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The Universal, Inalienable Right of the Child to the Marriage of His Biological Parents

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INTERSTATE BANKING IN UTAH

I. [§ 1] INTRODUCTION

In a flurry of recent banking activity, the Utah State Legislature has enacted new laws that have expanded and will further expand, interstate banking in Utah.¹ Utah joins a host of states that have enacted interstate banking laws in the last three years. The enactments allow the acquisition of, or merger with, financial institutions in other states that will function either as subsidiaries or branches of the parent bank. In 1984 the Utah State Legislature enacted a law that allowed the acquisition of any Utah depository institution by foreign depository institutions in eleven western states.² Also in 1984, a failing bank statute was enacted that allowed the Commissioner of Financial Institutions of the state of Utah to solicit offers from Utah banks and from banks from any foreign state to acquire a failing or failed bank in Utah.³ Most recently, in the 1986 legislature, a new banking act due to pressure from the Department of Financial Institutions, was rapidly pushed through both houses.⁴ The immediate purpose for passing the act was to facilitate the acquisition of two failing banks in Utah.⁵ The long term objective of the act is to expand interstate banking in Utah and provide a safer arena for the operation of financial institutions in the state of Utah. The new act, in part, removes some of the restrictions of the failing bank statute of 1984; operates a "trigger" that will open up interstate banking in Utah to all fifty states and the District of Columbia after December 31, 1987; gives the Commissioner of Financial Institutions increased power to force and encourage mergers and acquisitions of Utah financial institutions; and imposes new forceful restrictions on thrift institutions.⁶ These enactments demonstrate an attempt to prevent the failure of Utah banks and a push for full interstate banking in Utah.

¹UTAH CODE ANN. §§ 7-1-102, 7-1-702 (Supp. 1985), Banking Reform Act of 1986, H. B. No. 189 (Feb. 13, 1986) (to be codified in various sections of UTAH CODE ANN., title 7). These statutes refer to banking institutions as depository institutions and depository institution holding companies. Out-of-state banks are referred to as foreign depository institutions and foreign depository institution holding companies. UTAH CODE ANN. § 7-1-702 (Supp. 1985). These terms will be used interchangeably throughout the article.

² UTAH CODE ANN. § 7-1-102(2)(b) (Supp. 1985) (amended 1986).

³UTAH CODE ANN. §§ 7-19-1 to -11 (Supp. 1985) (amended 1986).

⁴The Daily Universe, Jan. 28, 1986, at 2, col. 1.

⁵Deseret News, Jan. 18, 1986, at A1, col. 6.

⁶Banking Reform Act of 1986, H.B. 189, § 1 (Feb. 13, 1986) (to be codified at UTAH CODE ANN. § 7-1-102).

A. [§ 1.1] REASONS FOR 1986 BANKING AMENDMENTS

The 1984 enactment authorizing reciprocal interstate banking created an opportunity for banks in the western region to acquire banks in Utah and provided an opportunity for any state bank to acquire failing banks in Utah. The new 1986 amendments, although not making any monumental changes,⁷ demonstrate a concern for the stability of Utah banks and financial institutions. States with very large banks were excluded from acquiring banks in Utah by the 1984 act for fear that these large banks would take over the Utah banking market. The legislature is now less concerned about large out-of-state banks taking over the Utah banking market and is more concerned with providing safe banking for the Utah consumer. The legislature will now allow the entry of large foreign banks that can strengthen and provide safe banking to the financial economy of Utah. The amendments will prevent bank problems before the problems ever develop. For instance, a Utah bank experiencing financial difficulties may be strengthened through an acquisition facilitated by the new act. The forceful statutes regarding Utah thrift institutions could have been enacted in response to the recent failures of thrift institutions in other states. Thrifts in Ohio, Maryland and Florida experienced serious runs that threatened the stability of the entire financial market before control could be restored by the respective state governments. Utah's new laws should prevent such failures by providing protection through more stringent control. Because of the recent enactments by state legislatures of interstate banking laws and a decision by the United States Supreme Court affirming the constitutionality of reciprocal banking statutes,⁸ much activity is taking place in this expanding area of banking law.⁹

II. [§ 2] INTERSTATE BANKING HISTORY

Bank chartering and expansion has been strictly regulated throughout banking history in the United States. Since 1864, banking in the United States has consisted of a dual banking system with state and federally chartered banks.¹⁰ State banks were originally allowed to branch according to their state laws. National banks, however, were prohibited

⁷Some may argue that the amendments are monumental. However, the changes seem to simply expand the 1984 law; allowing the acquisition of Utah banks by 49 states rather than 11 states and permitting foreign banks to be the first to offer to acquire Utah failing banks rather than requiring the Commissioner of Financial Institutions to first receive offers by Utah banks before allowing offers from foreign banks.

⁸*Northeast Bancorp v. Board of Governors*, 105 S. Ct. 2545 (1985).

⁹*Deseret News*, June 11/12, 1985, at B5, col. 5.

