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The Great Turf War of the New Millennium: Can Banks Engage in Real Estate Brokerage and Management Activities?

When the Gramm-Leach-Bliley Act (GLBA) finally became the law of the land in 1999, the structure of financial institutions changed. Not only were banks, insurance companies, and securities firms no longer prohibited from interacting with each other, but perhaps more importantly, a whole new range of previously forbidden activities appeared to meet the definition of "financial in nature." Two such activities that bankers have long wanted to engage in are real estate brokerage and real estate management. Banks have felt hampered by the brokerage and management prohibitions because brokerage and management are a natural complement to the many other services that financial institutions offer such as home mortgages, homeowner's insurance, trust services, and real estate development.

Shortly after the passage of GLBA, the Federal Reserve proposed a new rule that would allow financial holding companies (FHCs) to engage in real estate brokerage and management. This proposal quickly became the subject of a hotly contested battle between the banking lobby and the powerful National Association of Realtors (NAR). What on the surface appeared to be a reasonable extension of powers granted by GLBA has become the center of a campaign pitting groups one against the other.

This Note discusses the rule proposed by the Federal Reserve and the conflicting sides of this lively debate. First, this Note defines the rule proposal process and what it entails. Next,

2. See infra note 16.
3. See infra notes 50-77 and accompanying text.
6. See infra notes 50-99 and accompanying text.
7. Id.
8. See infra notes 14-21 and accompanying text.
this Note lists the factors regulators must examine in determining whether to promulgate a proposed rule. The following section discusses the current, undecided rule proposal, what changes may result from it, and what entities are on each side of the issue. This Note then addresses the beliefs and concerns of the proposed rule's proponents, followed by the opponents' arguments. Finally, this Note discusses the most likely regulatory analysis of the proposal and what the future may hold for real estate brokerage and management.

I. THE PROCESS

GLBA became effective on March 11, 2000. "By tearing down the legal barriers between commercial banking, investment banking and insurance, it was thought that [GLBA] would lead to dramatic new efficiencies, the rise of huge financial conglomerates, exciting new financial products and substantial savings to consumers." In relevant part, GLBA allows financial holding companies to engage in any activity that is "financial in nature or incidental to such financial activity... [or is] complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally." These terms of art have led to much debate about what business practices are allowable for FHCs.

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9. See infra notes 22-29 and accompanying text.
10. See infra notes 30-49 and accompanying text.
11. See infra notes 50-77 and accompanying text.
12. See infra notes 78-99 and accompanying text.
13. See infra notes 100-156 and accompanying text.

One thing that is clear is that Congress intended the 'financial in nature' test to be broader than the previous test for authorizing new activities for bank holding companies under the Bank Holding Company Act. Before passage of [GLBA], bank holding...
Congress knew it was ill-equipped to promulgate rules for every issue affecting the banking, securities, and insurance industries; therefore, it enacted a provision in GLBA allowing the Secretary of the Treasury and the Federal Reserve Board of Governors (hereinafter "the Secretary and Board") to issue rule proposals and determine whether an activity is permissible under GLBA. Industry groups or entities may request a determination as to whether an activity is permissible under GLBA by submitting a proposal to the Board of Governors. Also, "[t]he Secretary of the Treasury may, at any time, recommend in writing that the Board [of Governors] find an activity to be financial in nature or incidental to financial activity." The Secretary and Board must be in agreement as to whether an activity is permissible under GLBA. They may seek public comment on any rule proposal.

companies were permitted to engage only in activities that the Board determined were 'closely related to banking.' The closely related to banking test was tied to the activities of banks. In considering whether an activity was closely related to banking, the courts focused on three factors: (i) whether banks conduct the proposed activity, (ii) whether banks provide services that are operationally or functionally similar to the proposed services, and (iii) whether banks provide services that are so integrally related to the proposed services as to require their provision in a specialized form. The text and legislative history of [GLBA] indicate that Congress intended the new 'financial or incidental' standard to represent a significant expansion of the old 'closely related to banking' standard.

