of title II was not intended to insulate otherwise grandfathered interlocks from challenge under other antitrust statutes. See H. Williams, "Grandfathering" of S & L/Bank Interlocks Under the New Financial Institutions Regulatory Act—Some Considerations for Association Counsel (Oct. 25, 1978) (unpublished work on file at U. MIAMI L. REV.).

30. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 207, 92 Stat. 3674 (1978). For a list of these regulatory agencies and the institutions which they supervise see note 15 *supra*.

31. *Id.* § 208.

32. *Id.* § 207.

33. *Id.* § 209.

34. *Id.*

35. See HOUSE REPORT, *supra* note 9, at 15.

C. *Foreign Branching*

Title III of the Act gives the Federal Deposit Insurance Corporation (FDIC) express authority over the establishment and operation of foreign branches and the acquisition of shares of foreign banks by state nonmember-insured banks.³⁶ State banks insured by FDIC must now obtain the prior written consent of the FDIC in order to establish foreign branches.³⁷ The Act does not, however, completely preempt state regulation in this area. The practice of foreign branching is still subject to initial state authorization.³⁸

Although title III is labeled "Foreign Branching," many of its significant provisions have nothing to do with the operation of foreign banks. Most importantly, the title gives FDIC authority to write regulations for laws which they enforce.³⁹ Additionally, it expands the subpoena power for all banking supervisory agencies in conducting investigations and examinations,⁴⁰ as well as establishing protective sanctions for examiners against intimidation and threats.⁴¹

D. *Credit Union Restructuring*

Under title V, the Federal Credit Union Act⁴² has been amended by the creation of a three-member board in lieu of an Administrator.⁴³ This restructuring of the National Credit Union Administration upgrades the agency status to a stature equal to that of the other financial institutional regulatory agencies and other independent agencies which operate under the direction of a board.⁴⁴

36. Financial Institutions Regulatory Act, Pub. L. No. 95-630, §§ 301-311, 92 Stat. 3675 (1978) (to be codified in scattered sections of 12 U.S.C.). The regulatory authority granted to the FDIC under the title is similar to that exercised by the Federal Reserve with respect to foreign branches and foreign bank acquisitions of member banks. *See generally* 12 U.S.C. §§ 601-603 (1976).

37. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 301, 92 Stat. 3676 (1978).

38. *See id.*

39. *Id.* § 309. Under this provision FDIC is authorized "[t]o prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this Act or of any other law which it has the responsibility of administering or enforcing" *Id.*

40. *Id.* § 305.

41. *Id.* § 307.

42. 12 U.S.C. §§ 1751-1775 (1976).

43. Financial Institutions Regulatory Act, Pub. L. No. 95-630, §§ 501-508, 92 Stat. 3680 (1978) (to be codified in 12 U.S.C. § 1752a). Previously, the National Credit Union was directed by a single Administrator.

44. For example, the Federal Reserve System, the Home Loan Bank System, the Federal Deposit Insurance Corporation, the Interstate Commerce Commission and the Federal Trade

In addition, the title provides for the assessment of fees to be paid by each federal credit union which will be used to defray the operating expenses of the Board and to finance the examination and supervision of member credit unions.⁴⁵

E. *Change in Control*

To correct what was thought to be "[o]ne of the most glaring gaps in the regulatory structure [of] our depository institutions,"⁴⁶ titles VI⁴⁷ and VII⁴⁸ prescribe new rules regarding the transfer of ownership of banks and savings and loan associations.⁴⁹ The overriding principle of these titles is that one who acquires control of a financial institution should undergo the same scrutiny as an applicant for a new charter.⁵⁰ It should be noted that under both titles it is not necessary for the respective supervisory agency to approve an acquisition; they are only given power to disapprove.⁵¹

Before anyone can acquire control of a bank or savings and loan he must file a written notice with the appropriate agency no less than sixty days prior to the transfer.⁵² For the purpose of these titles the concept of control is deemed to encompass the power to vote twenty-five percent or more of the voting stock or to direct the

Commission all have a board of directors or a commission which directs the operation of the agency.

45. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 507, 92 Stat. 3682 (1978).

46. HOUSE REPORT, *supra* note 9, at 19.

47. Financial Institutions Regulatory Act, Pub. L. No. 95-630, §§ 601-602, 92 Stat. 3683 (1978) (to be codified in 12 U.S.C. § 1817(j)) (change in bank control).

48. *Id.* §§ 701-703 (to be codified in 12 U.S.C. § 1730) (change in savings and loan control).

49. Both titles provide the same regulatory scheme over transfers. Any difference between the two titles is merely a reflection of the need for language that recognizes differences in the respective regulatory structures.

50. See generally HOUSE REPORT, *supra* note 9, at 19-22. Congress was concerned with the fact that prior approval by the appropriate regulatory authority was not necessary before a transfer of ownership could transpire, while such approval was necessary when the institution was chartered, when it applied for insurance of accounts, and when it planned to merge, establish a branch or become part of a holding company. *Id.* at 19.

51. See Financial Institutions Regulatory Act, Pub. L. No. 95-630, §§ 602, 703, 92 Stat. 3683 (1978). Section 602 of title VI amends subsection (j) of § 7 of the Federal Deposit Insurance Act. 12 U.S.C. § 1817(j) (1976). Section 703 of title VII amends paragraph (6) of § 407(l) of the National Housing Act. 12 U.S.C. § 1730(l)(6) (1976).

52. Financial Institutions Regulatory Act, Pub. L. No. 95-630, §§ 602, 703, 92 Stat. 3683 (1978). Notice of transfers of ownership should be filed with the FDIC for state nonmember insured banks, with the Comptroller of Currency for National Banks, with the Board of Governors of the Federal Reserve for state member banks and bank holding companies and with the Federal Home Loan Board for savings and loans and their holding companies.

management or policies of an institution.⁵³ An acquisition comes within these regulations if it is effected by purchase, assignment, transfer, pledge or other disposition of voting stock.⁵⁴

The notice required to be filed with the agency must contain detailed disclosure concerning the acquisition plan and the persons involved.⁵⁵ Based on this filing the agency involved may disapprove the proposed acquisition for any one of the following reasons: (1) the acquisition would result in a monopoly or be in furtherance of an attempt to monopolize the banking or savings and loan business; (2) the acquisition would substantially lessen competition in a section of the country and such anticompetitive effects are not clearly outweighed by the public interest; (3) the financial condition of an acquiring party jeopardizes the financial stability of the institution or seriously threatens the interests of the depositors; (4) the competence, experience or integrity of any acquiring party or designated management personnel is not in the interest of the depositors of the bank; or (5) the acquiring party fails, neglects, or refuses to furnish the required information.⁵⁶

Should the regulatory agency involved determine that the proposed acquisition warrants a denial, review of that determination is provided.⁵⁷ First, a hearing must be conducted at the agency level⁵⁸ and then, upon an adverse determination, the acquiring party may obtain review in the United States court of appeals closest to the home office of the institution sought to be acquired.⁵⁹

Additionally, both titles provide that, whenever a bank or savings and loan association makes a loan or loans secured by twenty-five percent or more of an insured institution's outstanding voting

53. *Id.*

54. *Id.*

55. *Id.* Notice filed in accordance with these titles must include: (1) information on the acquiring person's background, business activities and any pertinent legal proceedings in which they might be involved; (2) statements of their net worth; (3) description of the terms and conditions of the acquisition; (4) detailed information about the financing of the acquisition; (5) descriptions of any plans or proposals to make major changes in the institution being acquired; (6) the identity and background of anyone employed to solicit stockholders about the acquisition; (7) copies of tender offers or advertisements about tender offers; and (8) any other relevant information as determined by regulation or specific request by the agency. *Id.*

56. *Id.*

57. *Id.* If the agency denies a proposed acquisition, it must notify the applicant within three days of its decision accompanied with a statement setting forth the basis for the denial. The acquiring party then has 10 days after the receipt of the disapproval notice to file for review. *Id.*

58. *Id.*

59. *Id.*

stock, that fact must be promptly reported to the appropriate federal regulatory agency.⁶⁰

F. *Correspondent Accounts*

The misuse of bank funds through correspondent accounts has long been a source of concern. The chief criticism is that oftentimes loans were made on preferential terms when compared with transactions involving individuals who did not have similar account relationships.⁶¹ Moreover, it has been found that such accounts have often been little more than a means of securing loans for bank insiders rather than serving as balances to facilitate check clearing and provide other services associated with a correspondent relationship.⁶² Title VIII of the Financial Institutions Regulatory Act⁶³ seeks to prevent these abuses. The title adopts the same standard applied to loans to insiders from their own banks,⁶⁴ that is: loans based upon a correspondent relationship must be made on substantially the same terms as those prevailing for comparable transactions with others⁶⁵ and not involve more than normal risk.