¹⁰*See generally*, National Bank Act, CH. 106, 13 Stat. 99 (1864) (codified in various sections of 12 U.S.C.).

from branching. The federal McFadden Act of 1927 was promulgated to promote competitive equality between state and national banks. The McFadden Act gave national banks the same opportunities states allowed their state banks and also prohibited all banks from interstate branching.¹¹

A. [§ 2.1] BANK HOLDING COMPANIES

To circumvent the restrictions of the McFadden Act, bank holding companies (BHCs) were organized by financial institutions. A BHC is a company organized to control one or more banks as subsidiaries. A BHC could control more than one bank in different states without violating the interstate branching laws. This was accomplished by treating the individual banks as separate entities although controlled by the same parent BHC. In 1956, the federal Bank Holding Company Act (BHCA) was enacted to control and place restrictions on such activities.¹² Section 1842(d) of the BHCA, known as the Douglas Amendment, prohibits the acquisition of out-of-state banks by BHCs “unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.”¹³ Thus, the Douglas Amendment allows the acquisition of banks by out-of-state BHCs if the state specifically authorizes the acquisition. However, from the time of its enactment, in 1956 to 1972, no state enacted any legislation authorizing the acquisition of depository institutions in its state by out-of-state BHCs.¹⁴ Rather than wait for states to enact legislation to allow interstate acquisitions, the banks found other ways to circumvent the banking law restrictions.

III. [§ 3] INTERSTATE EXPANSION

Banks and BHCs avoid branch banking restrictions for various reasons. One reason is that greater volume of transactions decreases the cost per transaction and increases the profit. Banks, therefore, may take advantage of the greater economies of scale to increase their profitability.¹⁵ Banks also seek banking expansion to participate in the lucrative financial markets outside of their home state.

A. [§ 3.1] NONBANK BANKS

Another, and perhaps more important reason for expanding banking is to compete with the financial institutions that are not restricted by

¹¹12 U.S.C. § 36 (1982).

¹²12 U.S.C. §§ 1841-1850 (1982).

¹³12 U.S.C. § 1842(d) (1982).

¹⁴Northeast, 105 S. Ct. at 2548.

¹⁵Ginsburg, *The Future of Interstate Banking*, 9 J. CORP. L. 655, 659 (1984).

banking regulations but can provide many of the same financial activities as banks. A bank, for purposes of the BHCA, is an institution 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."¹⁶ If demand deposits and commercial loans are offered, the institution falls within the definition of a bank, and federal and state banking restrictions are imposed. However, if the institution omits either demand deposits or commercial loans from its activities, (such as providing only demand deposits and consumer loans), the institution is not a bank within the definition of the BHCs and is not governed by banking regulations. These nonbank banks¹⁷ provide many "banking" activities but are not regulated by banking laws. Sears and American Express are examples of financial conglomerates that have acquired finance companies, brokerage firms, real estate brokers, savings and loan institutions, insurance companies, leasing companies and other nonbank entities, none of which are regulated by the stringent banking regulations.¹⁸ Banks are at a disadvantage to this type of financial institution because of the present banking regulations and freedom granted to nonbank banks.

BHCs have been able to avoid interstate banking restrictions by the acquisition of these nonbank banks as subsidiaries. The Federal Reserve Board may approve certain nonbank activities of BHCs if the activities are closely related to the business of banking.¹⁹ Nonbank banks such as brokerage firms, insurance companies, retailers, money market funds and financial conglomerates provide many of the financial services of banks without the banking regulations. Because these financial institutions are not banks, they are not governed by the interstate branching laws and may basically branch at will. Many banks are now taking an aggressive posture to compete with nonbank banks. Citicorp, for instance, a New York BHC, has established nonbank activities in many locations within the United States.

B. [§ 3.2] STATUTORY AND REGULATORY INTERSTATE BANKING

Statutory provisions and regulations allow some interstate presence. Grandfather provisions allow banks to continue interstate banking that

¹⁶12 U.S.C. § 1841(c) (1982).

¹⁷A nonbank bank is a financial institution that does not qualify as a bank under state or federal regulations but performs many of the same functions as a bank.

¹⁸ In a recent decision, the U.S. Supreme Court held that the Federal Reserve Board did not have the authority to redefine the definition of a bank, thus preserving the status of many "nonbank" institutions. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 54 U.S.L.W. 4101 (U.S. Jan. 22, 1986).

¹⁹12 U.S.C. §§ 1843(c)-1843(d) (1982).

already existed before the restrictive BHCA regulations were enacted.²⁰ First Interstate Bancorporation, a California BHC which has affiliates in eleven western states, including Utah, is an example of a BHC protected under the BHCA grandfather provision.

Loan production offices may be established under federal regulations.²¹ Loan production offices can originate loans but can neither approve nor make the actual loans, thereby not falling under the definition of a bank. The loan production offices are, therefore, free from banking regulations controlling interstate expansion.

Prior to 1978, international banks were allowed great freedom in establishing interstate branching systems. The International Banking Act of 1978²² has now put international banks on substantially the same level as state and national banks in terms of interstate banking. The grandfather provisions, however, also apply to interstate branches established before the International Banking Act.²³ "Edge Act" corporations,²⁴ corporations formed to provide international financial operations, are also able to provide interstate banking authorized by federal statute. Edge Act corporations are not restricted by the interstate branching laws.