"Complementary activities are non-financial activities that are related to or complement financial activities." 

17. See KAREN COUCH ET AL., FED. RESERVE BANK OF DALLAS, BANKS AS REAL ESTATE BROKERS—LETTING FREE ENTERPRISE WORK, SOUTHWEST ECONOMY 1 (May 1, 2001), available at http://dallasfed.org/htm/pubs/pdf/swe/swe01_3.pdf, at 2 (last visited Feb. 2, 2002). "By delegating to the regulatory agencies the responsibilities to resolve certain issues, Congress recognized the need to keep financial regulation responsive to the changing environment and acknowledged the agencies' technical expertise in this area." Id. at 2; see also 12 U.S.C. § 1843.


20. Id. § 1843(k)(2)(A)(ii).

21. Id. § 1843(k)(2)(B)(ii). "We recognize that, hard as we regulators try to foresee and address potential issues raised by our regulatory actions, we can benefit from the information and thinking of others. Our final rules often include significant modifications as a result of the comments we received on the proposed rules." Meyer, supra note 16, at 69.
Under GLBA, the Secretary and Board must take several factors into consideration when deciding whether an activity is "financial in nature or incidental to such financial activity" or "complementary to a financial activity." These factors include:

(A) the purposes of [Chapter 17 of GLBA] and the [entire] Gramm-Leach-Bliley Act;
(B) changes or reasonably expected changes in the marketplace in which financial holding companies compete;
(C) changes or reasonably expected changes in the technology for delivering financial services; and
(D) whether such activity is necessary or appropriate to allow a financial holding company and the affiliates of a financial holding company to—
   i. compete effectively with any company seeking to provide financial services in the United States;
   ii. efficiently deliver information and services that are financial in nature through the use of technological means, including any application necessary to protect the security or efficacy of systems for the transmission of data or financial transactions; and
   iii. offer customers any available or emerging technological means for using financial services or for the document imaging of data.

GLBA also lists activities that are considered "financial in nature." Those relevant to this discussion are as follows:

(A) Lending, exchanging, transferring, investing for others, or safeguarding money or securities.
(B) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as

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23. Id.
24. Id. § 1843(k)(3).
principal, agent, or broker for purposes of the foregoing, in any State.
(C) Providing financial, investment, or economic advisory services, including advising an investment company.
(D) Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.
(E) Underwriting, dealing in, or making a market in securities.

After assessment of the proposed activity, the Secretary and Board must issue a final rule declaring whether the activity is "financial in nature" and thus permissible under GLBA.

On December 19, 2001, the Secretary and Board determined that "finder activities" are financial in nature. Finder activities include "bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate." Any future activities deemed permissible by the Secretary and Board would be added to the list contained in Regulation Y.

II. CURRENT PROPOSAL AT ISSUE

On January 3, 2001, the Secretary and Board published a proposed rule and a request for public comment on whether real estate brokerage is an activity that is financial in nature, or incidental to such financial activity. Comment was also sought on whether real estate management activities could be considered

25. Id. § 1843(k)(4).
26. Id. § 1843(k)(2)(B)(ii).
27. See Meyer, supra note 16, at 66. The Secretary and Board were also asked to more specifically define some financial terms and "determine that certain types of expanded data processing activities are complementary to financial activities." Id. The expanded data processing functions have been added to the list of acceptable activities. Bank Holding Companies and Change in Bank Control (Regulation Y), 12 C.F.R. § 225.86(d) (2001).
29. 12 C.F.R. § 225.86(d). "Regulation Y" is the name of the section that lists acceptable activities for FHCs. Id.
financial in nature, or incidental to such financial activity. The proposed rule would allow FHCs to participate in both areas of the market. The original comment period closed on March 2, 2001. "Because of the significant public interest in the proposal," the deadline was extended to May 1, 2001. The Secretary and Board received nearly 75,000 comment letters, which is more than double the previous record.