Under the title, a bank which holds a correspondent account for another bank may not make a loan to an executive officer, director, or ten percent control person unless the terms and conditions of the loan are nonpreferential.⁶⁶ Similarly, a bank which has a correspondent account at another bank can only make loans to insiders of that bank on nonpreferential terms.⁶⁷ Furthermore, a bank may not establish a correspondent relationship with any bank where it has loans outstanding with inside persons of that bank unless such existing loans are nonpreferential.

Bank insiders must make annual written reports to the board of directors of their bank if they borrowed funds from any bank with whom a corresponding relationship existed.⁶⁸ These reports must include the maximum amount of indebtedness, the interest rate, as

60. *Id.*

61. See HOUSE REPORT, *supra* note 9, at 13.

62. *Id.*

63. Pub. L. No. 95-630, § 801, 92 Stat. 3690 (1978). Section 801 of title VIII amends § 106(b) of the Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 106(b), 84 Stat. 1766 (codified at 12 U.S.C. § 1972 (1976)).

64. See Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 801, 92 Stat. 3690 (1978). See generally HOUSE REPORT, *supra* note 9, at 13-14.

65. See Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 104, 92 Stat. 3644 (1978).

66. *Id.* § 801.

67. *Id.*

68. *Id.*

well as the other terms and conditions of the loan.⁶⁹ The directors of each bank must then compile those reports, make them publicly available and forward them to the appropriate regulatory agency.⁷⁰

G. *Disclosure of Material Facts*

Title IX of the Act⁷¹ supplements the reporting requirements which title XIII prescribes for borrowing by bank insiders.⁷² It requires all insured banks to file an annual report with the regulatory agency which supervises its activities.⁷³ This report must include the names of all stockholders owning, controlling or voting more than ten percent of any class of the bank's voting securities, the names of all executive officers with such holdings, the aggregate amount of outstanding credit to such inside persons, companies controlled by them or campaign committees established for their benefit.⁷⁴ Copies of the reports filed under this provision must be made available to the public upon request.⁷⁵ These disclosure requirements apply only to banks and do not pertain to other types of depository institutions which come under federal regulation.

H. *Federal Financial Institutions Examination Council*

Title X of the Act establishes the Federal Financial Institutions Examination Council.⁷⁶ This body will serve as a coordinating link between the various banking agencies.⁷⁷ The Council is intended to

69. For the purpose of this title, loans to companies controlled by a bank insider and loans to political committees which inure to the benefit of the bank insider are to be included in calculating the maximum indebtedness. *Id.*

70. *Id.* For a list of the appropriate regulatory agencies which supervise the particular type of banking institution involved, see note 52 *supra*.

71. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 901, 92 Stat. 3693 (1978). Section 901 of title IX amends § 7 of the Federal Deposit Insurance Act. 12 U.S.C. § 1817 (1976).

72. See generally text accompanying notes 66-70 *supra*. The information required in title VIII reports would also be included in reports filed under title IX.

73. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 901, 92 Stat. 3693 (1978). For a list of the appropriate regulatory agencies which supervise the particular type of banking institution involved, see note 52 *supra*.

74. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 901, 92 Stat. 3693 (1978).

75. *Id.*

76. *Id.* § 1004.

77. The lack of coordination among the agencies can readily be seen as problematic if one were to consider the not unlikely situation where a bank holding company owns subsidiary national banks, state member banks, and state nonmember banks. Here the holding company would be involved with all three banking regulatory agencies. Nonuniform reporting and disclosure requirements by the different agencies could easily lead to confusion, duplicity of work and unnecessary expense.

fulfill the "need for better coordination and cooperation among these agencies" in a banking industry which has become "sophisticated and complex."⁷⁸

The Council, to be composed of representatives from the various regulatory agencies,⁷⁹ will prescribe uniform principles and standards for the examination and supervision of all federally chartered financial institutions.⁸⁰ In addition, it will recommend procedures which attempt to promote consistency and uniformity in examination, supervision and reporting for all financial institutions.

I. *Right to Financial Privacy*

Title XI of the Act⁸¹ is welcomed by banks and their customers alike. The sanctity of traditional notions of the banker's duty of confidentiality is finally codified so that customers now have a legitimate expectation of privacy in their financial records and a right to challenge any attempt by a federal agency to gain access to such records. Unless the requirements of this title are met, a financial institution is prohibited from disclosing any customer records.⁸² While the bank customer has the initial burden of making the challenge, the burden of proof immediately shifts to the federal agency seeking access.

Under the title, a customer can simply authorize the release of their financial records.⁸³ If the customer does not give such authorization, one of the federal agency's alternatives is to proceed through

78. HOUSE REPORT, *supra* note 9, at 24-25.

79. The Council will be composed of five members. They are: the Comptroller of the Currency; a Governor of the Board of Governors of the Federal Reserve; the Chairman of the Federal Deposit Insurance Corporation; the Chairman of the Federal Home Loan Bank Board; and the Chairman of the National Credit Union Administration Board. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 1004(a), 92 Stat. 3694 (1978).

80. *Id.* § 1006(a).

81. Financial Institutions Regulatory Act, Pub. L. No. 95-630, §§ 1101-1121, 92 Stat. 3697 (1978).

82. This title is a congressional reaction to the decision of the Supreme Court in *United States v. Miller*, 425 U.S. 435 (1976). HOUSE REPORT, *supra* note 9, at 34. In *Miller*, the Court held that no fourth amendment right of a depositor is violated by a seizure of bank records relating to his financial transactions. The Court reached this holding by finding constitutional standing to challenge the seizure lacking notwithstanding the fact that the Bank Secrecy Act of 1970, 12 U.S.C. § 18296 (1976) required the bank to maintain these records. The Court in a later decision has suggested that Congress has the prerogative to establish nonconstitutional barriers to similar abusive intrusions by government officials. *See Zurcher v. Stanford Daily*, 98 S. Ct. 1970, 1982-83 (1978).

83. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 1104, 92 Stat. 3698 (1978).

an administrative subpoena or summons,⁸⁴ or judicial subpoena.⁸⁵ A subpoena will only issue, however, upon a demonstration by the agency that "there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry."⁸⁶ Before the agency can obtain financial records under a subpoena or summons, a copy must be served upon the customer who then has ten days from the date of service (or fourteen days from the date of mailing) within which to file a motion to quash.⁸⁷ In addition to consent, subpoena and summons, a federal agency may seek a search warrant in order to gain access to a customer's records.⁸⁸ In order to obtain a search warrant, however, the agency must demonstrate probable cause that a crime has been or may be committed.

An agency without subpoena authority over the desired records may make a formal written request for such records if the request is authorized by regulation or the head of the agency and is believed relevant to a legitimate law enforcement purpose, in which case the request will be treated like a subpoena.⁸⁹ The customer has ten days from the date of service or fourteen days from the date of mailing to protest the request by means of a motion to quash.⁹⁰

If a customer challenges a subpoena, summons or formal written request, the investigative agency must file a response with the appropriate United States district court.⁹¹ Upon a finding that the customer is not the object of legitimate law enforcement inquiry, that no legitimate law enforcement inquiry exists, or that the agency failed to substantially comply with the title, the process will be quashed or the request enjoined.⁹² Otherwise, the agency shall be

84. *Id.* § 1105.

85. *Id.* § 1107.

86. *Id.* §§ 1105, 1107.

87. *Id.* Accompanying the subpoena or summons must be a notice of the procedure which the customer must follow if he wishes to challenge the agency's efforts to obtain the financial records. *Id.*

Section 1105(b) of the committee bill included a provision which would have granted the Securities and Exchange Commission authority to dispense with the prior notification requirement. See HOUSE REPORT, *supra* note 9, at 35. This provision, however, was not included in the bill as enacted.

88. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 1106, 92 Stat. 3700 (1978). Within ninety days after the search warrant is served, notice must be mailed to the customer's last known address informing him that financial records concerning his transactions have been seized. This notification must include the name of the department or agency which obtained the records and the purpose for which these records were obtained. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* § 1110(a).