C. [§ 3.3] RECIPROCITY BRANCHING

Perhaps the most promising method of advancing toward full interstate branching is through the new state reciprocal laws now being established by states across the country. Since 1972 at least 24 states have enacted some form of interstate bank legislation.²⁵ The scope of the individual state statutes has ranged from Iowa's statute, which allows only

²⁰12 U.S.C. § 1843(c) (1982).

²¹12 C.F.R. § 7.7380 (1985).

²²12 U.S.C. §§ 3101-3107 (1982).

²³12 U.S.C. §3103(b) (1982).

²⁴12 U.S.C. U.S.C. §§ 611-631 (1982).

²⁵ALASKA STAT. § 06.05.235 (Suppl 1985); ARIZ. REV. STAT. § 6-321 to -327 (Supp. 1985); CONN. GEN STAT. § 36-552 to -557 (Supp. 1985); FLA. STAT. ANN. § 658.295 (West 1984); GA. CODE §§7-1-620 to .625 (Supp. 1985); IDAHO CODE § 26-2605 (Supp. 1985); ILL. REV. STAT. CH. 17 § 2510b (Supp. 1985); IND. CODE § 28-2-15-1 to -28 (Supp. 1985); IOWA CODE ANN. § 524-1805 (West Supp. 1985); KY. REV. STA. §§ 287.900 to -.905 (Supp. 1984); ME. REV. STAT. ANN. tit. 9-b, § 1011 to 1019 (Supp. 1985); MD. FIN. INST. CODE ANN. § 5-901 to -905 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 167A, § 2 (West Supp. 1985); 1985 Nev. Stat. 2149 (to be codified at NEV. REV. STAT. §§ 666.7-.24); N.Y. BANKING LAW § 142-b (McKinney Supp. 1986); N.C. GEN. STAT. §§ 53-209 to -218 (Supp. 1985); OHIO REV. CODE ANN. § 1101.5 (1985); Act of March 12, 1985, ch. 12, 1985 Or. Laws 25; R. I. GEN. LAWS § 19-30-2 (Supp. 1985); 1984 S.C. Acts 1762 (to be codified at S.C. CODE ANN. §§ 34-34-10 to -100, 34-35-40 to -490); TENN. CODE ANN. §§ 45-12-101 to -108 (Supp. 1985); UTAH CODE ANN. §§ 7-1-102, 7-1-702 (Supp. 1985) as amended by the Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) (to be

one BHC outside of the state to acquire an Iowa bank,²⁶ to Alaska's statute which allows virtually all BHCs in any state to acquire Alaska depository institutions.²⁷ Other state statutes fall between the Iowa and Alaska extremes, usually allowing entry from BHCs in certain states in a particular region if that particular state has reciprocal laws with the original state.

1. [§ 3.3.1] Northeast Bancorp

The recent United States Supreme Court decision in *Northeast Bancorp v. Board of Governors*²⁸, (*Northeast*) has been a boon to state reciprocity legislation and banks desiring interstate acquisitions. The decision has given judicial approval to interstate bank branching and acquisitions. In *Northeast*, Northeast Bancorp, Inc., Union Trust Company and Citicorp challenged the constitutionality of legislation by several New England states that had enacted reciprocity legislation.²⁹ The action was brought because the large money-center banks³⁰ were being statutorily excluded from the regional reciprocity compacts.³¹ These large banks claimed the regional statutes were discriminatory and violated the commerce clause, the compact clause, and the equal protection clause of the U.S. Constitution.³² The Supreme Court upheld the constitutionality of the state statutes in a unanimous 8-0 decision holding that the state enactments were authorized by the BHCA and that the constitutional clauses were not violated by the regional reciprocity compacts.³³

The decision was applauded by small regional banks and denounced by the money-center banks. Regional banking states have not allowed the money-center banking states (i.e. New York, Illinois and California) to participate in their regional compacts in fear that regional banks would be unable to compete with the large banks. The *Northeast* decision allows the states to create regional strongholds apart from the east coast, west coast oligopoly of banking.

codified in various sections of UTAH CODE ANN., title 7); VA. CODE §§ 6.1-398 to -407 (Supp. 1985); WASH. REV. CODE ANN. § 30.04.230 (Supp. 1986).

²⁶IOWA CODE ANN. § 524.1805 (West Supp. 1985).

²⁷ALASKA STAT. § 06.05.235 (Supp. 1985).

²⁸*Northeast*, 105 S. Ct. 2545.

²⁹*Id.* at 2549.

³⁰Money-center banks are those with substantial deposits that control basic monetary policy with most smaller banks in the United States. Most of these banks are located in New York, California and Illinois.

³¹See generally, *Northeast*, 105 S. Ct. at 2549.

³²*Id.*

³³*Id.*, at 2556. Justice O'Connor filed a concurring opinion and Justice Powell took no part in the decision.