The Secretary and Board's proposal concerning real estate brokerage was spurred by the request of three major trade associations. The American Bankers Association, prevalent among those who support the rule proposal, also requested a determination about real estate management. The Secretary and Board are willing to consider each activity independent of one another. Real estate management "is the business of providing for others daily management of real estate. This can include procuring tenants; negotiating leases; maintaining security deposits; billing and collecting rents; accounting; making principal, interest, insurance, tax and utilities payments; and overseeing inspection, maintenance and upkeep of real property." These functions are subject to traditional state laws and regulations.

Real estate brokerage is defined as "the business of bringing together parties involved in a real estate transaction (purchase, sale, exchange, lease or rental) and negotiating a contract." This activity includes "acting as agent; listing and advertising; locating

31. Id.
32. Id.
33. Id.
35. Dean Anason, Realtor Group Fighting to Keep Banks off its Turf, AM. BANKER, June 8, 2001, at 4. The previous record was held by a defunct anti-money-laundering plan proposed more than two years ago known as "know your customer." Id.
36. Meyer, supra note 16, at 68. The three major associations are the American Bankers Association, the Financial Services Roundtable, and the New York Clearing House Association. Id.
37. Id.
38. Telephone interview with Mark Van Der Weide, Counsel, Board of Governors, Federal Reserve System (January 3, 2002) [hereinafter Van Der Weide Interview]. "There are many possible outcomes. One is that we would approve one activity but not the other." Id.
40. Id.
41. Id.
buyers, sellers, lessors and lessees; conveying information; providing advice; negotiating price; and administering the closing. If approved for FHCs, all of these functions would be conducted pursuant to state licensing laws just as are imposed on traditional real estate firms. The proposal does not seek to allow FHCs to engage in real estate investment or real estate development.

There are two distinct viewpoints on this proposal. There are those who believe FHCs should be able to compete against real estate brokers in the open market. Proponents of the rule proposal believe this will help all those involved with real estate transactions. On the other side, there are those who contend separation of these types of enterprises is essential. These opponents think any type of integration could lead to enormous problems.

III. PROONENTS OF THE PROPOSED RULE

The American Bankers Association, the Financial Services Roundtable, and the New York Clearing House Association are the most visible supporters of adding real estate brokerage and management to the list of available activities for FHCs. Led by the American Bankers Association, they have put forth several justifications for the addition.

42. Id.
43. See generally OPEN THE DOOR, supra note 4.
44. Id.
46. See infra notes 50-77 and accompanying text.
47. Id.
48. See infra notes 78-99 and accompanying text.
49. Id.
50. See supra note 36 and accompanying text.
51. See infra notes 52-77 and accompanying text.
A. **One stop shopping for consumer convenience**

First, the proponents of the rule (collectively “the ABA”) assert that consumers will be advantaged in that “one-stop shopping” will, at the consumer’s discretion, make buying a home an easier, simplified transaction. They feel the unnecessary hassle of using several entities to complete a real estate purchase will be diminished and make for a happier consumer.

B. **Consumer protection will not be affected by the proposed rule**

Second, the ABA maintains that consumer protection will increase by allowing FHCs to compete in the real estate market. It points out that FHCs “are subject to stronger consumer protections and anti-tying provisions” than are conventional real estate and mortgage companies. These protections include privacy regulations under GLBA not applicable to mortgage companies.

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53. *Id.*


55. Press Release, American Bankers Association, *Dispelling the Misrepresentations of the Real Estate Industry*, at http://www.aba.com/Press+Room/brokerage050101.htm [hereinafter Dispelling the Misrepresentations] (last visited Feb. 23, 2002). “Existing anti-tying provisions would prohibit a bank from extending credit, furnishing any service, or varying the consideration for any loan or service on the condition that the customer obtain real estate brokerage services from the bank’s [real estate] affiliate . . . [t]he same rules, however, do not apply to realtors affiliated with mortgage companies.” *Id.; see also Testimony before the Subcomm. of Fin. Inst. and Consumer Credit of the House Comm. on Fin. Serv., 107th Cong. (May 2, 2001) (statement of Treasury Acting Under Secretary Donald V. Hammond) (stating viewpoints about the proposed rule)* [hereinafter Hammond].