92. *Id.* § 1110(c).

entitled to access to the customer's financial records.⁹³

Under limited circumstances the customer notice requirements may be delayed by order of a judge or magistrate until after the financial records have been obtained by the inquiring agency.⁹⁴ For a delay order to issue, the judge or magistrate must determine that the investigation is within the lawful jurisdiction of the agency, that the records being sought are relevant to a legitimate law enforcement inquiry and that certain exigent circumstances exist.⁹⁵ If emergency access is obtained in this manner, however, the inquiring agency must notify the customer as soon as possible stating the purpose for which the records were sought and the grounds necessitating the delay of notice.⁹⁶

Financial records obtained under the title may not be transferred to any other agency or department unless notice of a proposed transfer is given to the customer.⁹⁷ The customer may then challenge the transfer as if the notice of transfer were a subpoena, summons or formal request.⁹⁸

There are several exceptions to the procedure and notice requirements prescribed in the Act, most significant of which are grand jury subpoenas.⁹⁹ Moreover, the title does not prohibit the disclosure of financial records in accordance with procedures authorized by the Internal Revenue Code.¹⁰⁰

93. The title does not restrict any right which the financial institution may have to challenge the request for records. Nothing in the title, however, entitles a customer to assert the rights of the financial institution. *Id.* § 1110(f). For a discussion of a customer's lack of standing to assert a constitutional challenge where bank records are seized by government authorities, see note 82 *supra*.

94. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 1109(a), 92 Stat. 3702 (1978).

95. *Id.* § 1109(a)(1)-1109(a)(3). Permissible circumstances exist only if prenotification would result in endangering life or physical safety of any person, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardizing an investigation or unduly delaying a trial or proceeding. *Id.* § 1109(a)(3)(A)-1109(a)(3)(E).

96. *Id.* § 1109(c).

97. *Id.* § 1112(a). The Act makes a distinction between supervisory agencies of financial institutions and other government agencies or departments. For the purposes of the Act, the supervisory agencies are: the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board, the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Securities and Exchange Commission, the Secretary of the Treasury and any state banking or securities department or agency. *Id.* § 1101(b). While the Act provides that information may not be transferred to another government agency without specific statutory authorization, supervisory agencies may, however, share information. *Id.* § 1112(d).

98. *Id.* § 1112(b).

99. *Id.* § 1120.

100. *Id.* § 1113(c). For procedures under the Internal Revenue Code, see I.R.C. § 7602.

Another major improvement brought about by this legislation is the provision requiring the government to reimburse financial institutions for costs in assembling and furnishing documents requested after October 1, 1979.¹⁰¹

J. *Electronic Fund Transfers*

Title XX of the Act¹⁰² amends the Consumer Credit Protection Act¹⁰³ "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems."¹⁰⁴ Principal among the purposes, however, is the creation of substantive consumer rights. The regulatory scheme promulgated by the title covers electronic fund transfers initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape which operates as an authorization to a financial institution to debit or credit an account.¹⁰⁵ This would include any transfer initiated by automated teller machine transactions, direct deposit or withdrawal facilities, point-of-sale transfers¹⁰⁶ and by telephone in contemplation of an ongoing practice or in accordance with a prearranged plan.¹⁰⁷

The title requires the financial institution to prepare written documentation at the time of transfer which shall be made available to the consumer through periodic statements.¹⁰⁸ In addition, it establishes a procedure for the resolution of errors in electronic transactions. This procedure is activated if, within sixty days after a statement has been transmitted, the consumer notifies the financial

101. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 1115, 92 Stat. 3708 (1978).

102. *Id.* § 2001 (to be codified at 15 U.S.C. § 1693).

103. 15 U.S.C. §§ 1601-1691 (1976). The short title for these amendments is the "Electronic Fund Transfer Act."

104. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 2001, 92 Stat. 3728 (1978). See also S. REP. No. 915, 95th Cong., 2d Sess. 3, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9403.

105. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 2001, 92 Stat. 3728 (1978).

106. Point of sale transfers are electronic fund transfers which enable consumers to transfer money from their bank accounts to a merchant's account instantaneously through use of a computer terminal at the merchant's store.

107. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 2001, 92 Stat. 3728 (1978). The bill specifically excludes traditional wire transfers between banks, any transaction whose principal purpose is the purchase or sale of securities, and check guarantee and authorization services, unless such services directly result in a debit to the consumer's bank account.

108. *Id.* The required documentation must include the date and amount of the transfer, the type of transfer, identification of the consumer's accounts involved, identity of any third party involved in the transfer and identification of the electronic terminal involved.

institution that he believes that there is an error in his account.¹⁰⁹ The financial institution is then charged with the duty to complete an investigation within ten business days and to promptly correct the matter if it determines that an error did, indeed, occur.¹¹⁰ If the conclusion of the investigation reveals no mistake, an explanation of such findings must be mailed to the consumer within three days of the determination.¹¹¹ Failure by the financial institution to comply with the procedures of this provision or a knowing and willful determination by the financial institution that no error occurred when such a conclusion could not reasonably be drawn from the evidence, entitles the consumer to treble damages.¹¹²

On the other hand, consumer liability under the title is limited to fifty dollars for any unauthorized transfer by card, code or other means of transfer.¹¹³ The fifty dollar ceiling, however, increases to five hundred dollars if the consumer fails to report the unauthorized transfer within sixty days of the transmittal of an account statement or within two business days after he learns that the card or means of access has been lost or stolen.¹¹⁴ The financial institution has the burden of proving that all required disclosures were made by it, that the transfer was authorized or, if unauthorized, that all conditions for imposing liability upon the consumer have been met.¹¹⁵

The title is vigilant of consumer rights in several other respects. For example, the issuance of valid cards or other means of access is

109. *Id.*

110. *Id.* To avoid investigation deadlines imposed by the title, the financial institution may provisionally recredit the consumer's account for the amount alleged to be in error. This alternative permits the financial institution up to 45 days to resolve the matter. During the period, the consumer would have full use of the recredited funds.

111. *Id.* The title enumerates a list of errors which are grounds to activate the error resolution procedures. These include computational errors, the incorrect transfer or receipt of funds and unauthorized transfers and statement omissions. In addition, the title authorizes the Board of Governors of the Federal Reserve to prescribe regulations to define other errors.

112. *Id.* Damages would be three times the amount of the error.

113. *Id.* Congress felt that this was perhaps the most important protection contained in the bill. S. REP. NO. 915, 95th Cong., 2d Sess. 5, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9403, 9407.

114. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 2001, 92 Stat. 3728 (1978). Extenuating circumstances such as hospitalization or extended travel may toll the running of these limitation periods.

115. *Id.* The \$50 limitation on liability applies only where there has been a bona fide unauthorized transfer. If the consumer authorized the transfer, derived any benefits from it or was engaged in fraudulent conduct, the full liability would then fall on him. By requiring the financial institution to absorb any loss above the \$50 limitation in cases of a bona fide unauthorized transfer, Congress felt that this would create a sufficient incentive for financial institutions to secure an efficient electronic transfer system. See S. REP. NO. 95-915, 95th Cong., 2d Sess. 6, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9403, 9408.

limited to renewals and responses to a consumer's application.¹¹⁶ Moreover, no agreement which purports to restrict any right conferred to a consumer under the title will be valid.¹¹⁷ Failure to comply with any provision of the title can result in civil liability or, if committed knowingly and willfully, criminal liability.¹¹⁸

The consumer protection afforded by this title is meant to serve only as the minimum standard. States may create greater rights in favor of consumers. Where state law is inconsistent with the federal scheme, the Federal Reserve Board must determine the applicable standard by examining which law affords the greater protection.¹¹⁹

With respect to unauthorized transfers, under Florida law a financial institution will not be liable if it has failed to maintain reasonable procedures to protect against such a loss.¹²⁰ Such a defense does not exist under the new federal law, although threshold liability for the first fifty dollars of loss is imposed on the consumer.¹²¹

Another defense available to the financial institution under Florida law arises where the customer's negligence has contributed to the unauthorized transfer.¹²² This defense, however, seems to be tempered by the federal statute which limits consumer liability to five hundred dollars and then only for failure to notify within the time limits set forth in the statute.¹²³

III. THE FEDERAL INTERNATIONAL BANKING ACT

Florida's International Banking Law¹²⁴ is now complemented by the federally-enacted International Banking Act of 1978.¹²⁵ While

116. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 2001, 92 Stat. 3728 (1978).

117. *Id.*

118. *Id.* Civil liability, exclusive of the treble damage provision for failure to follow error resolution procedure and the proximate damage provision for failure to make a correct timely transfer when properly instructed to do so, must be at least \$100, but no more than \$1,000.

119. *Id.*

120. See FLA. STAT. § 659.062 (13)(c) (1977). The Florida statute applies to electronic transfers by remote service terminals and point of sale terminals. It does not cover, as does the federal statute, transactions initiated by phone pursuant to a prearranged plan and direct deposit and automatic payment transaction.

121. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 2001, 92 Stat. 3728 (1978); see text accompanying note 113 *supra*.

122. See FLA. STAT. § 659.062(13)(c) (1977).

123. Financial Institutions Regulatory Act, Pub. L. No. 95-630, § 2001, 92 Stat. 3728 (1978); see text accompanying notes 114-15 *supra*.

