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NEW INVESTMENT POWERS FOR OHIO SAVINGS ASSOCIATIONS

I. INTRODUCTION

In April of 1976 an amendment which significantly increases the investment powers of Ohio savings associations was enacted.\(^1\) Although the amendment appears straightforward, a closer study reveals its complexity and its innovative and unique nature. Basically, the new statute permits state savings associations (savings and loan associations and building and loan associations) in Ohio to acquire stock in and deposit money with any bank engaged primarily in the business of providing its services to associations. One should note that the only banks of that type now in existence in the United States are the Federal Home Loan Bank and the Bank for Savings and Loan Associations (BSLA) in Chicago, Illinois.

Although both the Federal Home Loan Bank and BSLA are named specifically in the Ohio statute,\(^2\) it appears that the legislature contemplated investment in banks other than these. However, there are no other banks in the United States which limit their customers to savings associations. The effect of the statute is to provide the legal framework for an Ohio bank for savings associations patterned after BSLA. A bank of this type in Ohio would supplement the present services offered by existing financial institutions.

Savings associations and commercial banks compete on various levels, most notably in the savings deposit and home mortgage loan areas. Therefore, it is reasonable to presume that a commercial bank would be unresponsive in performing banking services advantageous to its competitor.\(^3\) This

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\(^1\) Ohio Rev. Code Ann. § 1151.35 (Page Supp. 1976) provides:

(A) A building and loan association may become a member of, acquire stock in, and deposit money with a federal home loan bank created by the "Federal Home Loan Bank Act" and amendments thereto, including the "Home Owners Loan Act of 1933," or by supplements to said acts, and laws enacted in substitution therefor. Such association may do everything required, authorized, or permitted by such acts and laws of or to members of a federal home loan bank created therein, including, among other things, conversion of the association into a federal savings and loan association, as authorized by such acts and laws and pursuant to any rules and regulations prescribed thereunder; but such conversion shall be made only in compliance with section 1151.36 of the Revised Code.

(B) An association may acquire debt or equity securities in, and deposit money with any bank engaged primarily in the business or [sic] providing its services to associations, including the Bank For Savings and Loan Associations, Chicago, Illinois.

\(^2\) Id. § 1151.35 (A), (B).

\(^3\) The Bank for Savings and Loan Associations—Providing Healthy Competition, 6 The State Advisor 2 (Dec. 1974) [hereinafter cited as Providing Healthy Competition]. The State Advisor is the official publication of the National Association of State Savings and Loan Supervisors.
competition creates the need for a banking institution which would cater entirely to the needs of savings associations and their subsidiaries. In the past, only the Federal Home Loan Bank system performed this function.

The Federal Home Loan Bank (FHLB) was established by the Federal Home Loan Bank Act to serve as a government regulated reserve system and regulator of the savings and loan industry throughout the country. FHLB serves the savings and loan industry in much the same way as the Federal Reserve System serves the banking community. FHLB, the federal system established under the FHLB Act, can offer any services to savings associations that a national bank can offer to its customers. However, until 1966 FHLB had no real competitor and thus no incentive to provide a full range of services to its members. FHLB's conservative position in regard to offering services was primarily a result of its somewhat conflicting duty to regulate the same industry that it was designed to aid. Yet, FHLB filled a large void created by the animosity of the banking community toward savings associations.

In 1966, BSLA was formed in Chicago, Illinois and provided the much needed competition for FHLB. It is a state chartered commercial bank serving the savings and loan industry and their subsidiaries exclusively. The Illinois statute authorizes the purchase of stock in BSLA by savings associations. Also, Ohio and other states' savings associations are allowed to deposit money with BSLA and take advantage of its various services. BSLA is unique in that it was structured by savings associations to meet their own peculiar needs which were often ignored by other financial institutions. It is likely that the rapid growth and success of BSLA prompted the Ohio legislature to pass the amendment allowing for the creation of a bank for savings associations in Ohio. The fact that a bank similar to BSLA was contemplated is evident from the reference made to that bank in the statute.

Few states allow savings associations to purchase stock in banks other than FHLB. However, eight states, including Ohio, allow savings associations to purchase bank stock in some capacity other than in the FHLB.

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8 Act of July 11, 1967, § 1, ILL. REV. STAT. ch. 32, § 710.22 (Supp. 1976); ME. REV. STAT. tit. 9-B, § 554 (Special Session 1976); MASS. GEN. LAWS ANN. ch. 170, § 26 (West Supp. 1976); N.H. REV. STAT. ANN. § 393.27 (Supp. 1975) (the legal list prepared by bank
these eight states, only Ohio, New York, and Illinois provide specifically for a central bank or reserve to serve their own state's savings associations. Note, however, that the State of Illinois does not limit by statute the savings association customers to be served.  

