NONBANK BANKS:
A BANK IS ALWAYS A BANK UNLESS OF COURSE IT IS A
NONBANK BANK:
BOARD OF GOVERNORS V. DIMENSION FINANCIAL CORPORATION

Board of Governors v. Dimension Financial Corporation\(^1\) is of major significance because it is the first Supreme Court case addressing the issue of whether “nonbank banks”\(^2\) should be regulated under the Bank Holding Company Act of 1956 (BHCA)\(^3\). In rendering the Dimension Financial decision, the Supreme Court may have taken a major step in diffusing the controversy\(^4\) between financial institutions, the Federal Reserve Board, and Congress by determining when a bank is a “bank” for purposes of regulation under the BHCA.

In analyzing the issue before it, the Dimension Court reviewed applicable statutes, relevant case law, and legislative history and intent in determining whether Dimension Financial Corporation was a “bank” under the BHCA.\(^5\) In basing a major portion of its opinion on legislative intent and the plain purpose of the BHCA, the Supreme Court found that Dimension Financial Corporation did not meet the definition of “bank” under the BHCA and, as such, it was not subject to regulation by the Federal Reserve Board.\(^6\) By holding in favor of Dimension, the Supreme Court may have opened the door for Dimension, as well as other nonbank banks, to receive all of the privileges that normal banks do without suffering many of the regulatory constraints.

This Note will first review the facts of Dimension Financial and will present an overview of the revised Regulation Y, which prompted the litigation. Second, an overview of the purpose and policies behind the BHCA will be presented. The next section will review the changing definition of “bank” and the relevant case law. Finally, the conclusion will attempt to highlight some of the potential ramifications this decision will have on the banking industry.

**Facts**

The Dimension case was actually a group of cases commenced in three

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\(^1\)106 S. Ct. 681 (1986).

\(^2\)Nonbank banks essentially are financial institutions that offer services similar to those offered by banks. However, these institutions avoided Federal Reserve Board regulations because they operated their business in such a manner so as to place themselves outside of the narrow definition of “bank” found in § 2(c) of the Bank Holding Company Act. See Id. at 683.


\(^4\)For a better discussion of the controversy between interested parties such as bank holding companies, Congress, the Federal Reserve Board, and other financial institutions see Lobell, Nonbank Banks: Controversy Over a New Form of Consumer Bank, 39 Bus. Law. 1193 (1984).

\(^5\)Dimension Financial, 106 S. Ct. at 683.

\(^6\)Id. at 688-89.
circuits and consolidated in the United States Court of Appeals for the Tenth Circuit. The cases were initiated by various financial institutions challenging and seeking a review of the revised Regulation Y promulgated by the Federal Reserve Board on December 29, 1983. A major reason for this revision by the Federal Reserve Board of Governors was the proliferation of nonbank banks such as Dimension Financial Corporation.

Essentially, the revised Regulation Y provided that nonbank financial institutions that were functionally equivalent to banks would thereafter be regulated as banks. This inclusion of nonbank financial institutions within the definition of "bank" under the coverage of the BHCA was accomplished by amending the definition of bank found in Regulation Y in two major respects. First, the Federal Reserve Board amended the definition of "demand deposits" to include deposits "with transactional capability that as a 'matter of practice' is payable on demand." This amendment was effectuated to include Negotiable Order of Withdrawal (NOW) Accounts in the demand deposit definitional requirement of "bank" under the BHCA. Second, the Federal Reserve Board amended the definition of "making a commercial loan" to include transactions such as:

- any loan other than a loan to an individual for personal, family, household, or charitable purposes, [including] the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments . . .

The Dimension case arose when the Dimension Financial Corporation applied to the Federal Reserve Board for approval for the acquisition of thirty-one national banks in twenty-five states. In its proposal for the acquisition of these institutions, Dimension Financial indicated that these institutions would continue accepting demand deposits but would not make commercial loans.