124. FLA. STAT. § 659.67 (1977). See generally Baena & Romanchuck, *Banking Law: Survey of Florida Developments*, 32 U. MIAMI L. REV. 763, 765-69 (1978).

125. International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 (to be codified in scattered sections of 12 U.S.C.).

the purpose of Florida's law is to establish and promote Florida as a center of international commerce and trade,¹²⁶ the federal statute seeks to establish "the principle of parity of treatment between foreign and domestic banks in like circumstances."¹²⁷ Additionally, the new federal law includes amendments to the National Bank Act¹²⁸ and the Edge Act.¹²⁹

A. Federal Branches and Agencies

As a result of the Act, a foreign bank may now establish one or more agencies¹³⁰ or branches¹³¹ in any of the United States so long as it does not operate a branch or agency in that state under state law and so long as the state of establishment does not have laws of prohibition.¹³² Notice that state laws need not expressly permit the establishment of a federal branch or agency.¹³³ Also note that there is no limitation on the number of branches or agencies within a single state (unlike under Florida law¹³⁴), although there is a prescription against the establishment of both agencies and branches in the same state.¹³⁵

In general, operations of a federal branch or agency shall be conducted with the same rights and privileges, and is subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to a national banking association doing business at the same location.¹³⁶ The Comptroller of Currency is given primary examination, regulatory and supervisory authority over federal branches and agencies.¹³⁷

126. STAFF OF HOUSE COMM. ON COMMERCE, REPORT ON INTERNATIONAL BANKING (1977).

127. SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, REPORT ON INTERNATIONAL BANKING ACT OF 1978, S. REP. NO. 95-1073, 95th Cong., 2d Sess. 2, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2827, 2828 [hereinafter cited as SENATE REPORT].

128. International Banking Act of 1978, Pub. L. No. 95-362, § 2, 92 Stat. 608 (amending 12 U.S.C. § 72 (1976)).

129. *Id.* § 3 (amending 12 U.S.C. §§ 611-632 (1976)).

130. An "agency" is defined as "any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of balancing powers, checks are paid, or money is lent but at which deposits may not be accepted from citizens or residents of the United States." *Id.* § 1(b)(1) (to be codified in 12 U.S.C. § 3101(1)).

131. A "branch" is defined as "any office or any place of business of a foreign bank located in any State of the United States at which deposits are received." *Id.* § 1(b)(3) (to be codified in 12 U.S.C. § 3101(3)).

132. *Id.* § 4(a) (to be codified in 12 U.S.C. § 3102(a)).

133. *See id.* § 4(a)(2).

134. *Id.* § 4(h).

135. *Id.* § 4(e).

136. *Id.* § 4(b).

137. FLA. STAT. § 659.67.

B. *Interstate Banking Operations*

The reports and testimony before Congress on the International Banking Act of 1978 echoed a single overriding concern. Bankers and officials alike were fearful that unless subtle but nonetheless effective restrictions were imposed on interstate branching by foreign banks, a network of full service banking offices throughout the country could be established by the world's largest foreign banks and create a national banking system in which only the largest domestic banks could compete.¹³⁸

Therefore, as a stop-gap measure, the Act provides that in the case of a branch to be established outside of a foreign bank's home state of operations, which is a designation left to the foreign bank, such branch would be able to accept such credit balances as would agencies under relevant state and federal law.¹³⁹ Yet, with respect to deposits, such a branch would be limited to accepting the types of foreign source and international banking and finance-related deposits permissible for Edge Act corporations.¹⁴⁰

C. *Edge Act Corporations*

As it pertains to Edge Act corporations, the International Banking Act of 1978 expressly declares its purpose to be:

[T]o provide for the establishment of international banking and financial corporations operating under Federal supervision with powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad; to afford to the United States exporter and importer in particular, and to United States commerce, industry and agriculture in general, at all times a means of financing international trade, especially United States exports; to foster the participation by regional and smaller banks throughout the United States in the provision of international banking and financing services to all segments of United States agriculture, commerce, and industry and, in particular small business and farming concerns; to stimulate competition in the provision of international banking and financing services throughout the United States; and, in conjunction with each of the preceding purposes, to facilitate and stimulate the export of United States goods, wares, merchandise, commodities and services to achieve a sound United States international trade position.¹⁴¹

138. STAFF OF HOUSE COMM. ON COMMERCE, REPORT ON INTERNATIONAL BANKING (1977).

139. 12 U.S.C.A. § 3103(a) (West Supp. 1978).

140. *Id.*

141. *Id.* § 611(a).

Accordingly, the Federal Reserve Board is directed to promulgate revised regulations to accomplish these objectives by early 1979.¹⁴² Further, the requirement that all Edge Act corporation directors be United States citizens is eliminated so as to enable foreign-owned banks to penetrate the United States banking community.¹⁴³

The amendments seek to eliminate restrictions which have worked to the competitive disadvantage of Edge Act corporations. Accordingly, the Edge Act was amended in two substantial respects: First, the requirement that all Edge Act corporation directors be United States citizens was eliminated.¹⁴⁴ Second, the requirement that the ratio of an Edge Act corporation's equity to liabilities not be less than ten percent was also eliminated.¹⁴⁵

Additionally, Congress directed the Federal Reserve Board to promulgate revisions to regulation K¹⁴⁶ which pertains to Edge Act corporations. In response to this congressional mandate, the Board has issued a proposed comprehensive revision of regulation K.¹⁴⁷ Included among the revisions set forth in the proposal are: the creation of a class¹⁴⁸ of customers categorically deemed to be engaged in international business transactions; the establishment of Edge Act domestic branches;¹⁴⁹ the increase of the ceiling on single investments;¹⁵⁰ reduction of the permissible ratio of equity to liabilities to six percent;¹⁵¹ and authority to engage in financing the production of goods in the United States if they are to be exported.¹⁵²

The proposed revisions to regulation K have not overwhelmed bankers, to say the least. Indeed, the Florida Bankers Association adopted a terse resolution urging the Federal Reserve Board to with-

142. *Id.*

143. *Id.* § 614.

144. *Id.* § 3(c).

145. *Id.* § 3(d).

146. 12 C.F.R. §§ 211.1-.112 (1978).

147. 44 Fed. Reg. 10,509 (1979).

148. Under this proposal "customers which, on a nonconsolidated basis have more than two-thirds of their purchases or sales in international commerce, would be able to obtain full deposit and other banking services from Edge Corporations." *Id.* For current regulation see 12 C.F.R. § 211.7 (1978).

149. Under existing regulations if a firm wishes to provide international banking services at different locations in the United States it must incorporate separate Edge Act corporations. 12 C.F.R. § 211.6(a) (1978).

150. The current ceiling imposed upon investments in foreign companies without prior Board approval is \$500,000 or 25% ownership interest. 12 C.F.R. § 211.8(a) (1978). The proposal would raise the general consent limitation to \$2 million. 44 Fed. Reg. 10,510 (1979).

151. The present ratio is 10%. 12 C.F.R. § 211.9(c) (1978).

152. Under current regulations, Edge Act corporations may finance the shipment and storage of goods for export, but not their production. *Id.* § 211.7(d).

draw the proposed rules.¹⁵³ The big fear, of course, is gravitation toward national branch banking.¹⁵⁴ The irony is that if such a system were to evolve, the competitive equality created by Congress between Edge Act corporations and foreign-owned institutions would strike an imbalance of equality as between those institutions and domestics.

D. National Banks

To further neutralize any advantage that national banks might otherwise have over foreign banks, the International Banking Act of 1978 grants the Comptroller of the Currency the right to waive the requirement that all directors of a national banking association be United States citizens.¹⁵⁵ Under this section, however, the Comptroller only has discretion to waive the citizenship requirement as it would apply to directors of a national bank which is an affiliate or subsidiary of a foreign bank, and only as to less than fifty percent of the directors.¹⁵⁶ It is thought that this provision will facilitate foreign bank chartering and acquisition of national bank subsidiaries "without unduly compromising the principle of local ownership and control."¹⁵⁷

IV. ACTIVITIES OF INTERNATIONAL BANKS IN FLORIDA

Since the enactment of Florida's International Banking Law in 1977,¹⁵⁸ the Department of Banking and Finance has adopted rules governing the range of permissible activities in which international banking corporations may engage.¹⁵⁹ The rules are particularly clear with regard to the permissible activities of agencies and representative offices which operate under state law. As to the former, the rules expressly provide that loans shall not be made from agencies "unless such loans are clearly related to and usual in international or foreign business and financing international commerce."¹⁶⁰ To aid in interpreting this standard, the rules further provide that "[r]eal estate loans, automobile loans, retail installment contract financing, loans for the purchase of securities and other essentially domes-

153. See Russell, *supra* note 1.

154. *Id.*

155. International Banking Act of 1978, Pub. L. No. 95-369, § 2, 92 Stat. 608 (amending 12 U.S.C. § 72 (1976)).

156. *Id.*

157. SENATE REPORT, *supra* note 127, at 3.

158. 1977 Fla. Laws ch. 77-157 (codified at FLA. STAT. § 659.67 (1977)).