2. [§ 3.3.2] Interstate Banking Advantages

Banking law has changed more in the last few years than any other time in the history of banking in the United States. One of the reasons for enacting interstate banking legislation is to adjust to changes in banking and the changing economic environment.³⁴ Interstate banking and branching promotes increased competition among banks. The increased competition will have a great impact on innovative banking, lowering prices for bank services and increasing quality of banks and bank services. Increased competition and flexibility in banking will give banking institutions greater power to expand, compete and meet the needs of the public.³⁵ Expansion in the quantity of services provided will increase operating efficiency³⁶ and allow for greater quality of services to the public. Competition will give banks a competitive edge needed to compete with nonbanking financial institutions.

Economic reasons exist for allowing interstate banking in Utah. The smaller Utah banks may not be able to provide all of the services and capital needed within the state of Utah. Bringing in other institutions that have the technology, experience and money to meet the needs of the people is an added asset to the economy of Utah. Nationwide banking systems can provide much needed strength to capital poor economics.

3. [§ 3.3.3] Interstate Banking Disadvantages

Several disadvantages have been proffered by opponents of interstate banking. Overconcentration of banking is feared with the advent of interstate acquisitions.³⁷ Concentration of banking may exist when a number of large BHCs take over existing banks in a certain area. Because of the expertise and technological advances made in the larger institutions, these banks may exert more power than previously existed from the same number of bank branches. This concentrated power would have an adverse influence on smaller local banks still in existence. Consolidation of banking is very likely with increased interstate expansion. The large banks will get larger through acquisitions, and de novo expansion of small independent banks will remain strictly regulated by the Comptroller of the Currency of the United States and by state chartering bodies. The increased concentration of banking power could possibly reduce competition, decrease contact with the small consumer and squeeze out small banks that cannot compete.

³⁴Frieder, *Legislating for Interstate Bank Expansion: Financial Deregulation and Public Policy*, 9 J. CORP. L. 673, 754-56 (1984).

³⁵*Id.*, at 754.

³⁶*Id.*, at 731.

³⁷*Id.*, at 757.

Small banks may fear that they will not be able to compete with the large money-center institutions. Small banks for many years have been able to coexist with the large banks and there is no reason to expect any changes with interstate banking. Indeed, small banks fill a gap by providing local specialized services that a large bank cannot always provide.

Fear of BHCs gaining a monopoly of more than one state market is also a fear of the smaller banks. However, federal and state antitrust laws³⁸ exist to prevent institutions from gaining an anticompetitive monopoly. The Senate has also proposed specific banking legislation, other than the existing antitrust laws, which would prohibit banks from gaining a monopoly.³⁹ The proposal would limit any BHC to holding no more than one percent of the total deposits in the United States.⁴⁰

Draining local deposits for use in larger markets is another fear of opponents.⁴¹ Large banks could siphon off deposits accumulated in a local area and displace the deposits in a market where the return may be greater or the risk less. Draining these resources would take away any advantage a particular bank has, causing that bank to lose the business of the consumer. All banks, in-state or out-of-state, provide economic services to the local consumers. One of the purposes of a competitive market is to provide the best available services to the consumer, maintaining the business of the consumer. A bank will not take steps to lose that business. Furthermore, the Community Reinvestment Act of 1977⁴² requires that a bank help meet the credit needs of the community in which they are chartered. Ensuring that the needs of the community are met, large banks may be in a position to better allocate bank deposits in a manner that is economically efficient. Rather than drain local funds, the banks could redistribute the funds to an area with greater needs and greater demands.

IV. [§ 4] UTAH INTERSTATE BANKING

The original Utah reciprocal banking statute was passed in a special session of the Utah Legislature in 1984.⁴³ Prior to that time no interstate branching of banks was allowed by Utah law. The new 1986 Utah banking amendments will reduce restrictions of interstate banking law in Utah even more by permitting acquisitions by banks and BHCs from any

³⁸See generally, 15 U.S.C. §§ 1-7, 12-27 (1982); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

³⁹S. 1034, 99th Cong., 1st Sess. (1985). Proposed federal law considerations are discussed in § 5.

⁴⁰*Id.*

⁴¹Ayers & Jones, *Regional Banking - A Viable Alternative? an Empirical Study*, 9 J. CORP. L. 815, 836 (1984).

⁴²12 U.S.C. 2901-2905 (1982).

⁴³UTAH CODE ANN. §§ 7-1-102, 7-1-702 (Supp. 1985) (amended 1986).

state.⁴⁴ Local banks can satisfy many of the local needs of its people but larger banks have to be relied upon for specialized needs, especially large commercial transactions. With the initiation of regional compacts, states can develop a regional autonomous stronghold of banking power without having to rely on the New York, California or Chicago financial institutions, or may permit the entrance of the large money-center banks to strengthen the state financial economy. Utah originally chose the reciprocal banking route, proposing to be part of a western regional compact. But because of the great possibility of full interstate banking, and perhaps the need for added strength from large banking institutions, the legislature has chosen to allow banking in Utah by all states.