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1 Dimension Financial Corporation v. Board of Governors, 744 F.2d 1402 (10th Cir. 1984), aff'd 106 S. Ct. 681 (1986).
2 12 C.F.R. § 225 (1983). This regulation was promulgated by the Federal Reserve Board pursuant to the authority granted them under the BHCA s 1844(c). The purpose of this regulation was to define the term "bank" under the provisions of the BHCA.
4 49 Fed. Reg. 794 (1984). Prior to this revision in Regulation Y, financial institutions could avoid the BHCA regulations by either not making commercial loans or refusing demand deposits. This frequently used loophole is what the Federal Reserve Board attempted to eliminate by revising Regulation Y.
6 NOW accounts are a form of interest bearing checking accounts. These accounts were first utilized by mutual savings banks in Massachusetts. NOW accounts were recognized nationally in 1980 when they were authorized by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 303, 94 Stat. 132, 146.
10 By operating the institutions in this manner, Dimension Financial would create thirty-one (31) nonbank banks.
Dimension was granted approval for four of the acquisitions but the acquisition of the remaining twenty-seven banks was conditioned upon Dimension’s satisfactory operation of the four approved institutions. Dimension sought to challenge the Board’s ruling and successfully filed an appeal with the Tenth Circuit. Although Dimension’s appeal did not challenge the demand deposit provision, several other bankholding companies that were subsequently joined in the action by the court desired to have the amended portion of Regulation Y covering demand deposits reviewed. To avoid duplicative efforts and for judicial expediency, the Tenth Circuit joined all of the petitioners and chose to address amended Regulation Y in its entirety. In reviewing the challenges to the Board’s revisions of Regulation Y, the Tenth Circuit set aside both the demand deposit and commercial loan provisions of Regulation Y and ordered that the Board shall not attempt to enforce or implement the invalid regulations. The Board subsequently appealed.

In affirming the Tenth Circuit’s decision, the Supreme Court held that the Board’s definitions of demand deposit and commercial loan were not reasonable interpretations of Section 2(c) of the BHCA and, as such, the Board did not act within its statutory authority in defining “banks” when it amended Regulation Y.

THE PURPOSES AND POLICIES BEHIND THE BANK HOLDING COMPANY ACT (BHCA)

Prior to the enactment of the BHCA there was very little regulation of the banking industry in this country. The primary regulation of banks prior to 1956 could be found in the Banking Act of 1933. The Act was passed primarily as a response to the stock market crash of 1929 and the severe depression of the 1930’s. As passed, the Act regulated bank holding companies only if at least one bank within a holding company’s group was a member of the Federal Reserve System and the holding company wanted to vote the stock it owned in that bank.

However, a lack of effort on the part of Congress was not the reason for the near absence of regulation of bank holding companies. Every session of Congress from the 73rd to the 84th had attempted to pass legislation aimed at limiting the activities of bank holding companies. It was not until 1956 that legislation was finally passed by Congress and, according to one
representative's discussion of the new banking legislation, this action by Congress was simply a preventive measure designed to inhibit the inconclusive presumption that without regulation there would be too much centralization and monopolization.24 Because of this virtual lack of regulation of the banking industry prior to 1956, what became known as the BHCA was passed and remains, (as amended), the primary regulation of bank holding companies in this country.

It is generally accepted that there are two basic purposes of the BHCA.25 These purposes are:

1) To prevent bank holding companies from acquiring additional banks in a manner which would cause a concentration in commercial banking resources,26 and

2) To prevent bank holding companies from combining banking and nonbanking enterprises in such a way as to enable the bank holding companies to use bank deposits to finance nonbanking activities.27

For support of the claim that there are two basic purposes of the BHCA, one simply has to look at the original Senate Report that accompanied the passage of the BHCA. In this report the Chairman of the Federal Reserve System, William Martin, Jr., noted that the primary problems with bankholding companies usually arose from the bankholding companies' ability to increase or acquire the number of their commercial banking units and, the combination of banking and nonbanking business enterprises.28 Although the BHCA has under-

24101 CONG. REC. 8,176 (1955):
The old saying 'An ounce of prevention is worth a pound of cure,' is very applicable to the banking situation. I believe it is in the public interest that we check a banking monopoly before it gains a firm foothold and thus help to preserve our traditional American system of independent competitive banking.