159. FLA. ADMIN. CODE § 3C-15.01-.05 (1978).

160. *Id.* § 3C-15.03.

tic loans will not fall within the category of permissible activities."¹⁶¹

The rules establish a general prohibition against the taking of deposits by agencies of international banking corporations. Agencies may, however, maintain credit balances for the account of others which necessarily arise, or are incidental to, the exercise of their lawful powers. The rules set forth a veritable laundry list of what might constitute permissible credit balances.¹⁶² The gist of the examples set forth is that the balances must be transitory in nature as opposed to being tantamount to demand deposits.¹⁶³

As for representative offices, the rules make it clear that solicitation and even negotiation of "loans, deposits, letters of credit and other business" by these offices for the international banking corporation which they represent are permissible activities.¹⁶⁴ Additionally, representative offices may do research and act as a liaison between the home office and its customers in Florida.¹⁶⁵ A representative office may not, however, function as a branch office of a bank.¹⁶⁶

Finally, the rules have been expanded to provide a method of establishing that a bank domiciled in Florida would be permitted to maintain facilities or exercise powers similar to those permitted under the international banking law in the country in which the applicant is organized, as is required under that law.¹⁶⁷ The rules provide that such proof may consist of data as to the existing activities of foreign banks in that country, an opinion of a licensed member of that country's legal profession, or a certificate of an appropriate bank supervisory authority of that country.¹⁶⁸

Notwithstanding the expansive amendments to the Edge Act¹⁶⁹

161. *Id.*

162. These funds are: (1) proceeds of loans to customers where such proceeds are not immediately disbursed; (2) proceeds of incoming remittances; (3) proceeds of collections made for customers' accounts; (4) funds delivered by customers to settle letters of credit accounts with the banking agency prior to settlement date; (5) proceeds of export bills negotiated; (6) cash collateral resulting from collections arising out of a loan transaction with a customer; (7) undisbursed proceeds of a loan retained by the banking agency in the nature of a compensating balance from the borrowing customer; (8) funds delivered prior to execution of money transfers undertaken on behalf of customers; (9) funds delivered or received on account of the purchase or sale of securities for the account of customers; and (10) funds delivered or received from customers to cover currency transactions or as the result of currency transactions on behalf of customers. *Id.* § 3C-15.03(1).

163. *Id.* See also [1977] FLA. ATT'Y GEN. ANNUAL REP. 272.

164. FLA. ADMIN. CODE § 3C-15.04 (1978).

165. *Id.*

166. *Id.*

167. *Id.* § 3C-15.05; see FLA. STAT. § 659.67(4)(b) (1977).

168. FLA. ADMIN. CODE § 3C-15.05 (1978).

169. 44 Fed. Reg. 10,511 (1979) (proposed rule § 211.3).

and the proposed revisions to regulation K¹⁷⁰ and the congressionally-enacted International Banking Act, Florida's International Banking Law continues to display features which might continue to attract applicants. Foremost is the absence of reserve requirements. Also to be considered in this regard is the growing preference for state as opposed to federal regulation. Clearly though, the federal statutes offer greater opportunity for expansion and a base for wider market penetration.

V. STATE LIMITATIONS ON OUT-OF-STATE BANKS

A. *BT Investment Managers, Inc. v. Lewis*

The extent to which a state may exclude an out-of-state bank holding company from establishing nonbanking subsidiaries within its boundaries has come under serious challenge.¹⁷¹ In this regard, two Florida statutes which attempted to exclude out-of-state nonbanking concerns were recently declared unconstitutional¹⁷² as being violative of the commerce clause.¹⁷³ The statutes in question prohibited nondomiciliary corporations from furnishing investment advisory services¹⁷⁴ and exercising various trust powers¹⁷⁵ and duties within the state.

The controversy arose when Bankers Trust New York Corporation, a bank holding company organized under the laws of New York, attempted to engage *de novo* in certain investment advisory activities through a wholly owned subsidiary in Palm Beach, Flor-

170. See 44 Fed. Reg. 10,509 (1979). See also text accompanying notes 163-170 *supra*.

171. See *BT Inv. Managers, Inc. v. Lewis*, 461 F. Supp. 1187 (N.D. Fla. 1978).

172. *Id.* at 1201.

173. U.S. CONST. art. I, § 8, c. 3.

174. FLA. STAT. § 659.141(1) (1977). The pertinent parts of this statute provide that: no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state.

175. FLA. STAT. § 660.10 (1977). The relevant provision in this statute provides as follows:

All corporations except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state, as follows

The statute then goes on to list a number of fiduciary duties including, among others, acting as an executor or administrator with certain exceptions, and acting as a guardian or acting as a receiver.

ida.¹⁷⁶ After notice of its proposal, but prior to approval by the Board of Governors of the Federal Reserve System as required by the Bank Holding Company Act, the Florida Legislature enacted legislation amending section 659.141.¹⁷⁷ The effect of this amendment was to generally prohibit the provision of investment advisory services in Florida by out-of-state bank holding companies through control of business subsidiaries having offices in Florida.¹⁷⁸ The Board denied the application of Bankers Trust¹⁷⁹ despite finding substantial evidence indicating "that the celerity with which the legislation was enacted is directly attributable to the pendency of the instant proposal before the Board."¹⁸⁰ The denial was based upon a provision in the Bank Holding Company Act which expressly reserved authority in the states to adopt legislation within the exercise of their powers and jurisdiction with respect to banks, bank holding companies and their subsidiaries¹⁸¹ and upon the Supreme Court decision in *Whitney National Bank v. Bank of New Orleans & Trust Co.*¹⁸² From this adverse decision by the Board, Bankers Trust brought an action against Florida's comptroller challenging the constitutionality of the amended statute.¹⁸³ Additionally, and perhaps more significantly, Bankers Trust also attacked the constitutionality of another Florida statute which antedated its efforts to

176. The subsidiary, BT Investment Managers, Inc., was a corporation organized under the laws of Delaware and qualified to do business in Florida.

177. 1972 Fla. Laws ch. 72-96, § 1, as amended by 1972 Fla. Laws ch. 72-726 (codified at FLA. STAT. § 659.141(1) (1977)).

178. See note 175 *supra*.

179. Bankers Trust New York Corp., 59 FED. RES. BULL. 364 (1973).

180. *Id.* at 366.

181. Section 7 of the Act provides as follows: "The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846 (1976).

182. 379 U.S. 411 (1965). In *Bankers Trust* the Board interpreted *Whitney* as expressly instructing it "to consider the applicability and effect of any such [state] legislation." The primary issue in *Whitney* dealt with the jurisdiction of the Comptroller of Currency to authorize the opening of a new national bank which was a subsidiary of a bank holding company. In holding that such jurisdiction was vested in the Federal Reserve Board the Court suggested, in dicta, that the Board should consider a recently enacted state law which prohibited branch banking in its determination.

183. When Bankers Trust initially brought this action its case was dismissed without prejudice in a decision based upon the abstention doctrine. *BT Inv. Managers, Inc. v. Lewis*, 379 F. Supp. 792 (N.D. Fla. 1973). On appeal this decision was reversed by the Court of Appeals for the Fifth Circuit which held that abstention was improper. Finding no special state competence, overriding state interest or threat to Florida's administration of its own affairs, the court determined that the constitutionality of the Florida statute could be properly determined in a federal forum. *BT Inv. Managers, Inc. v. Lewis*, 559 F.2d 950 (5th Cir. 1977).

gain entry into the state. Section 660.10 of the Florida Bank Code established a bar to all corporations except banks and trust companies incorporated in Florida and national banks located in Florida from exercising various trust powers and duties within the state.¹⁸⁴

A three judge district court found the statutes discriminatory in nature and, as such, invalid per se as a violation of the commerce clause.¹⁸⁵ To reach this characterization of the challenged legislation, the critical inquiry to the court was whether the statutes were basically "protectionist" measures, or whether they could be fairly viewed as laws directed to legitimate local concerns, with effects upon interstate commerce that would be only incidental.¹⁸⁶ While the court recognized that there might be legitimate legislative interests in attempting to prevent undue concentrations of power and diminished competition in the Florida investment advisory and trust markets, it did not find a need here to balance between local concerns and interstate impact.¹⁸⁷ In light of the history behind the enactment of section 659.141(1) and the lack of any evidence which demonstrated that foreign investment advisory services or trust firms posed any greater danger to the competitive environment in Florida than did local firms, it was not difficult for the court to view the statutes as "economic protectionist" legislation.¹⁸⁸

To survive constitutional scrutiny under the commerce clause, legislative efforts must have an evenhanded impact upon both in-state and out-of-state firms. The court in *BT Investment Managers* confidently asserted that the two Florida statutes involved did not meet this standard. As to section 659.141(1) the court concluded

184. FLA. STAT. § 660.10 (1977); see note 175 *supra*.

185. *BT Inv. Managers, Inc. v. Lewis*, 461 F. Supp. 1187, 1201 (N.D. Fla. 1978). The court based its decision on *City of Philadelphia v. New Jersey*, 98 S. Ct. 2531 (1978), a case decided last term by the Supreme Court which defined a "virtually per se rule of invalidity" regarding economic protectionist legislation. See *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57 (1978). See also *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 530-39 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935).