56. Dispelling the Misrepresentations, *supra* note 55. Currently, none of the privacy or anti-tying rules are applicable to real estate brokerage companies. OPEN THE DOOR, *supra* note 4. If real estate brokerage were found to be financial in nature, traditional real estate brokers may be subject to all of the privacy restrictions under GLBA which include a written privacy policy and opt-out information sharing provisions for all customers. *Id.* “[I]n his Dec. 21 [2002] letter, [House Energy and Commerce Committee Chairman] Rep. [W.J.] Tauzin said that if real estate brokerage is labeled a financial business, real estate firms may have to comply with Gramm-Leach-Bliley’s privacy rules.” *Washington People, AM. BANKER, Jan. 7,*
The ABA also contends that allowing FHCs to participate in real estate brokerage and management will not affect soundness risks for banks. The rationale is that GLBA proscribes financial requirements of banks in order for them to qualify as FHCs so that they may deal in activities the Secretary and Board find acceptable under Regulation Y. Among the requirements under GLBA are that FHCs are well managed and capitalized. In fact, by allowing banks to participate in real estate brokerage activities and thereby diversifying FHC income sources, safety may actually be improved. This, in effect, could make an FHC more resilient to market fluctuations in certain sectors of the economy. The Chairman and CEO of Farmers and Merchants National Bank in West Point, Nebraska stated, while testifying before the House Financial Services Committee Financial Institutions and Consumer Credit Subcommittee, that “because brokerage and management [of real estate] are agency activities, they pose no risk to the soundness of the bank.” Agents do not take an equity position in deals they broker and, therefore, encounter no significant financial risk.

2002, at 5. For a description of the privacy requirements, see generally David W. Roderer, Tentative Steps Toward Financial Privacy, 4 N.C. BANKING INST. 209 (2000). The privacy requirements are applicable to banks. OPEN THE DOOR, supra note 4. Both FHCs and realtors, however, must be licensed. Id.

57. OPEN THE DOOR, supra note 4.
59. All of the depository institution subsidiaries of bank holding companies must be well capitalized and managed in order to be eligible for FHC status. 12 U.S.C. § 1843(l)(1)(B). The bank holding company must have filed “a declaration that the company elects to be a financial holding company to engage in activities or acquire and retain shares of a company that were not permissible for a bank holding company to engage in or acquire before the enactment of the Gramm-Leach-Bliley Act . . .” Id., § 1843(l)(1)(c)(i). Furthermore, FHCs are not allowed to engage in new GLBA activities if they have received a rating less than a “satisfactory record of meeting community credit needs” upon its most recent examination under the Community Reinvestment Act of 1977. Id., § 1843(l)(2).
60. Dispelling the Misrepresentations, supra note 55.
61. Id.
62. AMERICAN BANKERS ASSOCIATION, BANKS SELLING REAL ESTATE BENEFITS CONSUMERS AND MARKETPLACE, ABA TELLS CONGRESSIONAL COMMITTEE (2001), at http://www.aba.com/ Press+Room/nr050201.htm [hereinafter American Bankers Association] (last visited Jan. 29, 2002). Phillip Burns is the Chairman of Farmers and Merchants National Bank. Id.; see also Hammond, supra note 55 (making a statement similar to Burns’).
63. OPEN THE DOOR, supra note 4.
C. Competition will be increased by the proposed rule

Third, the ABA points out that integrated real estate firms, such as Century 21, Coldwell Banker, and Long and Foster are allowed to provide products including title insurance, homeowner's insurance, and mortgage loans. FHCs can perform all of those functions but are shut out of the last component: real estate brokerage. In order to increase competition, the ABA believes FHCs should be allowed to offer these products. In theory, more competition would lead to higher efficiency and better pricing and service levels. The ABA claims that opponents of the proposed rule "want to stop competition, while engaging in lending and brokerage themselves...[and] that's disingenuous...and wrong."