25See, e.g., Florida Dep't of Banking v. Board of Governors, 760 F.2d 1135, 1141 (11th Cir. 1985), cert granted and judgment vacated by 106 S. Ct. 825 (1986).

26Id.

27Id. at 1136-37. This case also put forth the belief that it was also the intent of Congress to prevent bank holding companies from acquiring banks in other states. For support the Florida Department court looked to the Douglas amendment of the BHCA which essentially remains unaltered from it's date of passage. In reviewing the operation of the Douglas Amendment to the BHCA, the court noted that notwithstanding any other provision of the Act, no application shall be approved which would permit a bankholding company to acquire any voting shares of, interest in, or substantially all of the assets of another bank located outside the state where the bankholding company conducts its principal business. The exception to this rule is if the state of the acquired bank specifically authorizes by statute the ability of an out-of-state bankholding company to acquire banks in that state. See id. at 1136 n.2.

28S. REP. NO. 1095, 84th Cong., 2d Sess., (1985), reprinted in 1956 U.S. CODE CONG. & AD. NEWS 2482, 2483. Mr. Martin was explicit in his support of the BHCA and the problems unregulated bankholding companies would present. Mr. Martin stated that the problems with bankholding companies arose from the following two circumstances:

1) The unrestricted ability of a bank holding company group to add to the number of its banking units, making possible the concentration of commercial bank facilities in a particular area under a single control and management; and

2) The combination under single control of both banking and nonbanking enterprises, permitting departure from the principle that banking institutions should not engage in business wholly unrelated to banking. Such a combination involves the lending of depositor's money, whereas other types of business enterprise, not connected with banking, do not involve this element of trusteeship.
gone two major amendments, the policy originally followed in the enactment of the BHCA has remained a consistent factor in the purpose of the BHCA.29

It is easy to agree with the first purpose of the BHCA, which is the prevention of the concentration of banking resources. It seems safe to assume, given the generally accepted principles of supply and demand, that it is better to have a competitive industry rather than a monopoly. Therefore, the same logic should apply to banking and bankholding companies.

It is the second purpose, the separation of banking and nonbanking activities, that sparks a greater controversy.30 In fact, the Federal Deposit Insurance Corporation Chairman, William M. Issac, stated that the separation of banking and commerce is unnecessary to protect against unsound banking practices.31 Other authors have gone further to indicate their belief that the second purpose of the BHCA is nothing but an offshoot of the non-concentration purpose.32 Whether or not one is of the opinion that the second purpose of the BHCA is meaningless, there have been three objectives put forth as a justification for the second purpose. These objectives are:

1) If bank holding companies are allowed to undertake business activities unrelated to the traditional notions of banking, they may face added risks of instability that would threaten their financial soundness.33
2) If allowed to enter nonbanking fields, bank holding companies may engage in risky, improvident lines of business.34 and
3) The administration of regulations by the regulators (the Federal Reserve Board and the Federal Bank Examiners) would become too costly and the bankholding companies activities would be much more difficult to supervise from the regulators viewpoint.35

While these objectives appear to be viable, they may soon become absolutely meaningless. In a recent decision the Federal Reserve Board of Governors decided to allow banks to begin competing in various nonbanking busi-
nesses, such as: consumer financial counseling; tax planning and preparation; futures and options advisory services; performance of personal property appraisals; and relaxed requirements for banks that underwrite insurance policies.\(^6\) However, this approval by the Board to allow bankholding companies to enter other lines of businesses is not without restrictions. Additionally, David Winston, government affairs counsel for the National Association of Life Underwriters has indicated that insurance companies are presently considering challenging the Federal Reserve Board's actions.\(^7\) Whatever the outcome of this most recent Board rule, it seems as if the Board may be conceding the point that the second purpose of the BHCA is an unnecessary smoke screen.