The New York statute specifically authorizes the formation of the Savings and Loan Bank of New York by ten or more state chartered savings associations with aggregate resources of at least five million dollars.  

Membership in the bank is limited by statute to savings associations and the bank can conduct a general deposit business only with its members.  

The shares are nontransferable except to another savings association with the approval of the bank's directors or through repurchase by the bank itself.  

In accordance with this Act, the Savings and Loan Bank of New York was organized in 1914, but no longer exists. The bank's failure could be attributed to the fact that the bank was created before the post-war housing boom when savings associations were only a minor force among financial institutions.  

The statute, however, has not been repealed and the possibility of another New York bank for savings associations is not precluded.  

The Illinois statute designates any bank of which ninety percent of the stock is owned by three or more savings associations as a central reserve for the savings and loan industry.  

BSLA, which was formed pursuant to this provision, is currently the only privately owned bank of its kind in the United States.  

The Ohio and Illinois statutes are different from that of New York in that Ohio and Illinois savings associations are not limited to the creation of one central bank. In Ohio, savings associations can purchase stock in any bank engaged primarily in providing its services to associations. In Illinois, any bank owned by three or more associations is deemed a central reserve. New York provides specifically only for the Savings and Loan Bank of New York. The creation of more than one central bank may, however, be impractical if that state's savings associations cannot support more than one bank with their limited numbers and assets.
Statutes in five other states permit investment by savings associations in bank stock. But these states either limit the associations' power to purchase stock by placing restrictions on the amount of stock which can be purchased, or fail to restrict the purchased bank's dealings with nonassociation customers. Allowing investment in a bank which deals with nonassociation customers could create antitrust problems, which will be discussed later in this article in conjunction with the Bank Holding Company Act.

A few states give the banking commissioner or superintendent of savings associations discretion over which investments the savings association can make. If the right to invest in certain enterprises is not specifically granted by statute, power is vested in the commissioner or superintendent. In these states, the commissioner could effectively block the creation of a central banking institution for savings associations if the right to invest in bank stock is not specifically given. The commissioner need only withhold his approval of the investment.

The scope of the Ohio statute is severely limited and complicated by federal laws and regulations concerning liquidity requirements, bank holding companies, and antitrust restrictions. The remainder of this article will focus on these limitations and other problems encountered by savings associations in the creation and operation of a bank for savings associations in Ohio. Specifically, part II discusses who may form a bank for savings associations in Ohio and with whom the bank can transact business. Part III explains the application of the Bank Holding Company Act as a limitation on investments, and how savings associations can avoid application of the Act. Part IV discusses the liquidity requirements imposed on savings associations. (The bank's usefulness is greatly diminished if it is not designated a one hundred percent liquidity agent.) Part V is an in-depth look at BSLA. This section is designed to illustrate the operation and importance of a central bank. Finally, part VI will discuss the feasibility of, and need for, a central bank for savings associations in Ohio.

II. AN INTERPRETATION OF THE OHIO STATUTE

The first question to be considered under the Ohio statute is who may form a bank for savings associations. The statute does not address...
this point and theoretically the stock can be issued to individuals or associations.\textsuperscript{19} The only restriction which is imposed on savings association stockholders provides that they may purchase securities only if the bank is "engaged primarily in the business of providing its services to associations."\textsuperscript{20} One should note that "primarily" does not mean exclusively.\textsuperscript{21} The word "primarily" was probably employed to allow the bank to perform services for the subsidiaries of associations as well as for the association.

Formation of the bank should be in accordance with the Ohio chartering provisions for commercial banks since the statute does not indicate otherwise.\textsuperscript{22} Still, the bank must limit itself by charter or by-laws to transactions involving savings associations. It is only in this respect that a bank for savings associations would differ from any other state chartered commercial bank. If the bank did not limit itself in this way, savings associations could not invest in its capital stock under the statute's restriction.