D. Real estate brokerage and management are a complement to current business lines of FHCs

Fourth, the ABA claims that moving into this type of industry would be only a small leap for FHCs. "Banking organizations engage in a wide variety of real estate-related activities: real estate lending; real estate settlement and escrow services; real estate investment advisory services; title insurance; and commercial real estate equity financing. Brokerage activities are just one more aspect of such traditional services." The ABA urges that buying a home is certainly financial in nature as required by GLBA because it is one of the largest financial transactions the average citizen is likely to participate in, and mortgage payments are "just like an investment in an annuity or a

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64. The Financial Services Roundtable, supra note 52; see also OPEN THE DOOR, supra note 4 (listing prominent firms who engage in these activities).

65. OPEN THE DOOR, supra note 4.

66. See generally Dispelling the Misrepresentations, supra note 55.

67. The Financial Services Roundtable, supra note 52. Efficiency would be increased because FHCs already deal in most of the other functions related to real estate brokerage. See Hammond, supra note 55; see also OPEN THE DOOR, supra note 4 (stating the ABA's position regarding efficiency).

68. Dispelling the Misrepresentations, supra note 55.

69. See generally Hammond, supra note 55.

70. Dispelling the Misrepresentations, supra note 55.
stock” in that the underlying asset fluctuates in value over time.\textsuperscript{71} Therefore, real estate brokerage and management are integral in this process and should be a regular practice of FHCs.\textsuperscript{72}

\textbf{E. State markets and Congressional action indicate the proposed rule should be promulgated}

Fifth, the ABA points out that “[r]eal estate brokerage and property management by depository institutions are not new issues. In fact, half of the states allow their state-chartered banks to be involved in these activities today. Credit unions and federal savings associations can also offer these services.”\textsuperscript{73} No conclusive facts have shown that any adverse effects have come from these allowances.

Arguably, if members of Congress wanted to disallow this type of activity, they could have done it when they drafted GLBA.\textsuperscript{74} Rather, it expressly granted the authority to determine what activities are financial in nature to regulatory agencies.\textsuperscript{75} “The proposed rule incorporates every aspect of Congress’ objective [in passing GLBA]: additional choices for the consumer; a more level playing field between banks and other financial service providers; and increased competition in the real estate brokerage industry.”\textsuperscript{76} Equally vigorous are the arguments on the other side of this issue.\textsuperscript{77}

\textbf{IV. OPPONENTS TO THE PROPOSED RULE}

The National Association of Realtors (NAR) and its partners do not want FHCs to be able to conduct real estate brokerage and management activities, and have put forth several
arguments against the proposal. NAR has been extremely vocal about its position.

A. The proposed rule would affect consumer choice and reduce competition

NAR believes that consolidation in the banking industry, if this rule were put into place, would negatively affect consumer choice and constrict competition by putting smaller firms out of business. They feel that FHCs will have an unfair advantage in the marketplace. NAR believes that entities with access to low interest Federal Reserve funds should not be able to engage in "selling property." NAR has also said that FHCs special tax treatment and other protections will allow them to take the real estate market by force. The concept of "tying" or forcing consumers to use an entity's own products in order to be eligible for certain rates or prices is a chief concern of realtors against the


79. Anason, supra note 35, at 4. In fact, NAR sent 50,000 letters to Congress in opposition to the proposal. Id.


81. Id.

82. Smith, supra note 45, at D1 (citing Bob Balhorn). Smith's use of the term "selling property" is peculiar. Id. As an agent, FHCs would not take title to any real estate they intend to broker. Hammond, supra note 55, at 10. Therefore, it is hard to understand how access to Federal Reserve funds would be of any advantage. See id.