A. [§ 4.1] SCOPE OF THE 1984 ACT

The reciprocal banking statute of 1984 was an important stepping stone for full interstate banking in Utah. The statute was enacted "to allow reciprocal acquisition of control or mergers of depository institutions or depository institution holding companies by foreign depository institution holding companies and foreign depository institutions. . . ."⁴⁵ The 1984 statute authorizes Utah depository institutions to acquire foreign depository institutions with reciprocal legislation, and also authorizes the Utah State Commissioner of Financial Institutions to allow the acquisition of Utah banks and BHCs by foreign depository institutions if the other state has reciprocal legislation.⁴⁶ Utah has created a regional compact in which reciprocal acquisitions are allowed with Alaska, Washington, Oregon, Idaho, Wyoming, Montana, Colorado, New Mexico, Arizona, Nevada and Hawaii.⁴⁷ California is conspicuously missing from this list of states.⁴⁸ All other western states have been included in the compact. The states listed in the statute must have similar reciprocal legislation to participate in bank acquisitions in the state of Utah.

Banks and BHCs that are principally located in a state named in the Utah statute may "(a) acquire control of, (b) merge with, (c) acquire all or

⁴⁴Banking Reform Act of 1986, H. B. 189 (Feb. 13, 1986) (to be codified at various sections of UTAH CODE ANN., title 7).

⁴⁵UTAH CODE ANN. § 7-1-102(2)(a) (Supp. 1985) (amended 1986). A foreign depository institution is defined as a "depository institution whose home office is located in and whose operations are conducted principally in a reciprocal state." UTAH CODE ANN. § 7-1-103(15) (Supp. 1985) (amended 1986). A foreign depository institution holding company is defined as a "depository institution holding company whose subsidiary depository institution's operations are conducted principally in a reciprocal state." UTAH CODE ANN. § 7-1-103(16) (Supp. 1985) (amended 1986).

⁴⁶UTAH CODE ANN. § 7-1-702(2) (Supp. 1985) (amended 1986).

⁴⁷UTAH CODE ANN. § 7-1-102(2)(b) (Supp. 1985) (amended 1986).

⁴⁸*Id.*

substantially all of the assets of, or (d) assume the deposit liabilities of a depository institution whose operations are principally conducted in any reciprocal state.”⁴⁹ The 1984 act required that the bank or BHC to be acquired in Utah be in existence for a period of five years before being acquired by a foreign depository institution.⁵⁰ The new amendments have eliminated this requirement, now permitting the acquisition of de novo⁵¹ or recently established banks.⁵² Acquiror BHCs from other states must comply with all guidelines and regulations that Utah banks comply with. The Commissioner of Financial Institutions of Utah has the right to treat violations by non-Utah BHCs in the same manner accorded Utah banks.⁵³ Once a foreign depository institution has been granted permission by the commissioner to acquire a Utah depository institution, the foreign institution will be accorded the same privileges and restrictions as Utah institutions.

The Utah legislature has taken additional steps to ensure that consumers are protected from problem banks. The initial legislation of the failing bank statutes in 1984 are very similar to the federal Garn-St. Germain Depository Institutions Act of 1982.⁵⁴ The 1984 Utah statute provided that the Commissioner of Financial Institutions of the state of Utah could solicit offers from domestic or foreign depository institutions to acquire part or all of the assets of a failing Utah depository institution.⁵⁵ The Commissioner had to first solicit offers from in-state institutions. If no acceptable offers were received from Utah banks, then the Commissioner could look elsewhere.⁵⁶ These same methods were already available under the Garn-St. Germain Act except only failing institutions with assets of more than \$500,000,000 could be acquired under the Garn-St. Germain Act.⁵⁷

1. [§ 4.1.1] Creation of Regional Strongholds

Reciprocal legislation is a new and prospectively important manner of carrying on banking business. The state statutes challenged in the

⁴⁹UTAH CODE ANN. § 7-1-702(1) (Supp. 1985) (amended 1986).

⁵⁰UTAH CODE ANN. § 7-1-702(6) (Supp. 1985) (amended 1986).

⁵¹A de novo bank is a newly established depository institution which is not created by acquiring or merging with an existing bank.

⁵²UTAH CODE ANN. § 7-1-703(6) (Supp. 1985), amended by the Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986).

⁵³UTAH CODE ANN. § 7-1-102(2)(c) (Supp. 1985) (amended 1986).

⁵⁴Cited as Deposit Insurance Flexibility Act, Pub. L. No. 97-320, 96 Stat. 1469, (codified in various sections of 12 U.S.C.).

⁵⁵UTAH CODE ANN. §§ 7-19-1 to -11 (Supp. 1985) (amended 1986).

⁵⁶UTAH CODE ANN. § 7-19-2 (Supp. 1985) (amended 1986).

⁵⁷Cited as Deposit Insurance Flexibility Act, Pub. L. No. 97-320, 96 Stat. 1469, (codified in various sections of 12 U.S.C.).