186. 461 F. Supp. at 1195-98. This is the two level analysis which the Supreme Court, in *City of Philadelphia v. New Jersey*, 98 S. Ct. 2531, 2536 (1978), established as the evaluation standard for determining the permissible limits of state regulation affecting interstate commerce.

187. 461 F. Supp. at 1197-98.

188. *Id.* at 1196. In considering the discriminatory aspects of this legislation the court quoted a finding of the Federal Reserve Board wherein the Board stated:

"It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry."

Id. at 1198 (quoting 59 FED. RES. BULL. at 366).

that it erected "an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment market."¹⁸⁹ Similarly, it found that section 660.10 "cordons off Florida trust companies from competition by out-of-state concerns."¹⁹⁰ This decision raises serious questions as to the constitutionality of other sections of the Banking Code which curtail the activities of out-of-state institutions in Florida.¹⁹¹

While it appeared to the court that section 659.141(1) was enacted as a reaction to the application of Bankers Trust,¹⁹² section 660.10 was not so construed. That section, which limited many trust activities within the state to banks and trust companies incorporated in Florida,¹⁹³ is similar in nature to legislation in a number of other states.¹⁹⁴ No doubt, it is true that states have a legitimate interest in assuring that corporate fiduciaries serve the public faithfully. Laws which attempt to regulate a fiduciary's financial resources, govern their conduct and define their responsibilities are certainly within the scope of this interest. The extent to which this can be accomplished through parochial legislation which requires that certain trust functions be handled by state domiciliaries is questionable after this decision.¹⁹⁵ One thing seems certain though,

189. 461 F. Supp. at 1196.

190. *Id.*

191. See, e.g., FLA. STAT. § 659.57 (1977) (transactions of business by out-of-state banking corporations).

192. See 461 F. Supp. at 1193; 59 FED. RES. BULL. at 366; note 188 *supra*.

193. See note 175 *supra*.

194. See, e.g., CAL. FIN. CODE § 1503 (West 1968); S.C. CODE § 21-13-320 (1976). *But see*, e.g., N.Y. BANK. LAW. § 131 (McKinney 1971).

195. The Comptroller in *BT Investment Managers* attempted to obviate invalidation under the commerce clause by arguing that Congress, through certain provisions of the Bank Holding Company Act, had "affirmatively consented to Florida's prohibition on the entry of foreign bank holding companies and their subsidiaries into this state." 461 F. Supp. at 1198. This reasoning was based upon two specific provisions of the Act. 12 U.S.C. § 1842(d), 1846 (1976). Under § 1846 Congress provided for a reservation of certain rights to the states. It was this section which the Federal Reserve construed as effective to deny it authority to approve Bankers Trust's application originally. See note 181 *supra*. The court interpreted this language to mean merely that the state was not dispossessed of any regulatory authority which it held prior to the enactment of the Bank Holding Company Act. It did not grant authority to the states to promulgate legislation which would otherwise violate the commerce clause. 461 F. Supp. at 1199. See generally *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (Congress may approve regulation by the states that would otherwise offend the commerce clause under its power over interstate commerce).

The second section of the Act which the Comptroller relied upon expressly prohibits Federal Reserve approval to holding companies seeking to acquire additional banks in any state in which the business of its subsidiaries is not principally conducted, unless that state permits such acquisition by specific statutory authorization. 12 U.S.C. § 1842(d) (1976). Notwithstanding the express language of the statute, the Comptroller argued that an impermissible loophole would be created if bank holding companies could expand their operations

generic arguments about traditional state regulatory power, prevention of undue concentration of economic resources, diminished competitive effects and superior qualification of domestic corporations, unsupported by specific evidence, will not be sufficient to sustain legislation which has an uneven impact upon foreign financial institutions to the advantage of their in-state cousins.

Clearly, we may reasonably expect a flurry of indirect investment advisory activity by out-of-state banks as a result of this decision, to the chagrin of the Florida Bankers Association.¹⁹⁶ Indeed, a number of out-of-state bank holding companies have established or are in the process of establishing interstate banking networks.¹⁹⁷ When considered in light of other recent legislative developments discussed elsewhere herein, the fear of a national banking system becomes compelling. Another consequence of the decision may be that other sections of the Banking Code which curtail the activities of foreign institutions in Florida will be similarly subjected to attack.¹⁹⁸

B. Federal Reserve Board Consideration of State Legislation

In a recent case before the Fifth Circuit Court of Appeals, the Florida Association of Insurance Agents challenged the Federal Reserve Board's approval of proposals by three bank holding companies to acquire interests in insurance agencies in Florida.¹⁹⁹ Subsequent to a review of these applications by an administrative law judge, but prior to the decisions by the Federal Reserve, the Florida Legislature enacted legislation which generally prohibited financial institutions from engaging in insurance agency activities.²⁰⁰ The court reversed and remanded the decisions of the Board concluding that they had failed to adequately consider the effects of the new

into nonconsenting states through nonbanking subsidiaries. Relying upon the language of the Act and its legislative history, the court rejected this analysis. Since the word "bank" was specifically defined in the statute, it would fly in the face of the plain meaning of the Act's language to read "nonbanking subsidiaries" into its definition of a bank. Accordingly, the court concluded that this section of the Act provided no authority for the proposition that a state may bar foreign bank holding companies from acquiring nonbanking subsidiaries within its boundaries. 461 F. Supp. at 1200.

196. The Florida Bankers Association appeared in the case as *amicus curiae* aligned with the defendant.

197. See *Arenson, A Bank Bridge Over State Lines*, N.Y. Times, Apr. 20, 1979, § D, at 1, Col. 5.

198. See, e.g., FLA. STAT. § 659.57 (1977).

199. *Florida Ass'n of Ins. Agents, Inc. v. Board of Governors of Fed. Reserve Sys.*, 591 F.2d 334 (5th Cir. 1979).

200. See 1974 Fla. Laws ch. 74-35 (codified at FLA. STAT. § 626.988 (1977)).

Florida statute.²⁰¹

There was no allegation of discriminatory treatment, nor was the validity of the statute challenged. The legislation involved made no distinction between domestic and foreign corporations in prescribing its prohibition. To that extent, the decision does stand for the proposition that state regulation cannot be ignored by the Board when it evaluates applications for acquisition of nonbanking subsidiaries under the Bank Holding Company Act.

The degree to which a state statute must be considered by the Board was a matter which concerned the court. In this regard it asserted that "casuistic predictions" about the effect of the law or any resulting public benefits which might stem from the proposal would be insufficient to sustain a decision by the Board.²⁰² A "more detailed inquiry," it concluded, is mandated by the Bank Holding Company Act.²⁰³

The court, in requiring the Board to more adequately consider the state statute, presumed it to be valid. It based its decision, which compelled a more detailed inquiry, on the public benefits test, which is the Board's standard for evaluating any acquisition of a nonbanking subsidiary. The court did not consider, as the district court did in *BT Investment Managers*, the various sections of the Bank Holding Company Act relating to the remaining vestiges of state regulatory authority.²⁰⁴ As a result, the question of whether the Board, when referring to state regulatory schemes in evaluating applications before it, may condition deference to state law on its opinion of the constitutionality of that law, remains unanswered.

Read in conjunction, *BT Investment Managers*²⁰⁵ and *Florida Association of Insurance Agents*²⁰⁶ perhaps shed some light into the interstices of the dual regulatory scheme which governs the activities of nonbanking subsidiaries. It would seem that as long as a state makes no distinction between in-state and out-of-state firms, its regulation must carefully be considered by the Federal Reserve Board. Where distinctions are made, the courts will view with critical suspicion any purported justification for the distinction. Moreover, state authority to regulate evenhandedly in this area may not

201. 591 F.2d at 342-43.