83. See Protection, Privacy Top Public Concerns, supra note 78. FHCs have access to low interest Federal Funds and deposit insurance. Institute of Real Estate Management, News Release: IREM Opposes Federal Reserve and Treasury Department's Proposal to Redefine Real Estate Brokerage and Property Management Activities as Financial in Nature (July 18, 2001), at http://www.irem.org/i06_ind_res/html/071801.html [hereinafter Institute of Real Estate Management] (last visited Feb. 2, 2002). FHCs, as highly regulated entities, are subject to different tax liabilities than real estate brokers. Id.; see NAR President Testifies, supra note 78.
The opponents question the logic of allowing FHCs "to entwine their fortunes so closely with another industry," and fear possible conflicts of interest.

B. Real estate brokerage and management are not financial in nature

Second, NAR also believes real estate brokerage is a commercial activity rather than a financial one as required by GLBA. NAR President Richard A. Mendenhall said:

Banking industry representatives say that because a home is financed, real estate brokerage is incidental to banking. Banks have it backwards. It is the mortgage that is, in fact, incidental to buying a home. Let me put this in perspective. There are two parties to every real estate transaction, a buyer and a seller. The seller requires no financing for his part of the transaction. Therefore, right off the bat, fifty percent of the transacting parties handled by real estate firms involve only the marketing and selling of property. These sellers are not shopping for a loan or any of the other lender services. The other fifty percent represent the buying side. You might assume all these homebuyers require a

As a result of these expanded activities granted to financial holding companies, the Gramm-Leach-Bliley Act effectively permits affiliation between bank holding companies, insurance companies, and securities firms, under the umbrella of a "financial holding company." However... the Act continues to bar banking and commerce affiliations, i.e., affiliations between depository institutions and companies engaged in activities that are not "financial in nature."

Id. at 5.
mortgage. However, according to the American Housing Survey, approximately twenty percent of home purchases are made without financing. This means that this proposal, if adopted, places the Federal Reserve in the embarrassing position of permitting financial holding companies to engage in a commercial activity where seventy percent of the consumers involved in the transaction require no financing at all. 88

Although it is hard to make the math add up, the point raised by the NAR is intriguing. 89 Gramm-Leach-Bliley does not mandate that FHCs should be involved in all activities. 90 Rather, GLBA serves the function of controlling FHC involvement in all aspects of business. 91 Another argument advanced by NAR is that "real estate is tangible" and "finance is paper." 92 Therefore, real estate is not financial in nature, and FHCs should not be allowed to participate in the market. 93 If real estate brokerage and management are found to be financial in nature, FHCs would be able to participate in any activity in commerce from "buying a television set" to "the manufacture and sale of automobiles." 94 Perhaps far-fetched, NAR highlights a frightful possible trend. 95

NAR has a stronger argument against the allowance of real estate management. 96 They point out that it "involves the overall management of the property, from obtaining a good, qualified tenant, to collecting rents, taking care of renovations and repairs, hiring the best people for jobs from maintenance workers to accountants, and dealing with any legal proceedings related to the property." 97 On a day-to-day basis, they claim, these activities

88. NAR President Testifies, supra note 78.
89. See id.
91. Id.
92. Kosterlitz, supra note 45, at 570. NAR feels the fact that real estate can be touched and finance cannot is a good indicator that real estate is not financial in nature. Id. Therefore, tangibility could serve as a bright line test for whether an activity is financial in nature. See id.
93. Id.
94. NAR Letters Argue Against Proposed Rule, supra note 78.
95. See id.
96. See infra notes 97-156 and accompanying text.
97. Institute of Real Estate Management, supra note 83.
have nothing to do with a financial activity. Taken in this light, GLBA would not allow FHCs to engage in these activities.