Whatever one's position on the validity of the purposes and legislative intent behind the BHCA, until legislative revocation, these two principles continue to be the underlying tenets upon which the BHCA stands.

**THE CHANGING DEFINITION OF "BANK"**

There have been three definitions of "bank" under the BHCA. The term was first defined in the original 1956 Act when the BHCA was first promulgated. The BHCA was subsequently amended in 1966 and 1970 to focus the Act more clearly on the institutions which the BHCA was designed to regulate. Along with each amendment came a new definition of the word "bank."

The first definition of "bank" in the 1956 BHCA was simply "any national banking association or any state bank, savings bank or trust company."\(^3\) This definition was designed to guard against the concentration of commercial banking resources because of the influence that the commercial banking resources had on the money and credit system of the United States economy.\(^3\) However, it was soon discovered that this definition also encompassed industrial banks,\(^3\) which were never considered a threat to the banking system or a purpose of the BHCA.\(^4\) Due primarily to this unwanted inclusion of industrial banks, the BHCA was amended in 1966.\(^4\) In 1966, the definition of "bank" was narrowed to include only those "institution[s] that accepts deposits that the depositor has a legal right to withdraw on demand."\(^3\) Although the

\(^{b}\)Id.
\(^{c}\)Bank Holding Company Act of 1956, Pub. L. No. 511 § 2(c), 70 Stat. 133.
\(^{d}\)49 FED. RESERVE BULL. 166 (1963). This purpose was noted in a 1963 Federal Reserve Board interpretive letter written to advise of the applicability of BHCA coverage to industrial banks.
\(^{e}\)These so called industrial banks were simply company sponsored "banks" designed to offer limited checking account services for their employees.
\(^{f}\)112 CONG. REC. 12,385 (1966). To include financial institutions such as industrial banks under the regulations of the BHCA would not promote the purposes the Act was originally intended to serve. In supporting the tighter definition of "bank," the Chairman of the Senate Banking Committee stated: "Generally speaking, the bill was intended to apply to commercial banks of a sort which might have relationships with businesses and business firms which should be avoided."
\(^{h}\)Id.
1966 definition of "bank" was indeed narrower than the original 1956 definition, it still included institutions that did not pose significant dangers to the banking system. Because one of the principal purposes of the Act was to "restrain undue concentration of . . . commercial credit," Congress further tightened the definition of "bank" under the BHCA in the 1970 amendment to exclude any institutions that did not "engage in the business of making commercial loans." In supporting its amendment, Congress recognized the Federal Reserve Board's position and stated that the definition of "bank" may be too broad and would include institutions that did not make commercial loans. Because of this 1970 amendment to the BHCA, the statutory definition of a "bank" under the Act has since been any institution that:

1) accepts deposits that the depositor has a legal right to withdraw on demand; and
2) engages in the business of making commercial loans.

This definition of bank was apparently acceptable for a time because it was another decade before the Federal Reserve Board made any serious attempts to include "nonbank banks" in coverage under the BHCA. However, in the late 1970's, financial institutions that did not fit the definition of "bank" under the BHCA began appearing with greater frequency.

The primary case in which the Board first attempted to address the problem of nonbank banks has come to be known as the Beehive case. Beehive was an industrial loan company formed under Utah law. Beehive satisfied the BHCA definition of a "bank" in all respects except that it did not offer demand deposits, but instead offered NOW accounts. The Beehive case arose when

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"Dimension Financial, 106 S. Ct. at 685.


"An Act to Amend the Bank Holding Company Act of 1956, Pub. L. No. 89-485, § 3, 80 Stat. 236 (1966). In the comments accompanying this Act, Congress was very specific in recognizing the Federal Reserve Board's position and stated: "The Federal Reserve Board has noted that [the 1966] definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans."


First Bancorp. v. Board of Governors, 728 F.2d 434 (10th Cir. 1984).