*Northeast*⁵⁸ case have begun to strengthen the position of New England in banking. New England is now legally allowed to establish a banking power-center that will compete directly with the New York banks. Acquisitions have already taken place in New England that will strengthen the New England banking position.⁵⁹ Other regional powers are also beginning to emerge. Most of the biggest banks in the southeast, including banks in Georgia, Florida, North and South Carolina and Tennessee, completed mergers or acquisitions in 1985.⁶⁰ A limited amount of activity is taking place in the Mid-Atlantic states and the Midwest, centered in Ohio, Michigan, Indiana and Kentucky, is working on major acquisitions between those states.⁶¹ In an equal manner, the western states' statutes could strengthen their banking power. The states that have not yet enacted interstate legislation may choose the manner of acquisitions that best fits them or choose no manner at all. However, the recent legislation by many of the states in the country show the trend toward regional banking and the innovation in the banking system nationwide through interstate banking.

2. [§ 4.1.2] The Western Regional Compact

For the Utah reciprocal statute to be effective, other states in the specified region must enact similar legislation. Of the eleven states named in the Utah statute⁶² six have enacted interstate legislation,⁶³ four of these being compatible with the Utah statute.⁶⁴ Washington and Oregon currently allow the acquisition by foreign BHCs of banks that are in financial trouble, but do not allow acquisition for any other reason.⁶⁵ Thus, the Utah reciprocity law is not effective with those states. The Oregon statute is further limiting by allowing only contiguous states to acquire failing institutions in Oregon.⁶⁶ Nevada, Idaho and Alaska authorize reciprocal

⁵⁸*Northeast*, 105 S. Ct. at 2548, 2549. These states include Massachusetts, Connecticut, Rhode Island and Maine.

⁵⁹Wall Street Journal, Jan. 20, 1986, at 6, Col. 1.

⁶⁰*Id.*

⁶¹*Id.*

⁶²UTAH CODE ANN. § 7-1-102(2)(b) (Supp. 1985) (amended 1986).

⁶³ALASKA STAT. § 06.05.235 (Supp. 1985); ARIZ. REV. STAT. § 6-321 to -327 (Supp. 1985); IDAHO CODE § 26-2605 (Supp. 1985); 1985 Nev. Stat. 2149 (to be codified at NEV. REV. STAT. §§ 666.7-.24); Act of March 12, 1985, ch. 12, 1985 Or. Laws 25; WASH. REV. CODE ANN. § 30.04.230 (Supp. 1986).

⁶⁴ALASKA STAT. § 06.05.235 (Supp. 1985); ARIZ. REV. STAT. § 6-321 to -327 (Supp. 1985); IDAHO CODE § 26-2605 (Supp. 1985); 1985 Nev. Stat. 2149 (to be codified at NEV. REV. STAT. §§ 666.7-.24).

⁶⁵Act of March 12, 1985, ch. 12, 1985 Or. Laws 25; WASH. REV. CODE ANN. § 30.04.230 (Supp. 1986).

⁶⁶Act of March 12, 1985, ch. 12, 1985 Or. Laws 25.

banking with Utah,⁶⁷ and Arizona has enacted a reciprocal banking statute that will go into effect October 1, 1986.⁶⁸ The statutes of these states vary in breadth. The Idaho statute is narrowest of the four, including fewer states than the Utah compact.⁶⁹ The Nevada statute allows reciprocal acquisitions in the same states that Utah allows;⁷⁰ and Alaska allows reciprocal acquisitions with any state, including California and those outside of the western region.⁷¹ Arizona has included an interesting trigger provision where initially only acquisitions with banks already in existence for at least five years may take place.⁷² But in 1992, the five-year provision will be automatically repealed and de novo expansion will be authorized.⁷³

The states that have enacted reciprocal legislation in the western states have left out California. Leaving California out of the western states' reciprocal laws has created some controversy that has mostly been resolved by the *Northeast* case. In *Northeast*, a major opponent of the New England statutes was Citicorp, a major New York bank. New York had been excluded from the New England reciprocal statutes as California has been left out of western states' statutes. Justice Rehnquist in the majority opinion quotes a previous decision where it was said that "banking and related financial activities are of profound local concern."⁷⁴ This demonstrates "that our country has traditionally favored widely dispersed control of banking."⁷⁵ States may regulate banking as they see fit as long as no serious grievances are committed. The 1984 Utah statute originally left California out of the western regional compact. This occurred because of fear of the strength of the California banking market. But with the new amendments, all states, including California, will be authorized to make acquisitions in Utah.

B. [§ 4.2] SCOPE OF THE 1986 ACT

The 1986 Utah banking act demonstrates how fast banking and banking law is changing. In a period of less than two years, banking in Utah has progressed from no interstate banking to limited interstate

⁶⁷ALASKA STAT. § 06.05.235(e) (Supp. 1985); IDAHO CODE § 26-2605 (1985); 1985 Nev. Stat. 2149 (to be codified at NEV. REV. STAT. §§ 666.7-.24)

⁶⁸ARIZ. REV. STAT. § 6-321 to -327 (Supp. 1985).

⁶⁹IDAHO CODE § 26-2605 (Supp. 1985).

⁷⁰1985 Nev. Stat. 2149 § 13 (to be codified at NEV. REV. STAT. §§ 666.7-.24).

