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business of the company being acquired.

(d) In some cases it may be difficult, due to the wide variety of circumstances involving possible acquisition of assets, to determine whether such acquisitions require prior Board approval. Bank holding companies are encouraged to contact their local Reserve Bank for guidance where doubt exists as to whether such an acquisition is in the ordinary course of business or an acquisition, in whole or in part, of a going concern.

[39 FR 35128, Sept. 30, 1974, as amended at Reg. Y, 57 FR 28779, June 29, 1992]

### § 225.133 Computation of amount invested in foreign corporations under general consent procedures.

For text of this interpretation, see § 211.111 of this subchapter.

[40 FR 43199, Sept. 19, 1975]

### § 225.134 Escrow arrangements involving bank stock resulting in a violation of the Bank Holding Company Act.

(a) In connection with a recent application to become a bank holding company, the Board considered a situation in which shares of a bank were acquired and then placed in escrow by the applicant prior to the Board's approval of the application. The facts indicated that the applicant company had incurred debt for the purpose of acquiring bank shares and immediately after the purchase the shares were transferred to an unaffiliated escrow agent with instructions to retain possession of the shares pending Board action on the company's application to become a bank holding company. The escrow agreement provided that, if the application were approved by the Board, the escrow agent was to return the shares to the applicant company; and, if the application were denied, the escrow agent was to deliver the shares to the applicant company's shareholders upon their assumption of debt originally incurred by the applicant in the acquisition of the bank shares. In addition, the escrow agreement provided that, while the shares were held in escrow, the applicant could not exercise voting or any other ownership rights with respect to those shares.

(b) On the basis of the above facts, the Board concluded that the company had violated the prior approval provisions of section 3 of the Bank Holding Company Act (''Act'') at the time that it made the initial acquisition of bank shares and that, for purposes of the Act, the company continued to control those shares in violation of the Act. In view of these findings, individuals and bank holding companies should not enter into escrow arrangements of the type described herein, or any similar arrangement, without securing the prior approval of the Board, since such action could constitute a violation of the Act.

(c) While the above represents the Board's conclusion with respect to the particular escrow arrangement involved in the proposal presented, the Board does not believe that the use of an escrow arrangement would always result in a violation of the Act. For example, it appears that a transaction whereby bank shares are placed in escrow pending Board action on an application would not involve a violation of the Act so long as title to such shares remains with the seller during the pendency of the application; there are no other indicia that the applicant controls the shares held in escrow; and, in the event of a Board denial of the application, the escrow agreement provides that the shares would be returned to the seller.

[41 FR 9859, Mar. 8, 1976. Correctly designated at 41 FR 12009, Mar. 23, 1976]

### § 225.136 Utilization of foreign subsidiaries to sell long-term debt obligations in foreign markets and to transfer the proceeds to their United States parent(s) for domestic purposes.

For text of this interpretation, see § 211.112 of this subchapter.

[42 FR 752, Jan. 4, 1977]

### § 225.137 Acquisitions of shares pursuant to section 4(c)(6) of the Bank Holding Company Act.

(a) The Board has received a request for an interpretation of section 4(c)(6) of the Bank Holding Company Act

(''Act'')[1] in connection with a proposal under which a number of bank holding companies would purchase interests in an insurance company to be formed for the purpose of underwriting or reinsuring credit life and credit accident and health insurance sold in connection with extensions of credit by the stockholder bank holding companies and their affiliates.

(b) Each participating holding company would own no more than 5 percent of the outstanding voting shares of the company. However, the investment of each holding company would be represented by a separate class of voting security, so that each stockholder would own 100 percent of its respective class. The participating companies would execute a formal ''Agreement Among Stockholders'' under which each would agree to use its best efforts at all times to direct or recommend to customers and clients the placement of their life, accident and health insurance directly or indirectly with the company. Such credit-related insurance placed with the company would be identified in the records of the company as having been originated by the respective stockholder. A separate capital account would be maintained for each stockholder consisting of the original capital contribution increased or decreased from time to time by the net profit or loss resulting from the insurance business attributable to each stockholder. Thus, each stockholder would receive a return on its investment based upon the claims experience and profitability of the insurance business that it had itself generated. Dividends declared by the board of directors of the company would be payable to each stockholder only out of the earned surplus reflected in the respective stockholder's capital account.

(c) It has been requested that the Board issue an interpretation that section 4(c)(6) of the Act provides an exemption under which participating bank holding companies may acquire such interests in the company without prior approval of the Board.