Id. at 435. According to the Utah Dept. of Financial Institutions Regulation No. 2, Rec. Vol. 1, at 162, any industrial loan company formed under Utah law must reserve the right to require 30 days notice before an account holder may make a withdrawal.

11d. The tactic that Beehive utilized, offering NOW accounts rather than true demand deposit accounts, appears to be a popular technique among bankholding companies and other financial institutions attempting to avoid Federal Reserve Board regulation. This avoidance is accomplished by the loophole present in the BHCA that permits the existence of nonbank banks. See Dimension Financial, 106 S. Ct. 691; Wilshire Oil Co. v. Board of Governors, 668 F.2d 732 (3rd Cir. 1981), cert den'd, 457 U.S. 1132 (1982).
First Bancorporation sought to acquire Beehive Financial Corporation. In August of 1981, First Bancorporation applied to the Board for permission to acquire Beehive Financial Corporation. This request was conditionally permitted provided that First Bancorporation complied with two conditions. The conditions were:

1) That for First Bancorporation to acquire Beehive Financial Corporation, Behive could not continue to offer both NOW accounts and make commercial loans; and

2) If Beehive elected to cease making commercial loans, they had to agree to subject the NOW accounts to Federal Reserve Board regulations concerning reserves and interest limitations.

Additionally, the Board informed First Bancorporation that Foothill Thrift and Loan Company, an industrial loan company that First Bancorporation had previously acquired, also had to comply with the conditions set forth in the Beehive ruling. Although Beehive was ultimately acquired by another suitor, First Bancorporation still sought a review of the Board's decision because of the order concerning Foothill Thrift and Loan Company. The Board argued that if Foothill were to continue offering both commercial loans and NOW accounts, Foothill would be a “bank” as defined in the BHCA and, as such, First Bancorporation could not acquire Foothill because of the restrictive provisions of 12 U.S.C. Section 1843(c)(8) of the BHCA.

In response to this claim that Foothill was a “bank” under the BHCA, First Bancorporation asserted that Foothill failed to meet the BHCA definition of “bank” because Foothill did not “accept deposits that the depositor ha[d] a

\[\text{Id.}\] From a cursory review of the case law, it appears as if one of the key factors in a Federal Reserve Board determination to bring suit under the power they are given in the BHCA is if a bankholding company is attempting to acquire an unregulated nonbank. Like Dimension Financial Corp., First Bancorporation was attempting to acquire an unregulated financial institution.

\[\text{Id.}\] In reviewing a bankholding company application for the acquisition of a nonbank, the Federal Reserve Board has adopted a two-step process. First, the Board makes a determination as to whether or not the activity the bankholding company is seeking to enter is closely related and incidental to banking. The Board relies on the laundry list of permissible activities found in Regulation Y. Second, the Board determines whether the proposed activity has public benefits that outweigh the potential adverse effects. To provide for a fair determination, this second step is closely scrutinized on a case by case basis. See, e.g., Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245, 249-50 (D.C. Cir. 1980). This two-step process for reviewing § 4(c)(8) applications has been expressly endorsed when subjected to judicial review. See Florida Ass'n of Ins. Agents, Inc. v. Board of Governors, 591 F.2d 334, 335 (5th Cir. 1979); Citicorp v. Board of Governors, 589 F.2d 1182, 1190 (2d Cir. 1979), cert denied 442 U.S. 929 (1979); Association of Bank Travel Bureaus, Inc. v. Board of Governors, 568 F.2d 549, 551-52 (7th Cir. 1978).

\[\text{Id.}\] In imposing the first condition, it was the Federal Reserve Board’s theory that if Beehive were to continue offering both NOW accounts and commercial loans, Beehive would then be a bank rather than an industrial loan company. As such it would not be eligible for acquisition as a nonbank entity under § 4 of the BHCA.

\[\text{Id.}\] In 1979 First Bancorporation applied for and was granted unconditional approval to operate the Foothill Thrift & Loan, (an industrial loan company), and in this ruling the Federal Reserve Board was attempting to rescind their approval of an earlier acquisition.