III. THE BANK HOLDING COMPANY ACT AND RELATED ANTITRUST LAWS

A. The Importance of Control

The Bank Holding Company Act of 1956 and its 1970 amendments provide an important restriction on the formation of a bank for savings associations, the services it may perform, and the customers it can serve.\textsuperscript{23} The Act and its amendments were enacted to restrict the expansion by banks into nonbanking activities by classifying the bank’s investments in a holding company as investments in its own subsidiary.\textsuperscript{24} Before the Act, such a holding company was not a bank and was therefore not subject to banking regulations which restrict investments. Thus banks would establish holding companies to purchase nonbanking subsidiaries. By establishing these holding companies, the banks would accomplish indirectly what they were prohibited from doing directly. The Bank Holding Company Act remedies this situation by providing that these holding companies are now subject to banking regulations and the Act thereby regulates the holding company purchases.\textsuperscript{25}

\textsuperscript{19} Ohio Rev. Code Ann. § 1151.35 (B) (Page Supp. 1976).
\textsuperscript{20} Id. § 1151.35 (B).
\textsuperscript{21} Webster's Third New International Dictionary 1800 (14th ed. 1961).
\textsuperscript{22} Ohio Rev. Code Ann. §§ 1101.01-09 (amended 1977).
The Act defines "bank holding company" as "any company which has control over any bank or over any company that is or becomes a bank holding company." A "company" is defined as "any corporation, partnership, business trust, association, or similar organization." The ultimate question within this statute is what constitutes "control" of a bank; sufficient "control" will result in the formation of a bank holding company. The Act provides that a company is said to "control" a bank if it (a) owns, controls, or has the power to vote 25 percent of any class of securities, (b) controls, in any manner, the election of a majority of the directors, or (c) exercises control over the management or policies of the bank. The statute specifically provides that if a company owns or controls less than five percent of the bank's voting stock, then there is a rebuttable presumption that the company does not exercise "control" over the bank. In addition, when 25 percent of the bank stock is controlled or owned, "control" is statutorily conclusive, and when there is between five and 25 percent ownership, the question of "control" depends upon the circumstances of each case.

The determination of what constitutes "control" is important in order for a bank for savings associations to remain outside the proscriptions of the Bank Holding Company Act. Where "control" of a bank is found to exist, section 4(a) of the Bank Holding Company Act will be applied. This section prohibits a bank holding company from purchasing or retaining shares in any company that is not a bank. Thus, ownership of a bank by a savings association or a group of savings associations may be, under certain conditions, considered ownership of a bank holding company. If a holding company is found to exist and it is conducting a nonbanking activity, i.e., the savings association business, its activities may be prohibited under the Bank Holding Company Act.

"Control" in this situation becomes very important since the manner in which a bank for savings associations is organized can determine whether, at the same time, a holding company is formed. The simplest way to avoid the Act's application is for the incorporators to restrict the sale of securities by allowing a maximum percentage, less than five percent, to be purchased by each investor. Thus, no single investor would have "control" of the bank. If this condition is not met, a holding company may be established by a

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27 Id. § 1841 (b).
28 Id. § 1841 (a) (2).
29 Id. § 1841 (a) (3).
group of savings associations subject to section 4(a). If section 4(a) is viewed alone, it would therefore preclude the purchase of a bank by savings associations which is found to be a holding company. The Ohio statute which allows savings associations to purchase bank stock appears to be in conflict with this conclusion.

The prohibitions within the Bank Holding Company Act can be avoided by two relevant exceptions to section 4(a). The first is section 4(c)(8) which allows a bank holding company to carry on activities closely related to banking. The second exception is found in section 2(a)(5)(E). This section, which exempts a company wholly owned by savings associations that restricts its activities to avoid antitrust problems, will be discussed later in the article.

Section 4(c)(8) provides in pertinent part that the prohibitions of section 4(a):

shall not, with respect to any bank holding company, apply to — (8) shares of any company the activities of which the Board, after due notice and opportunity for hearing has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking . . . the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices.  

If a savings association or group of savings associations is deemed to be a holding company, this exception can apply only if the “incident to banking” rationale applies to activities carried on directly by the holding company as well as those activities carried on by the holding company's subsidiaries. One commentator has stated that “[t]his exception applies both to ownership of shares of nonbank companies and to activities carried on directly by the holding company.” In this case, savings association business is the activity which is carried on directly by the holding company. The importance of section 4(c)(8) of the Act becomes apparent when read in conjunction with section 4(a)(2)(B) which states that the holding company may not

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32 Id. § 1843 (c) (8).
33 Id. § 1841 (a) (5) (E).
34 Id. § 1843 (c) (8).
engage in activities other than those permitted under section 4(c)(8).\(^3\)

While section 4(c)(8) exempts only the holding of shares of companies engaged in activities which are a proper incident to banking, it is clear that the Federal Reserve Board allows the holding company to carry on directly such permissible activities.\(^7\) Thus, if the operation of savings associations is found to be so closely related to banking as to be a proper incident thereto under section 4(c)(8) criteria, then the exemption would allow savings associations to control a bank.