202. *Id.* at 339-40.

203. *Id.* at 340.

204. The sections of the Bank Holding Company Act which expressly deal with the permissible limits of state regulation are sections 3(d) and 7. 12 U.S.C. §§ 1842(d), 1846 (1976). See note 195 *supra*.

205. 461 F. Supp. 1187.

206. 591 F.2d 334.

be overridden by the Board, nor may it be casually treated. As of yet, however, the Board has no specific judicial or statutory authority to ignore state legislation which is blatantly unconstitutional although *BT Investment Managers* may provide a basis for that position.²⁰⁷

C. Direct Mortgage Lending by Out-of-State Banks

In 1977, staff counsel for the Comptroller of Florida was asked to consider whether out-of-state banks would be prohibited by Florida law from transacting a banking or trust or establishing branch offices within the state.²⁰⁸ Although staff counsel's conclusion that prohibitions exist as to both activities was not surprising, the breadth of the opinion rendered causes some concern. Notwithstanding the recent opinion in *BT Investment Managers* as to trust activities,²⁰⁹ the opinion of staff counsel continues to haunt us.²¹⁰

Particularly alarming is staff counsel's interpretation of section 659.57, which follows:

Section 659.57, F.S., is a specific provision dealing with out-of-state banking corporations. Generally, subsection (a) thereof permits out-of-state banks (or foreign banks) to engage in the following limited activities:

- (a) Acquiring a part or an entire interest in any loan which *another person* makes, has made or will make;
- (b) Entering into mortgage servicing contracts with persons authorized to transact such business in this state; or
- (c) Acquiring, holding, leasing, mortgaging or conveying property in this state which was heretofore or which may hereafter be assigned, mortgaged or conveyed to it as security for a loan with regard to any business authorized by this section.

Under the above section, *it is my opinion that a foreign bank cannot contract for or make a direct mortgage loan in this state, since the transaction permitted in (c) above must be authorized by this section. It follows then, if direct loans are not otherwise*

207. See generally 461 F. Supp. 1187.

208. Letter from William B. Corbett, Assistant General Counsel, to George E. Lewis, Comptroller of Florida (Feb. 14, 1977) (inter-office communication) [hereinafter cited as Letter to Comptroller]. The question was phrased as follows: "What provisions of the Florida Banking Code (or other laws) prohibit foreign banks from transacting a banking or trust business in this state or from establishing branch offices in this state?" *Id.* at 1.

209. 461 F. Supp. 1187.

210. Brown, *Corporate Workouts*, 32 U. MIAMI L. REV. 979, 988-89 (1978).

permitted under (a) and (b) thereof, foreign banks cannot make direct loans in this state.²¹¹

The preceding analysis is subject to critical attack on at least two levels. First, if pursuant to subsection (b) a bank may enter into mortgage servicing contracts,²¹² it must follow that out-of-state banks are implicitly authorized to take mortgages on property situated in Florida. Second, a careful reading of section 659.57 reveals that staff counsel ignored a key phrase within subsection (c).²¹³ This subsection expressly permits an out-of-state bank to maintain or transfer any interest in property located within Florida which it acquired "as security for or . . . in satisfaction of, a loan or loans made by it or obligations acquired by it in the transaction of any business authorized by this section."²¹⁴ By failing to consider the disjunctive "or," staff counsel assumed that subsection (c) necessarily had to be read in light of other authorizations within the statute rather than as an authorization provision itself. If due recognition is given to the language preceding the disjunctive, however, it becomes clear that an out-of-state bank does, indeed, have authority to contract for or make a direct mortgage loan in Florida. Moreover, the recent decision in *BT Investment Managers* denouncing economic protectionist legislation which distinguishes between in-state and out-of-state firms as unconstitutional,²¹⁵ suggests that any other applications of the section may also be unconstitutional.

It is important to note that any domiciliary prerequisites which flow from section 659.57, regardless of what interpretation is given its language, would be immaterial with respect to international banks which operate as federal agencies in Florida.²¹⁶ Because federal law permits federal agencies to conduct lending activities comparable to those in which national banks within the state may engage, limitations on mortgage lending in Florida would be inapplicable as to them.²¹⁷

VI. CREDIT UNION SHARE DRAFTS

Share draft accounts, which are akin to automatic transfer accounts used by commercial banks and transaction accounts used by

211. Letter to Comptroller at 2-3; see FLA. STAT. §§ 659.57(1)(a)-.57(1)(c) (1977).

212. FLA. STAT. § 659.57(1)(b) (1977).

213. *Id.* § 659.57(1)(c).

214. *Id.* (emphasis added).

215. 461 F. Supp. 1187; see text accompanying notes 171-197 *supra*.

216. International Banking Act of 1978, Pub. L. No. 95-369, § 4, 92 Stat. 610.

217. *Id.*; see text accompanying notes 130-37 *supra*.

federally chartered savings and loan associations, are presently fashionable among credit unions.²¹⁸ Essentially, share drafts are a means of withdrawing savings from a credit union. The drafts themselves look much like checks, and can be negotiated and processed like checks. The difference, of course, is that until funds are withdrawn from a credit union bank share draft, interest accrues at a rate of up to six and three-quarters percent annually.²¹⁹

Recently, share draft programs have come under attack by the Florida Bankers Association.²²⁰ In upholding the validity of these programs, the district court of appeal looked to the statute which authorizes the existence of credit unions and defines their powers.²²¹ Finding the statute silent on the question of how credit union members might withdraw their deposits, the court concluded that share drafts were merely one method.²²² Thus, credit unions which are not forbidden to engage in share draft programs by their own bylaws, may lawfully honor drafts on members' funds in their share accounts. The Florida Bankers Association reportedly plans to appeal this decision.²²³

VII. DOCUMENTARY STAMP TAXES

Lenders and borrowers boasted of a short-lived victory over the Department of Revenue in 1978. In a declaratory action²²⁴ the Miami National Bank challenged the validity of the Department's position that documentary stamp taxes are due on the full amount of an obligation, and not just the increased portion, where the debtor borrows additional sums from the same lender and executes a new note evidencing the entire outstanding debt.²²⁵ To determine the

218. FLORIDA TREND, October 1978, at 43.

219. Share drafts have been categorized as "a sophisticated means of withdrawing savings from a credit union." *Id.*

220. Florida Bankers Ass'n v. Leon County Teachers Credit Union, 359 So. 2d 886 (Fla. 1st DCA 1978).

221. See FLA. STAT. §§ 657.01-.247 (1977).

222. 359 So. 2d at 890. In this case the court had before it a final order by the Department of Banking and Finance which was also a party to the suit. This order stated that withdrawals by means of share drafts were not part of the incidental powers necessary to effectively carry on business. *Id.* See also FLA. STAT. § 657.04(8) (1977). The Department argued that an administrative rule would be necessary to permit this particular withdrawal method. While the court disagreed with the Department's position, it did suggest that the Department could promulgate a rule through appropriate administrative procedure which could eliminate share draft programs by credit unions. 359 So. 2d 890-90.

223. FLORIDA TREND, October 1978, at 43.

224. Department of Revenue v. Miami Nat'l Bank, 354 So. 2d 84 (Fla. 1st DCA 1977).

225. *Id.* at 85. *But see* [1963-1964] FLA. ATT'Y GEN. BIENNIAL REP. 209. See generally FLA. ADMIN. CODE § 12B-4.54 (1977) (exempt transactions).

applicable law the parties agreed upon the following factual situation:

A borrows \$10,000 from the bank. A signs a promissory note for \$10,000 and affixes documentary stamps thereto representing the full \$10,000.

Subsequently, A borrows an additional \$5,000 from the bank. A signs a promissory note for \$15,000—the amount of the \$15,000 representing the original borrowed amount of \$10,000 plus the newly borrowed amount of \$5,000. The bank attaches the old note for \$10,000 to the new note and A affixes documentary stamps representing the \$5,000 increase.²²⁶

The court affirmed the trial court's holding that the renewal portion of the example note was not subject to documentary stamp taxation since it fell within the exemption for renewal of existing promissory notes.²²⁷

Unfortunately, however, the Supreme Court of Florida quashed the district court of appeal's decision upon review and remanded the case to the trial court.²²⁸ The supreme court concluded that section 201.09 is not ambiguous in its declaration that the exemption from taxation pertains to a renewal promissory note which "only extends or continues the identical contractual obligations of the original promissory note . . . and without enlargement in any way of said original contract and obligation."²²⁹ The court would not concern itself with the bank's contention that had the transaction in issue involved three promissory notes (*i.e.*, the original \$10,000 note, a renewal \$10,000 note, and a new \$5,000 note) only the note for \$5,000 would have required new documentary stamps.²³⁰

In another development in this area, the Attorney General of Florida has clarified that documentary stamp taxes on "open-end mortgages" are to be based upon the fixed amount of the initial or original debt or obligation and not upon the maximum amount which could be advanced under the terms of the mortgage.²³¹ Such future advances or loans are only taxable when made.²³² As a result of the Supreme Court of Florida's decision in *Miami National*

226. 354 So. 2d at 84. For the statute imposing the documentary tax, see FLA. STAT. § 201.08(1) (1977).