\[\text{Id.}\] at 435-36. § 1843(c)(8) of the BHCA delineates what activities are proper incidents to banking activities.
legal right to withdraw on demand . . .” (emphasis added).\textsuperscript{59} First Bancorporation further argued that under Utah law, industrial loan companies must reserve the legal right to require thirty days notice before payment must be made to a depositor or note bearer.\textsuperscript{60} Because Foothill depositors had no legal right to withdraw on demand, First Bancorporation asserted that Foothill could not be considered a bank.\textsuperscript{61} In setting aside the orders and decisions of the Federal Reserve Board of Governors, and holding in favor of First Bancorporation, the Tenth Circuit noted that Section 2(c) of the BHCA defined “bank” as an institution which makes commercial loans and “accepts deposits that the depositor has a legal right to withdraw on demand.”\textsuperscript{62} The court held that this statute, coupled with the Utah law which specifically proscribed industrial loan companies from accepting demand deposits, must resolve the dispute in favor of First Bancorporation. Because there was no legal right of withdrawal on demand,\textsuperscript{63} Foothill could not be a bank under the BHCA.\textsuperscript{64}

As a result of Beehive and other pressures, the Board became more aware of the growing number of nonbank banks. In discussing this rapidly increasing number of nonbank banks, the Board noted that since 1980 a growing number of insurance, securities, commercial and industrial companies have been acquiring FDIC insured national or state banks.\textsuperscript{65} The Board went on to indicate that these acquisitions were being accomplished by either divesting a portion of the acquired bank’s loan portfolio and maintaining demand deposits or giving up demand deposits and continuing commercial lending.\textsuperscript{66} Both of these methods are predicated upon a continued narrow interpretation of the definition of the word “bank” under Section 2(c) of the BHCA. Because of a surge in the presence of nonbank banks in this country, the Board held hearings on the subject of nonbank banks so that interested parties could express their viewpoints. As the Dimension Court noted, after hearing testimony from interested parties, the Board found that nonbank banks pose three dangers to the national banking system.\textsuperscript{67} The Board asserted that the dangers to the national

\textsuperscript{59}Id. It is apparent from language in the case that First Bancorporation based their major argument on the clear language of § 2(c) of the BHCA.

\textsuperscript{60}Id. at 435.

\textsuperscript{61}Id.

\textsuperscript{62}Id. at 435-36, citing 12 U.S.C. § 1841(c).

\textsuperscript{63}Id. at 436.

\textsuperscript{64}Id. For a good discussion of the similarities of NOW accounts and demand deposit accounts and why NOW accounts are different, see Pennsylvania Bankers Ass’n v. Secretary of Banking, 481 Pa. 332, 392 A.2d 1319 (1978), affg 32 Pa. Commw. 439, 379 A.2d 1062 (1977).


\textsuperscript{66}Id. In discussing these tactics the Federal Reserve Board noted that these “nonbank banks” that were being acquired through this method continued to take deposits from the public, make loans, enjoy FDIC insurance, and maintained access to the payments system. Because these “nonbank banks” were for all practical purposes banks, the Federal Reserve Board believed that these “banks” should not be exempt from Board regulation under the BHCA.

\textsuperscript{67}Dimension Financial. 106 S. Ct. at 685.
banking system were:

1) Nonbank banks are outside the bank regulations, therefore they have a significant competitive advantage over regulated banking institutions despite the functional equivalence of the services offered;

2) The proliferation of nonbank banks threatens the structure established by Congress for limiting the commingling of banking and commerce and avoiding the concentration of banking resources; and

3) Interstate acquisition of nonbank banks undermines the statutory proscriptions on interstate banking without prior state approval.\(^6\)

According to the 1970 Amendments to the BHCA, both elements of 12 U.S.C. Section 1841(c), accepting demand deposits and making commercial loans, needed to be present for an institution to be considered a bank under the BHCA. As a result of the proliferation of nonbank banks, the Board decided to amend its definitions of demand deposits and commercial loans so as to bring these so-called “nonbank banks” under its regulatory powers.