(d) On the basis of a careful review of the documents submitted, in light of the purposes and provisions of the Act, the Board has concluded that section 4(c)(6) of the Act is inapplicable to this proposal and that a bank holding company must obtain the approval of the Board before participating in such a proposal in the manner described. The Board's conclusion is based upon the following considerations:

(1) Section 2(a)(2)(A) of the Act provides that a company is deemed to have control over a second company if it owns or controls ''25 per centum or more of any class of voting securities'' of the second company. In the case presented, the stock interest of each participant would be evidenced by a different class of stock and each would accordingly, own 100 percent of a class of voting securities of the company. Thus, each of the stockholders would be deemed to ''control'' the company and prior Board approval would be required for each stockholder's acquisition of stock in the company.

The Board believes that this application of section 2(a)(2)(A) of the Act is particularly appropriate on the facts presented here. The company is, in practical effect, a conglomeration of separate business ventures each owned 100 percent by a stockholder the value of whose economic interest in the company is determined by reference to the profits and losses attributable to its respective class of stock. Furthermore, it is the Board's opinion that this application of section 2(a)(2)(A) is not inconsistent with section 4(c)(6). Even assuming that section (4)(c)(6) is intended to refer to all outstanding voting shares, and not merely the outstanding shares of a particular class of securities, section 4(c)(6) must be viewed as permitting ownership of 5 percent of a company's voting stock only when that ownership does not

[1] It should be noted that every Board Order granting approval under section 4(c)(8) of the Act contains the following paragraph:

''This determination is subject . . . to the Board's authority to require such modification or termination of the activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and the Board's regulations and orders issued thereunder, or to prevent evasion thereof.''

The Board believes that, even apart from this Interpretation, this language preserves the authority of the Board to require the revisions contemplated in this Interpretation.

constitute ''control'' as otherwise defined in the Act. For example, it is entirely possible that a company could exercise a controlling influence over the management and policies of a second company, and thus ''control'' that company under the Act's definitions, even though it held less than 5 percent of the voting stock of the second company. To view section 4(c)(6) as an unqualified exemption for holdings of less than 5 percent would thus create a serious gap in the coverage of the Act.

(2) The Board believes that section 4(c)(6) should properly be interpreted as creating an exemption from the general prohibitions in section 4 on ownership of stock in nonbank companies only for passive investments amounting to not more than 5 percent of a company's outstanding stock, and that the exemption was not intended to allow a group of holding companies, through concerted action, to engage in an activity as entrepreneurs. Section 4 of the Act, of course, prohibits not only owning stock in nonbank companies, but engaging in activities other than banking or those activities permitted by the Board under section 4(c)(8) as being closely related to banking. Thus, if a holding company may be deemed to be engaging in an activity through the medium of a company in which it owns less than 5 percent of the voting stock it may nevertheless require Board approval, despite the section 4(c)(6) exemption.

(e) To accept the argument that section 4(c)(6) is an unqualified grant of permission to a bank holding company to own 5 percent of the shares of any nonbanking company irrespective of the nature or extent of the holding company's participation in the affairs of the nonbanking company would, in the Board's view, create the potential for serious and widespread evasion of the Act's controls over nonbanking activities. Such a construction would allow a group of 20 bank holding companies—or even a single bank holding company and one or more nonbank companies—to engage in entrepreneurial joint ventures in businesses prohibited to bank holding companies, a result the Board believes to be contrary to the intent of Congress.

(f) In this proposal, each of the participating stockholders must be viewed as engaging in the business of insurance underwriting. Each stockholder would agree to channel to the company the insurance business it generates, and the value of the interest of each stockholder would be determined by reference to the profitability of the business generated by that stockholder itself. There is no sharing or pooling among stockholders of underwriting risks assumed by the company, and profit or loss from investments is allocated on the basis of each bank holding company's allocable underwriting profit or loss. The interest of each stockholder is thus clearly that of an entrepreneur rather than that of an investor.

(g) Accordingly, on the basis of the factual situation before the Board, and for the reasons summarized above, the Board has concluded that section 4(c)(6) of the Act cannot be interpreted to exempt the ownership of 5 percent of the voting stock of a company under the circumstances described, and that a bank holding company wishing to become a stockholder in a company under this proposal would be required to obtain the Board's approval to do so.

[42 FR 1263, Jan. 6, 1977; 42 FR 2951, Jan. 14, 1977]

### § 225.138 Statement of policy concerning divestitures by bank holding companies.

(a) From time to time the Board of Governors receives requests from companies subject to the Bank Holding Company Act, or other laws administered by the Board, to extend time periods specified either by statute or by Board order for the divestiture of assets held or activities engaged in by such companies. Such divestiture requirements may arise in a number of ways. For example, divestiture may be ordered by the Board in connection with an acquisition found to have been made in violation of law. In other cases the divestiture may be pursuant to a statutory requirement imposed at the time and amendment to the Act was adopted, or it may be required as a result of a foreclosure upon collateral