Whether the operation of a savings association is incident to banking and therefore exempt from the holding company restriction can be assessed in light of certain Federal Reserve Board Regulations. Regulation “Y” includes the following as permissible nonbanking activities which would qualify for a bank holding company exemption.\(^8\)

1. Making or acquiring, for its own account or for the account of others, loans and other extensions of credit (including issuing letters of credit and accepting drafts) such as would be made, for example, by a mortgage finance, credit card, or factoring company;
2. Operating as an industrial bank, Morris Plan Bank, or industrial loan company, in the manner authorized by State law so long as the institution does not both accept demand deposits and make commercial loans . . . .\(^9\)

A footnote to Regulation “Y” indicates that the operation of a savings association is not regarded by the Federal Reserve Board as falling within the first category set out in the above regulation.\(^{40}\) However, the inclusion of savings associations within the second category has been considered by the Board.\(^{41}\) Recently, however, the Board has included the operation of savings associations in an interpretation that specifies activities which have been found to be not so closely related to banking as to be a proper incident thereto.\(^{42}\) The policy reasons behind the decision to classify savings associations as not incident to banking involve antitrust considerations, apparent in the language of section 4(c)(8), upon which the “proper incident to banking” rationale is based.\(^{43}\)

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\(^3\) 12 U.S.C. § 1843 (a) (2) (B) (1970).
\(^7\) The Scope of Banking Activities, supra note 35, at 1178 n.72.
\(^8\) Nonbanking Activities, 12 C.F.R. § 225.4 (a) (1977).
\(^9\) Id. § 225.4 (a) (1)-(2).
\(^40\) Id. § 225.4 n.i.
\(^42\) Activities Not Closely Related to Banking, 12 C.F.R. § 225.126 (h) (1977).
incident to banking, uses a weighing process. Whether the inclusion of the activity by the holding company will “produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency” are weighed against “possible adverse effects such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices.”

Further antitrust considerations are mandated in section 3 of the Act which sets forth the factors the Board uses in determining whether to approve applications for merger or acquisitions by the holding company. Section 3 provides that acquisitions will not be approved if they “substantially lessen competition,” or “tend to create a monopoly,” or are in “restraint of trade” unless the anticompetitive effects of the acquisition are outweighed by the “convenience to and needs of the community.”

Although savings associations and commercial banks are considered “distinct lines of commerce,” they do, as already noted, compete with each other to a certain extent. Thus, the Board has concluded that savings association activities are not a proper incident to banking. The adverse effect of acquisition of one by the other outweighs the benefits, the adverse effect being a lessening of competition. The Bank Holding Company Act encompasses two facets of competition—those on an industrial and geographical level. Section 4(c)(8) is based on a functional approach to competition which has a broad industry-wide application, i.e., competition based on similarity of function between one industry and another. Section 3, the merger and acquisition provision, has a much more selective application to the problem of competition on a geographic level. When both aspects of competition are considered, “[i]n most approved applications there is no overlap of markets, either geographically or by type of loan, that could lead to a significant reduction in existing competition.”

Also, regardless of whether there is existing competition between the holding company subsidiary and the bank, the Board will not approve applications where both “bulk large” in their respective areas since the acquisition would cause an undue concentration of economic resources.

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44 Id.
45 Id. § 1842 (C) (2).
46 Id.
48 The Scope of Banking Activities, supra note 35, at 1209.
50 Id. § 1842 (C) (2).
51 Rose and Fraser, Bank Holding Company Diversification into Mortgage Banking and Finance Companies, 91 Banking L.J., 976, 981-82 (1974).
52 Id. at 985.
For example, in a situation where the holding company carries on the savings association activity directly, even if the savings associations and banks do not compete directly, a purchase of one by the other would cause the concentration of the economic resources of the two largest financially oriented industries in the United States. The holding company would, under these circumstances, control the areas of specialization of both savings associations and banks.

C. Related Antitrust Provisions

The origins of the antitrust provisions contained in the Bank Holding Company Act likely stem from the Clayton and Sherman Acts' antitrust provisions. The Supreme Court in its 1963 decision of United States v. Philadelphia National Bank applied the antitrust laws to banking acquisitions and mergers. Until this time it was believed that bank mergers were exempt from the antitrust laws. Now, any acquisition under the Bank Holding Company Act must pass the scrutiny of section 7 of the Clayton Act, which is administered by the Department of Justice and the Federal Trade Commission, as well as be subject to the restrictions imposed by the Federal Reserve Board. A recent ruling of the FTC implies that a rejection of a proposed acquisition by the FTC will take precedence over an approval by the Federal Reserve Board.