Another factor in the Board’s decision to revise Regulation Y was the case of Wilshire Oil Co. v. Board of Governors.\(^9\) Wilshire Oil Company was a producer of oil and natural gas.\(^7\) One of Wilshire’s subsidiaries was the Trust Company of New Jersey (TCNJ) which was a “bank” under the BHCA.\(^7\) This presented a problem for Wilshire because under Section 4(2) of the BHCA, Wilshire was required to either divest its oil and gas operations or the TCNJ by December 31, 1980, it was not allowed to maintain both.\(^7\) From 1977 through November 1980, the Board frequently urged Wilshire to determine how it was going to comply with the BHCA prior to the December 31, 1980 deadline.\(^7\) Finally, on November 3, 1980, Wilshire notified the Board that rather than divest either of its primary interests, it would convert the TCNJ into a nonbank.\(^7\) To achieve this conversion from bank to nonbank, Wilshire informed the Board that the TCNJ would no longer accept “demand deposits.”\(^7\) In support of the decision by the Wilshire management to have the TCNJ discon-

\(^{6}\) For a more detailed discussion of the Federal Reserve Board's determination and why these nonbank banks posed such dangers to the banking system, see 49 Fed. Reg. 794, 834-836 (1984).

\(^{9}\) 668 F.2d 732 (3rd Cir. 1981).

\(^{7}\) Id. at 733.

\(^{7}\) Id. Wilshire owned 90% of the shares of TCNJ. There was apparently no dispute by Wilshire that TCNJ was a bank under the BHCA prior to the changes TCNJ made concerning its demand deposit accounts. Wilshire conceded the facts that TCNJ accepted “demand deposits” and engaged in the business of making “commercial loans.” However, Wilshire’s argument centered on the fact that Wilshire was attempting to take the TCNJ out of the regulatory coverage of the BHCA by utilizing the nonbank bank loophole.

\(^{7}\) Id. After the deposit changes were instituted at TCNJ, Wilshire conceded that if TCNJ was still a “bank” subject to Federal Reserve Board regulation under the BHCA, then Wilshire would be a “bankholding company” engaged in both banking and nonbanking activities. If that was found to be the case, Wilshire would then be in violation of § 4(a)(2) of the Act.

\(^{7}\) Id.
continue the acceptance of demand deposits, the TCNJ sent out the following notice to all of its demand depositors:

The Trust Company of New Jersey, beginning November 20, 1980 reserves the right to require 14 days notice prior to withdrawal from its transactional accounts. The Trust Company has never exercised its right to require notice and has no intention of exercising a notice provision on any type of account.76

Although it did cease accepting “demand deposits,” TCNJ continued to offer what it called “transactional accounts”77 with the same reservation of right clause in the new account agreement forms it had sent out to its prior demand deposit customers. By taking this action, Wilshire claimed that its depositors no longer had a “legal right to withdraw [their deposits] on demand” and, as such, the TCNJ was not a “bank” under the BHCA and Wilshire was not then a bank holding company.78 The Board ultimately disagreed with Wilshire’s contentions and found that the TCNJ was a bank under the BHCA, that Wilshire was a bank holding company, and because Wilshire refused to divest its banking operations it was in violation of Section 4(2) of the BHCA.79 Wilshire subsequently petitioned the Third Circuit for review.