⁷¹ALASKA STAT. § 06.05.235 (Supp. 1985).

⁷²ARIZ. REV. STAT. § 6-323 (Supp. 1985).

⁷³ARIZ. REV. STAT. § 6-324 (Supp. 1985).

⁷⁴Lewis v. B. T. Investment Managers, Inc., 447 U.S. 27, 38 (1980).

⁷⁵*Northeast*, 105 S. Ct at 2555.

banking and will soon expand to full interstate banking. The principle changes in the 1986 act include: phasing out the regional reciprocity compact, phasing out reciprocal legislation requirements, and eliminating the requirement that banks in Utah be in existence for five years before being acquired by a foreign depository institution.⁷⁶ Until December 31, 1987, only banks from any of the eleven western states named in the original statute may acquire banks in Utah, and only if the state has reciprocal laws permitting Utah banks and BHCs to acquire banks under substantially comparable conditions.⁷⁷ After December 31, 1987, any bank or BHC from any state may acquire Utah financial institutions, irrespective of reciprocal legislation, with authorization of the Commissioner of Financial Institutions.⁷⁸ The new act also strictly controls thrift institution activities⁷⁹ by; requiring thrift institutions to participate in a guaranty corporation, insuring funds up to \$15,000 rather than the previous limit of \$10,000,⁸⁰ requiring thrifts to obtain federal insurance by July 1, 1989,⁸¹ facilitating the conversion of thrifts to banks or savings and loans and also facilitating the acquisition of thrifts by foreign banks.⁸²

The 1986 act facilitates failing bank acquisitions. The new Utah act eliminates the requirement to first solicit offers from in-state institutions.⁸³ The commissioner now may go directly to the state or BHC that would give the most immediate help to the failing institution, regardless of the location of the BHC.⁸⁴ This simplified procedure now allows the Commissioner to weigh the options and select that option which is most beneficial to the failing bank and to the state of Utah.

1. [§ 4.2.1] Trend Toward Interstate Banking

To facilitate interstate expansion, several methods of legislation are available for states proceeding to enact interstate banking laws. The state

⁷⁶Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at §§ 1,3,4 (to be codified at UTAH CODE ANN. §§ 7-1-102, 7-1-702, 7-1-703).

⁷⁷Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at §§ 1,3 (to be codified at UTAH CODE ANN. §§ 7-1-102, 7-1-702).

⁷⁸*Id.*

⁷⁹A thrift or industrial loan corporation is a financial institution authorized to accept deposits and is a member of a guaranty corporation. Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at § 1 (to be codified at UTAH CODE ANN. § 7-1-102).

⁸⁰Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at § 22 (to be codified at UTAH CODE ANN. § 7-8a-6).

⁸¹Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at § 19 (to be codified at UTAH CODE ANN. § 7-8a-2).

⁸²Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at §§ 17,18 (to be codified at UTAH CODE ANN. §§ 7-8-17, 7-8-18).

⁸³Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at § 33 (to be codified at UTAH CODE ANN. § 7-19-5).

⁸⁴*Id.*

may employ the method that would best meet the needs of the economy of that state. For instance, a state may allow banks and/or BHCs to acquire depository institutions in their state. De novo banks or bank acquisitions may be allowed. Acquisitions may come from a few specified states, or free entry from any state, or no entry may be allowed at all. The national trend seems to be moving toward free interstate branching. Those states that will not keep up with the trend may suffer economic setbacks by not providing for the needs of the consumers. Some economists favor full interstate banking and believe that the regional arrangements that are taking place across the country are reasonable transitions to a full interstate banking system.⁸⁵

2. [§ 4.2.2] Erosion of Regional Strongholds

Even though some of these regional compacts have been in existence for just a few months, some of the compacts are already beginning to break down. Utah is a good example. Less than two years ago Utah proposed a western regional compact consisting of eleven western states.⁸⁶ Beginning on December 31, 1987, Utah's banking statute will expand to include, not only those named in the 1984 act, but all states nationwide.⁸⁷ Utah's statute will thus be similar in scope to the Alaska statute.⁸⁸ Once a foreign depository institution acquires a Utah institution, they will have access to many of the same markets that states are now legislating against. For example, if a Utah bank acquired an Idaho bank and was subsequently acquired by a New York bank, the New York bank would own banks in Utah and Idaho even though Idaho law prohibits New York banks from acquiring banks in Idaho. Similarly, states in some of the other regional compacts have already gone with full interstate laws⁸⁹ or will soon establish full interstate banking.⁹⁰

C. [§ 4.3] CURRENT ACQUISITIONS AND OUTLOOK

The recent decision in *Northeast*, and the new Utah statutes have opened the door for acquisitions by and of Utah banking institutions. Zions Utah Bancorporation, a Utah BHC with assets of \$2.3 billion,

⁸⁵*Financial Regulators Favor "Trigger" to Phase-In Full Interstate Banking*, 1 CONTROL OF BANKING (P-H) para. 24.6 (May 23, 1985).

⁸⁶UTAH CODE ANN. 7-1-102(2)(c) (Supp. 1985) (amended 1986).