The determination by the Federal Reserve Board that the savings and loan business is not a proper incident to banking is subject to change, given the expanding scope of activities found acceptable for savings associations. "[At] some stage it will be unrealistic to distinguish [savings banks] from commercial banks for purposes of the Clayton Act." This also applies to the Bank Holding Company Act since it is based on the same antitrust considerations. "The gradual movement toward comparability of services and powers between [savings associations] . . . and commercial banks will effect a myriad of changes in the competitive posture of bank holding companies." Due to recent developments, savings associations in certain areas of the country now constitute a significant competitive force

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53 Cimeno and Brady, Bank Holding Companies and the Regulatory Process, 9 Suffolk L. Rev. 1213, 1228 (1975) [hereinafter cited as Cimeno and Brady].
56 [1977] 3 Trade Reg. Rep. (CCH) ¶ 21,289 (The Federal Home Loan Bank Board's regulatory authority over savings and loan associations is concurrent with the FTC's authority. It does not imply antitrust exemption and does not create primary jurisdiction over interlocks, an area in which the FTC has greater expertise.
58 Cimeno and Brady, supra note 53, at 1246.
in relation to banks. For example, "recent federal legislation establishing a regional experiment in Massachusetts and New Hampshire has permitted mutual savings banks, savings and loan associations, and commercial banks in those states to offer negotiable orders of withdrawal (NOW accounts). The accounts are subject to third party orders, similar to demand deposits, and may earn up to five percent interest on the remaining balance."69 This regional experiment was later expanded to cover all of New England and may soon be developed nation-wide.60 In addition, several New England states have given authority to savings associations to offer traditional demand checking accounts.61 "These structural changes have had a significant impact on competitive alignments and have accelerated the trend toward eliminating the distinctions between [savings associations] ... and commercial banks."62

Increased similarity of functions and services between banks and savings associations also increases their competitive posture within a limited geographic sphere. Acquisitions and mergers of savings associations and banks are less likely to be permitted where similarity of services offered is great and customer overlap is significant. The possibility of the merger of a bank and savings association in Ohio is not likely to be approved according to a 1967 Attorney General Opinion which was based on antitrust considerations.63 Moreover, the Federal Reserve Board would not approve such an acquisition because it would lessen competition.

However, with the increased sphere of services offered by savings associations, the possibility that a savings association may ultimately be considered to be a bank arises under the Bank Holding Company Act. "Bank" under the Act is defined as "any institution organized under the laws of the United States, any State of the United States . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."64

It is conceivable that savings associations may ultimately receive authority to accept demand deposits and make commercial loans, and thereby meet the definition of "bank" under section 2 of the Act. In that eventuality, a savings association could be the subject of a section

59 Cimeno and Brady, supra note 53, at 1240; see 12 C.F.R. § 545.4-1 (3) (1977).
63 67 OHIO ATTY GEN. OP. 102 (1967).
By coming within the definition of a "bank" the antitrust considerations would be determined in accordance with section 3 and savings associations could establish a bank and avoid the prohibitions of section 4(c)(8) of the Bank Holding Company Act. Although the "closely related to banking" issue of the Act may be eliminated, antitrust considerations under the Act may be more prevalent in the situation where the functions are similar.

D. The Exception for the Non-Competing Bank

From the above discussion, it is apparent that savings associations cannot control a "bank" in the ordinary sense of the term, due to the antitrust policies upon which the Bank Holding Company Act is based. The question becomes whether or not the antitrust provisions in the Bank Holding Company Act are applicable to the creation of a bank exclusively for savings and loans. The answer lies in section 2(a)(5)(E), the second exception to section 4(a) of the Act. The exception reads as follows:

No company is a bank holding company by virtue of its ownership or control of any State chartered bank or trust company which is wholly owned by thrift institutions and which restricts itself to the acceptance of deposits from thrift institutions, deposits arising out of the corporate business of the owners, and deposits of public moneys. The term "thrift institution" under the Act includes "domestic building and loan associations." This exemption is very limited in scope and contains three apparent conditions: (1) the bank or trust company must be state chartered; (2) it must be wholly owned by savings associations; and (3) deposits can only be accepted from savings associations or subsidiaries.

Thus, if the bank is wholly owned by savings associations and restricts its activities and customers to those permitted under this section, a bank holding company will not be found. By restricting its customers to savings associations, the policy reasons for not allowing savings associations to purchase a bank are removed. The bank is no longer in competition with the savings associations, its owners, because the bank exists only to serve those associations. The bank therefore does not compete for their customers and competition problems are removed.