Upon hearing Wilshire’s appeal, the Third Circuit Court of Appeals affirmed the Board’s decision and looked to the substance of the TCNJ operation rather than the form.80 The court noted that TCNJ’s reservation to require notice prior to a withdrawal had “no significant purpose” other than removing TCNJ out of the literal definition of bank under the BHCA.81 The court also indicated that the Federal Reserve Board had acted within the authority that was granted to it by Section 5(b) of the BHCA.82 Therefore, the court affirmed the Board’s final decision and order and denied Wilshire’s petition for review.83

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76 Id. The court noted that except for this reservation, TCNJ did not change any of its banking operations, and this reservation had no practical effect on TCNJ.
77 Id.
78 Id.
80 Id. at 739. For support of the courts decision that the Federal Reserve Board could go beyond the formalities and examine the substance of a transaction, See First Nat’l Bank v. Dickinson, 396 U.S. 122, (1969), affg 400 F.2d 548 (5th Cir. 1968).
81 668 F.2d at 740. The court had a great deal of data to rely on in holding that TCNJ had not altered their operations in such a manner to remove themselves from the BHCA. Even after TCNJ altered their policy of accepting “demand deposits,” the deposit slips that TCNJ distributed to their “transaction account” customers were still labeled checking accounts. Additionally, TCNJ referred to the deposits in the transactional accounts as “demand deposits” in their Report of Condition that was filed with the FDIC on January 27, 1981 for the last quarter of 1980. Finally, the ultimate proof of TCNJ’s violation of the BHCA could be found in the Resolutions of Wilshire Oil Company of Texas and the Resolutions for the TCNJ which both approved the reservation of the right to require notice, and indicated the reservation was made to avoid the requirements of the BHCA and have little effect on TCNJ’s operations.
82 Id. § 5(b) of the BHCA provides that “the Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof. 12 USC § 1844(b) (1976).
83 Wilshire, 668 F.2d at 740.
In attempting to incorporate both the Beehive and Wilshire decisions, the Board revised Regulation Y. Prior to the revision of the Regulation, the definition of “bank” could only be found in the BHCA definitions. As a result of Beehive, Wilshire and the increase in the number of nonbank banks, the Board revised Regulation Y to define “demand deposits” to include those deposits that had the transactional capability that as a matter of practice are payable on demand, and includes deposits accessible by check, draft, negotiable order of withdrawal [NOW], or other similar instrument.

Additionally, the commercial loan definition was expanded to include:

- any loan other than a loan to an individual for personal, family, household, or charitable purposes, including the purchase of commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments, the extension of broker call loans, the sale of federal funds, and the deposit of interest bearing funds.

In revising Regulation Y, the Board noted that a narrow interpretation of the nonbank exemptions under the BHCA would “ensure that all bank holding companies which should be covered under the [BHCA] in order to protect the public’s interest will, in fact, be covered.” However, as previously noted, these new definitions of “demand deposits” and “commercial loans” were directly attacked in Dimension Financial and their adoption was held to be outside of the Board’s authority.

CONCLUSION

What effect will Dimension Financial ultimately have on banks and the banking system of this country? It is quite possible that this decision may be setting the stage for a judicial mandate of decreased Federal Reserve Board regulation of the banking industry. However, it is generally accepted that the banking industry and bank holding companies must face a global market, so the issues of concentration and monopolization may be outmoded propositions or rationale used by the supporters of the Board’s regulation. Therefore, the question of the usefulness of banking regulation may soon be moot.

The Supreme Court may have been experimenting with the idea of reduced federal regulation. Perhaps the Court has opted to usurp the powers of the legislature and attempt to “judicially promulgate” less restrictive banking

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106 S. Ct. 681.
Id.
legislation, while ignoring the concept of judicial deference to legislative agencies.

Presently no clear-cut answer can be asserted that will effectively assess the ramifications *Dimension Financial* will have on the banking industry. However, the important issues to consider are not the effect this decision will have on the revised definitions of demand deposits or commercial loans. Nor is it important in the long run that this decision may have encouraged the mixing of banking or commerce or the concentration of banking resources. What is important is the effect *Dimension* will have on the regulatory powers of the BHCA and the banking system in general. Although the short-term effect will be the continued existence of nonbank banks, the Court’s decision did not prevent Congress from legislatively eliminating the nonbank loophole presently in the BHCA. Therefore, it would appear as if the continued regulation of the banking industry will rest with the decisions of Congress.

*JOSEPH REECE*