⁸⁷Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at §§ 1,3 (to be codified at UTAH CODE ANN. §§ 7-1-102, 7-1-702).

⁸⁸ALASKA STAT. § 06.05.235 (Supp. 1985).

⁸⁹Alaska, Maine and New York.

⁹⁰Wall Street Journal, Jan. 20, 1986, at 6, col. 1. (These states include Ohio, Michigan, Rhode Island, Kentucky and Nevada.)

recently acquired the \$200 million Nevada State Bank of Las Vegas. Moore Financial Group of Boise, with assets of \$3.5 billion, recently completed the acquisition of \$350 million Continental Bank & Trust Co. of Utah. Under the recently passed Utah failing bank statute, Citicorp, the giant New York BHC, has now entered the Utah banking market by purchasing Utah First Bank.⁹¹ Utah First Bank is now known as Citibank, and by owning a Utah bank, Citicorp may now acquire (with approval of the Commissioner of Financial Institutions) other Utah financial institutions without having to wait until the trigger provision opens up Utah banking to states nationwide.⁹²

V. [§ 5] PROPOSED FEDERAL LAW CONSIDERATIONS

In 1985, members of the House of Representatives and the Senate of the United States, introduced bills which demonstrate potential future federal regulations.⁹³ The Senate bill⁹⁴ introduced in May, 1985, proposed specifically authorizing interstate acquisitions. The bill would have prohibited the exclusion of contiguous states in state reciprocity statutes.⁹⁵ This bill would have helped both New York and California by allowing those two states to acquire banks in contiguous states such as Connecticut, Massachusetts and Nevada which now prohibit acquisitions by banks in New York and California.⁹⁶ However, most of the bill was rendered moot as a result of the *Northeast* decision.⁹⁷ Future legislation is still possible on this "contiguous" discrimination issue.

A. [§ 5.1] THE HOUSE BILL

The House bill,⁹⁸ which was much more complex, was introduced after *Northeast* was decided in June, 1985.⁹⁹ One of the principle provisions of the bill was a "trigger" clause that would authorize restricted interstate legislation. After July 1, 1990 or two years after the enactment

⁹¹Deseret News, Jan. 25, 1986, at B1, col. 1

⁹²Banking Reform Act of 1986, H.B. 189 (Feb. 13, 1986) at § 32 (to be codified at UTAH CODE ANN. § 7-19-4).

⁹³S. 1034, 99th Cong., 1st Sess. (1985); H.R. 2707, 99th Cong., 1st Sess. (1985).

⁹⁴S. 1034, 99th Cong., 1st Sess. (1985).

⁹⁵*Id.* at 2.

⁹⁶CONN. GEN. STAT. § 36-552; MASS. GEN. LAWS ANN. ch. 167A, § (West Supp. 1985); 1985 Nev. Stat. 2149 § 13 (to be codified at NEV. REV. STAT. §§ 666.7-.24).

⁹⁷*Northeast*, 105 S. Ct. 2545.

⁹⁸H. R. 2707, 99th Cong., 1st Sess. (1985).

⁹⁹*Northeast*, 105 S. Ct. 2545.

of interstate legislation, states would have to allow entry of banks from all states.¹⁰⁰ This provision would affect all states that have already enacted interstate legislation and may deter those states that have not. States that want limited or no entry in their banking markets may not enact any legislation for fear of having to open interstate banking on a nationwide scale.

For fear of undue concentration, the bill also provided that a BHC could not acquire more than 1% of the total domestic deposits in depository institutions.¹⁰¹ The largest 25 banks in the country would also be prohibited from merging with one another,¹⁰² thereby prohibiting BHCs from obtaining a monopoly of any United States banking market. Congress is apparently concerned about interstate banking and for the most part, is in favor of such legislation.

B. [§ 5.2] CHAIRMAN VOLCKER

Federal Reserve Board Chairman Paul Volcker is in favor of such federal legislation. He believes that permanent regional banking compacts will harm the U.S. banking system.¹⁰³ Banks and nonbanks alike will continue to seek “unnatural channels” to avoid the state and federal regulations to establish a type of interstate banking.¹⁰⁴ A federal framework for interstate banking will, therefore, protect the U.S. banking system and provide uniform guidelines for states to follow to keep the system working fairly and competitively.

VI. [§ 6] CONCLUSION

The flow toward interstate banking is an inevitable part of our banking system. The activity already taking place in Utah is evidence that the Utah banks are desirous to expand interstate banking and out-of-state banks are just as desirous to participate in and contribute to the Utah economy. Utah has taken a positive step toward creating a uniform banking system that will promote competitive banking and better fulfill the needs of Utah consumers.

NEIL B. JOHNSON

¹⁰⁰H.R. 2707, 99th Cong., 1st Sess. at 3 (1985).

¹⁰¹*Id.* at 5, 6.

¹⁰²*Id.* at 5.

¹⁰³*Financial Regulators Favor “Trigger” to Phase-In Full Interstate Banking*, 1 CONTROL OF BANKING (P-H) para. 24.6 (May 23, 1985).

¹⁰⁴*Id.*