If the conditions of section 2(a)(5)(E) are met, a bank holding company is not formed regardless of the amount of control a single
investor may have and the limitation on percentage ownership by each investor becomes meaningless. The third condition mentioned above places a limit on the customers which the bank may serve. If the bank deals with the public in any way, the exemption does not apply. The rationale for not applying the exemption has its origin in the antitrust provisions of the Act. Specifically, if the bank has only savings associations as customers, the bank is not then competing in any way with savings associations because the savings association has a different clientele, i.e., the public. The purpose of the Act, which is to prevent anticompetitive acquisitions and mergers, therefore has no application to the problem.

A bank for savings associations which would come under this exemption is probably the type most practical under the Ohio statute and, most likely, the type of bank which was contemplated by the sponsors of the amendment. However, one advantage that was perhaps considered by the Ohio legislature is destroyed by the conditions relating to customers. The offering of checking accounts by the savings associations through the bank is not possible, because the bank is then serving the public and the exemption from the Bank Holding Company Act does not apply. The plan of allowing savings associations to offer checking accounts through commercial banks has been designated the "Madison Bank Plan," named after the first bank in Illinois to offer this service. Allowing savings associations' customers to also make deposits in their demand accounts at the savings association's office is a convenience to the customer. In Ohio, this particular service may be offered by savings associations through commercial banks, but not by a bank for savings associations.

Finally, in regard to a possible violation of the Clayton Act, interlocking directorates between the bank and the savings associations, which are its owners, may present a problem. The Bank Holding Company antitrust provisions are not applicable where the exemption described above is met, since a bank holding company does not exist when the specific conditions of section 2(a)(5)(E) are met. The provisions contained in section 8 of the Clayton Act do not prohibit a private banker or a director, officer, or employee of a member bank of the Federal Reserve System, from being, at the same time, a director, officer, or employee of any number of other banking institutions not organized under the National Banking Act, or under the laws of any State or the District of Columbia.
Since federal savings associations are not created under the National Banking Act nor under the laws of any state, they are exempted regardless of whether they are "banks" or "banking associations" under the Act. The question then arises as to whether a state savings association is a "bank" or "banking association" so as to avoid the Clayton Act violation. However, because of a recent FTC ruling which disallows interlocking directorates between savings associations and banks due to their anticompetitive effects, the designation as a "bank" or "banking association" is overridden by the anticompetitive effect. Before section 8 of the Clayton Act is applicable, however, the bank must be a member of the Federal Reserve System. Therefore it would be advantageous for a bank owned by savings associations to remain outside the Federal Reserve and its regulations, and thus avoid the regulation imposed by the Clayton Act. One factor that should be considered is that a bank for savings associations and its owners are not in competition. Therefore, the purpose for preventing interlocking directorates is eliminated and section 8 of the Clayton Act should not apply regardless of the bank's membership in the Federal Reserve System.

IV. LIQUIDITY REGULATIONS

A major stumbling block to the creation of a viable bank for savings associations is a series of regulations set forth by the Federal Home Loan Bank Board. These regulations impose a liquidity requirement for member savings associations. Each month members must maintain "an average daily balance of liquid assets in an amount not less than seven percent of the average daily balance of the member's liquidity base during the preceding calendar month." The term liquid assets includes cash, accrued interest on unpledged assets, and the book value on various unpledged assets among which are "time deposits in a Federal Home Loan Bank or the Bank for Savings and Loan Associations, Chicago, Illinois." "The term 'cash' means cash on hand and unpledged demand deposits in a Federal Home Loan Bank, an insured bank, or the Bank for Savings and Loan Associations, Chicago, Illinois."

The regulations of the Federal Home Loan Bank Board are specific as to who may serve as liquidity agents for savings associations: namely, FHLB, BSLA, and to a limited extent, insured banks. Such an exclusive list virtually excludes a competitor because it may not serve as a liquidity agent beyond the limited capacity of an insured bank. Liquidity deposits

72 Id. § 212.2 n.3.
73 [1977] 3 TRADE REG. REP. (CCH) ¶ 21, 289.
74 Liquidity Requirements, 12 C.F.R. § 523.11 (a) (1977).
75 For a definition of "liquidity base," see Definitions, 12 C.F.R. § 523.10 (g) (1977).
76 Id. § 523.10 (a).
of a savings association in an insured bank cannot exceed the greater of 
one-fourth of one percent of the total deposits of the bank, or $40,000." If 
the association deposits any more money, the entire deposit loses its 
liquidity. The result is that only a small fraction of liquidity deposits can 
be placed in any one insured commercial bank. Therefore, before a bank 
for savings associations begins operation, it must persuade Congress to 
ampend the liquidity regulation. It is impossible to predict whether Congress 
would favor such a proposal. However, a good argument for inclusion can 
still be made under the antitrust laws.