227. 354 So. 2d at 85-86; see FLA. STAT. § 201.09 (1977).

228. State of Florida, Dept. of Rev. v. Miami Nat'l Bank, Case No. 53, 136 (3d DCA, June 7, 1979).

229. Department of Revenue v. McCoy Motel, Inc., 302 So. 2d 440, 443 (Fla. 1st DCA 1974).

230. See 354 So. 2d 84.

231. 1978 Op. Att'y Gen. Fla. 078-37 (Mar. 3, 1978).

232. *Id.*

Bank,²³³ however, it may not be acceptable to roll the amount of the original debt or obligation and the amount of future advances or loans into a single instrument as the latter are made, and to merely affix documentary stamps representing such future advances or loans.

VIII. PREPAYMENT CHARGES

The District Court of Appeal, Third District, has recently held, in a case of first impression, that when a loan agreement between a borrower and a lender does not contain a provision for premature termination, a charge to the borrower upon his voluntary fulfillment of the obligation prior to maturity does not constitute interest.²³⁴ The case involved a substantial prepayment charge which the debtor paid under protest and then challenged under the usury statute.²³⁵ The court, however, characterized this prepayment as consideration for the borrower's voluntary termination of the loan agreement prior to its maturity. Thus, it decided that the usury laws were not applicable.²³⁶ Although the lender in this case admitted that the prepayment charge was calculated by applying the rate of interest specified in the agreement to the minimum loan balance for the remainder of the original financing period,²³⁷ the court noted that the manner in which the lender computed the charge did not affect its status as consideration.²³⁸ The determinative factor to the court, however, was the lack of a provision for premature termination in the original agreement.²³⁹

IX. PURCHASE MONEY SECURITY INTERESTS

Florida's version of the Uniform Commercial Code²⁴⁰ has been amended to curb further judicial erosion of the general rules of priority among secured creditors.²⁴¹ Specifically, sections 679.312(3)

233. See 354 So. 2d at 86.

234. *American Wood Prods., Inc. v. Walter E. Heller & Co.* Southeast, 358 So. 2d 1149 (Fla. 3d DCA 1978).

235. *Id.*; see FLA. STAT. § 687.03 (1977) (interest usurious at a rate in excess of 15% per year).

236. 358 So. 2d at 1150-51 (termination transaction was the antithesis of a loan and did not involve giving of credit).

237. The parties had agreed that the borrower would maintain a minimum loan balance with the lender until such time as the agreement terminated in accordance with its provisions. *Id.* at 1150.

238. *Id.* at 1151.

239. *Id.*

240. FLA. STAT. §§ 671.101-680.105 (1977).

241. 1978 Fla. Laws ch. 78-222 (amending FLA. STAT. §§ 679.312(3)-312(4) (1977)).

and (4) have been amended to provide that unless a purchase money security interest is perfected in the time and manner prescribed, such interest will not be afforded any special priorities, but rather will be relegated to the general rules of priority.²⁴²

The real gist of the amendments is reflected in the preamble of the Senate bill, wherein it is expressly stated that the opinion of the Supreme Court of Florida in *International Harvester Credit Corp. v. American National Bank of Jacksonville*,²⁴³ is repealed to the extent that it is inconsistent with the perfection requirements of section 679.312.²⁴⁴ In that case the court held that as between a secured party claiming under an after-acquired property clause and a purchase money secured party who failed to perfect within the ten day grace period, the former's interest in the after-acquired property attaches only to the extent of the "debtor's equity" in the property.²⁴⁵

Since the notion of "debtor's equity" is foreign to the Uniform Commercial Code,²⁴⁶ *International Harvester* created a judicial exception which generated considerable criticism.²⁴⁷ Most authorities, including the Permanent Editorial Board for the Code, were in complete accord with the lengthy dissenting opinion filed by then Chief Justice Carlton.²⁴⁸ In his dissent, the Chief Justice chastised the court for its failure to interpret the Code in simple literal fashion, and declared that the priorities to be given competing security interests were matters for legislative determination.²⁴⁹ The amendments emphatically demonstrate legislative support for Justice Carlton's analysis and bring Florida back to a state of uniformity with other jurisdictions on this issue.

X. PRODUCTION OF EXAMINATION REPORTS

In *Hialeah-Miami Springs First State Bank v. B. S. Enterprises*, the District Court of Appeal, Third District held that insofar as reports of examinations conducted by the State Comptroller's Office and the Federal Deposit Insurance Corporation are

242. See *id.*

243. 296 So. 2d 32 (Fla. 1974).

244. 1978 Fla. Laws ch. 78-222 (introduced as FLA. S.B. 417, 1978 Reg. Sess.).

245. 296 So. 2d at 34-35.

246. See 1978 Fla. Laws ch. 78-222.

247. See, e.g., Note, 29 U. MIAMI L. REV. 384 (1975) (urging that this decision not be followed in the future).

248. See, e.g., Burke, *Annual Survey-Secured Transactions*, 30 BUS. LAW. 893, 907 (1975); Note, 29 U. MIAMI L. REV. 384, 388-90 (1975).

249. 296 So. 2d at 35-37 (Carlton, C.J., dissenting).

pertinent, they are discoverable in the course of litigation.²⁵⁰ Qualifying its decision, however, the court further held that as to the state records, an in camera inspection by the trial judge is required,²⁵¹ and as to the federal records, the party requesting production must seek to obtain the records from the appropriate federal officials.²⁵²

The impact of this decision is perhaps more substantial than the one page opinion would suggest. In the past, the discoverability of examination reports has been an issue which the courts have generally avoided.²⁵³ The weighty policy decision involved is whether to perpetuate traditional notions of liberal construction of the discovery rules or confidentiality. This Third District opinion suggests that the former is overwhelming the latter, which may prove to be very embarrassing for bankers and frustrating for bank counsel. Since reports of examinations concerning disputed loans are typically written with the benefit of hindsight, bankers, as well as bank counsel, can be expected to feel that they have little, if any, protection from the disclosure of such reports. If one accepts the presumption that banks do not issue loans with the expectation of failure, one can imagine that bankers will view their lending decisions as extremely vulnerable to attack given the *Hialeah-Miami Springs* decision.

XI. CONCLUSION

The balance struck by the dual system of banking regulation in this country has shifted significantly in favor of the federal scheme during 1978. Florida, probably more than any other state, because of its position as one of the leaders in the international

250. 353 So. 2d 1243, 1244 (Fla. 3d DCA 1978).

251. *Id.* See also FLA. STAT. § 658.10(2)(a) (1977) which provides:

Orders of courts or of hearing officers for the production of confidential records and information shall provide for in camera inspection by the court or the hearing officer and shall be subject to further orders by the court or the hearing officer to protect the confidentiality thereof, except to the extent deemed necessary by the court or the hearing officer to protect the interests of all parties or affected persons or the soundness of individual banks or the banking industry.

252. 353 So. 2d at 1244. Disclosure regulations of the Federal Deposit Insurance Corporation mandated by the Freedom of Information Act, 5 U.S.C. § 552 (1976) and promulgated under the authority of the Federal Deposit Insurance Act, 12 U.S.C. § 1819 (1976) can be found in 12 C.F.R. §§ 309.1-.7 (1978). 12 C.F.R. § 309.5(f) (1978) exempts "[r]ecords contained in or related to examination, operating, or condition reports prepared by or on behalf of . . . the Corporation . . ." However, 12 C.F.R. § 309.6(c)(8) vests discretion in the Chairman of the Corporation's Board of Directors to authorize the disclosure of any information which FDIC regulations exempt unless it is otherwise expressly prohibited by law.

253. See, e.g., *Overby v. United States Fidelity and Guar. Co.*, 224 F.2d 158 (5th Cir. 1955) (request for production not sufficiently specific).

banking market, has already begun to feel the impact of this shift. The increased presence of other types of financial institutions into areas which have traditionally been the exclusive domain of banks is also impacting on the banking community. Whether the fears expressed by Florida bankers with regard to these changes are justified can only remain to be seen. The intensified competitive environment brought on by these changes, however, should lead to new and innovative practices among financial institutions in Florida which should in turn inure to the benefit of the state's economy.