In order for another bank for savings associations to become viable, 
the regulation must be amended so as to deem such a bank a legitimate 
liquidity agent, equal to FHLB and BSLA. In the alternative, the amendment 
must restate the liquidity regulation in general terms to allow any bank 
dealing exclusively with savings associations to qualify as a 100 percent 
liquidity agent.

The liquidity requirement was the most serious in a flow of regulations 
originally aimed at the Bank for Savings and Loan Associations due to its 
increased competition with Federal Home Loan Banks. Because of the 
regulation, BSLA's assets dropped by more than half within a year. However, BSLA found sufficient congressional support for legislation which 
gives BSLA parity with FHLB as a liquidity agent. BSLA "argued that the 
Federal Home Loan Bank system was a monopoly and that it was trying 
to rule the Bank for Savings and Loan Associations out of competition by 
edict—a question that the United States Department of Justice is required 
to prosecute under antitrust laws." 80

V. THE BANK FOR SAVINGS AND LOAN ASSOCIATIONS, CHICAGO, ILLINOIS
A. The Role of BSLA

The Bank for Savings and Loan Associations in Chicago, Illinois is 
the only privately owned bank for savings associations in this country. 
BSLA was created in response to a need on the part of the savings and 
loan industry which had not been filled by existing institutions. As mentioned 
previously, lack of response on the part of the commercial banking community 
can be traced to increased competition between savings associations and 
banks for savings dollars. Also, savings associations were originally 
created to provide money for housing. But when the savings association's

79 Id.
80 Providing Healthy Competition, supra note 3, at 4.
81 Id. at 3.
money was tied up in outstanding loans, they could no longer lend, and for this reason required access to readily available funds. Often commercial banks were slow to lend to their competitors in the savings and loan industry, not realizing the importance of savings associations as customers.

The Federal Home Loan Bank provided many services for savings associations, but did not offer some of the "specially designed" services that often were needed.\textsuperscript{52} Also the Federal Home Loan Banks had the duty to regulate member savings associations as well as to provide the needed banking services. This regulatory function exercised over its customers did not promote a good business relationship. In addition, the fact that the Federal Home Loan Bank system did not have a competitor gave it no incentive to provide a full range of services needed by savings associations.

In response to the needed services, "BSLA was formed to operate as a service corporation for the exclusive use of the savings and loan industry in Illinois"\textsuperscript{53} providing a central reserve for savings associations in that state. The bank initially contemplated dealing with savings associations throughout the country, and this later became a reality. The roles of the bank were several: to provide loans to savings associations when required so that they could continue lending; to serve as a liquidity agent for savings associations; to provide specially designed services for associations, including those services which were not always performed by other commercial banks and the Federal Home Loan Bank; to act as a central reserve system; and to offer services to associations throughout Illinois and eventually the entire country. Today one out of every three savings associations in the country deals, in some way, with BSLA.\textsuperscript{54}

B. Ownership, Structure and Formation

BSLA originated in 1966 when 29 associations each contributed $100 to purchase a charter and sell stock in the bank.\textsuperscript{55} An initial subscription of two million dollars was hoped for; however, 177 associations subscribed to 4.6 million dollars in stock.\textsuperscript{56} The bank issued additional shares of stock to satisfy a demand, and as of 1976, there were 212,128 shares outstanding.\textsuperscript{57} The original stock was sold to Illinois state chartered savings associations.

There are several restrictions on the sale of stock agreed to by all stockholders. If a purchaser subsequently decides to sell his shares, they

\textsuperscript{52} Id.

\textsuperscript{53} Van Vlissingen, \textit{supra} note 6, at 28.

\textsuperscript{54} Annual Report, \textit{supra} note 78.

\textsuperscript{55} \textit{Providing Healthy Competition}, \textit{supra} note 3, at 3.

\textsuperscript{56} Id. at 4.

\textsuperscript{57} Annual Report, \textit{supra} note 78.
must first be offered to the remaining stockholders. This allows the bank to maintain control over who owns its shares. Directors can only own qualifying shares ($1,000 par value) in the bank as required by the Illinois Banking Act, and must sell their shares to their replacements upon leaving or retiring from the Board. Also, there is a maximum limit on the amount of shares that can be owned by any one savings association. This is designed to prevent any investor from gaining control over the bank, and it also prevents any possible conflict with the Bank Holding Company Act. There is no minimum number of shares that an association can own.

BSLA has avoided federal complications that would arise if it became a member of either FDIC or the Federal Reserve System. The $40,000 maximum amount of FDIC insurance would be of little consequence in relation to the size of institutional deposit balances. Membership in either organization would add the annual premium cost of membership to overhead expense and would superimpose additional audits. The decision to remain outside the Federal Reserve System has permitted the bank to open an entirely new source of funds to Illinois savings associations. By selling notes, debentures, and commercial paper, the bank can tap outside money markets such as corporations, mutual funds, foundations, insurance companies, banks, and pension trusts. For maximum effectiveness this requires that the BSLA be able to compete equally in the free market without the restrictions imposed by Federal Reserve Board Regulation Q.

At the present time there are four reserve systems in this country; two are government affiliated, and two are privately operated. The Federal Reserve and Federal Home Loan Bank are government operated and provide reserve systems for commercial banks and savings associations respectively. The Savings Bank Trust Company is a privately operated reserve system owned by and serving the mutual savings banks of New York State. Finally, BSLA is also a private reserve system for the savings and loan industry. It was given this status by "Public Law 90-109 making the bank a central reserve bank and liquidity agent for the savings and loan industry." Although the bank is itself a reserve system, correspondent banks are used

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88 Much of the material in this section is taken from a meeting with George J. Bodie, Vice President and Trust Officer for The Bank for Savings and Loan Associations in the Chicago offices on August 29, 1977 (hereinafter cited as Meeting).

89 Id. The board of directors is composed of nineteen savings and loan executives from Illinois and therefore the policy of the bank is dictated by those who know the savings and loan industry and are familiar with its specific needs.

90 Van Vlissingen, supra note 6, at 28.

91 Id.

92 Meeting, supra note 88.

93 Van Vlissingen, supra note 6, at 28.

94 Annual Report, supra note 78.
for a clearing system when needed. However, most business is transacted by wire service, a much faster method than check clearing.\textsuperscript{95}

C. Operation

BSLA is an Illinois state chartered commercial bank, chartered in perpetuity. The application for a charter was conditioned on the fact that the bank would deal exclusively with savings associations and their subsidiaries and not with the public in general.\textsuperscript{96} This restriction places the bank within the exemption from the Bank Holding Company Act for banks wholly owned by savings associations and dealing exclusively with savings associations.\textsuperscript{97} The bank can perform any service that another Illinois commercial bank can perform with the only restriction being the limitation on the customers that it may serve. Because the bank is state chartered, it is subject to regulation and examination by the Illinois state banking commissioner.

In ten years of existence, the assets of BSLA have exceeded one billion dollars and it has become the 80th largest bank in the country. Because of its outstanding success, the bank was asked by the savings and loan industry to offer its services in other states. Today, BSLA serves over 1,500 federally and state chartered institutions in the United States.\textsuperscript{98} Most savings associations that deal with BSLA also deal with local commercial banks for convenience and with the Federal Home Loan Bank. Federal Home Loan Banks can also offer a full range of commercial services; however, bank services differ from region to region, and many associations take advantage of BSLA to supplement the FHLB’s services. The following includes some of the services offered by the BSLA: 24 hour certificates of deposit, term certificates of deposit, general demand checking accounts, registered check program, treasurer’s money orders, loan services, reserve repurchase agreements, mortgage banking, mortgage servicing, mortgage participations, investment services, wire transfer of funds, internal transfers, and investment counseling.\textsuperscript{99}

VI. Conclusion

A bank for savings associations in Ohio is feasible; however, it faces many obstacles before it can become a reality. The restrictions in the Bank Holding Company Act impose limits by requiring either that stock holdings by savings associations be restricted to less than five percent, or that the

\textsuperscript{95} Meeting, supra note 88.
\textsuperscript{96} Van Vlissingen, supra note 6, at 28.
\textsuperscript{98} Annual Report, supra note 78.
\textsuperscript{99} Id.
bank organize itself so as to fall under the exemption for banks wholly owned by savings associations. By dealing exclusively with associations and their subsidiaries, the bank can qualify under the exemption and also avoid antitrust violations under the Clayton Act.

A more formidable obstacle is the liquidity requirement imposed on member savings and loans by the Federal Home Loan Bank Board. Before a newly created bank can become viable, it must be deemed a liquidity agent. Special legislation would have to be passed before this could be possible, and it is difficult to determine whether Congress would amend the liquidity regulation. However, since BSLA was given 100 percent liquidity status, antitrust barriers are now less persuasive. Congress has no legitimate reason for denying 100 percent liquidity status to a legitimate enterprise designed to serve the needs of the savings and loan industry.

A bank of this type in Ohio could be a very lucrative business venture. Profits in the form of dividends would be an incentive for Ohio investors. Finally, an Ohio bank for savings associations would be more convenient for Ohio savings associations and would be responsive to the particular needs of a locality.