V. CONCLUSION

As stated above, GLBA requires the Secretary and Board to consider whether a proposed activity is financial in nature, incidental to such activity, or is complementary to a financial activity and whether it poses a substantial risk to the safety or soundness of the United States financial system. In addition, the Secretary and Board are also to consider whether an activity is necessary or appropriate so that financial entities are able to "compete effectively." The ABA and NAR are each determined that their viewpoint should become the rule. Propaganda, such as consumer polls, has been implemented to sway public and Congressional opinion. Taken as a whole, the stimuli for the polls are skewed and the results are largely inconclusive. Apparently, other methods of persuasion have been more effective. The Secretary and Board have taken lots of time to consider this issue. This has given the powerful real

98. NAR Letters Argue Against Proposed Rule, supra note 78.
99. See infra notes 135-49 and accompanying text.
102. See infra note 103 and accompanying text.
103. OPEN THE DOOR, supra note 4. The ABA reports that only 18% of consumers polled feel that they can find competitive prices for real estate. Id. It also found that 69% of consumers feel if would be beneficial if banks offered mortgage services and the same number felt they would get a better value for money spent on the services. Id. According to another poll, the ABA found that 81% feel that private information would be better protected by FHCs. Id. NAR polls show that 33% of consumers feel that if the proposed rule is finalized, overall bank customer service will decline. Protection, Privacy Top Public Concerns, supra note 78. The poll goes on to say that 57% of people felt that the proposal is too risky for FHCs and "could lead to a repeat of the savings and loan crisis and the Asian financial crisis." Id. Of the persons polled, NAR reports that 57% think that customers of FHC mortgage companies would receive better rates on home loans and 53% “believe bank-owned brokerages would be primarily interested in helping wealthy people buy and sell homes, rather than first-time homebuyers and less well-off people.” Id.
104. See infra notes 105-12 and accompanying text.
105. Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. 307-03 (Jan. 3, 2001) (to be codified at 12 C.F.R. pt. 225). It has been more than one year since the proposal was introduced. Id.
estate lobby an opportunity to persuade many in Congress. In December of 2001, a bill was introduced in the House and Senate designed to prevent FHCs from "direct or indirect real estate brokerage or management." If passed, these measures would disallow the Secretary and Board from making a decision as to whether real estate brokerage and management are financial in nature. It is "unclear" when a decision on the proposed rule will come. The Secretary and Board have not offered any comment as to whether the introduced legislation has had any delaying effect on the decision. It is anticipated that it will be announced sometime in 2002. It is clear from Senator Gramm's comments that he drafted GLBA to make sure that these types of decisions are in the hands of the Secretary and Board. Unless the proposed legislation becomes law, the Secretary and Board will make the decision as mandated in GLBA.

There are several factors that indicate real estate brokerage is financial in nature. Other types of depository institutions currently do business in this field. FHCs themselves engage in


107. R. Christian Bruce, Financial Institutions: Bank Group Urges Senate Opposition to Legislation Banning Real Estate Powers, 77 Banking Daily (BNA) 636 (Dec. 20, 2001). In the Senate, the bill is known as the Community Choice in Real Estate Act. Id. It was introduced by Senators Allard (R-CO.), Clinton (D-NY), Shelby (R-AL), and Feingold (D-WI). Id. The House version is HR 3424. Id. It was introduced by Representatives Calvert (R-CA), Kanjorski (D-PA), and LaTourette (R-OH). Id.

108. Id.

109. Van Der Weide Interview, supra note 38.

110. Telephone interview with Mark Van Der Weide, Counsel, Board of Governors, Federal Reserve System (Jan. 22, 2002) (second interview with Mark Van Der Weide). "We are still working on [the decision] and there are lots of things we are looking at." Id.

111. Van Der Weide Interview, supra note 38. "More likely than not, it will be this year [2002]." Id.

112. Michelle Heller, DC Speaks: Gramm Calls GLB His Legacy; Gradual Impact was 'Anticipated,' AM. BANKER, Nov. 9, 2001, at 1 (quoting Sen. Gramm). "I set up (the law) for the regulatory process to generate an answer. I'm willing to live with whatever the regulators decide based on the structure of the law." Id.


114. See supra notes 52-77 and accompanying text.

activities such as trust management that give them a certain "expertise" in the field. And, as stated above, a home purchase is often the largest financial decision a person makes. "Banks and bank holding companies also engage in a variety of activities that at first glance seem functionally and operationally similar to real estate brokerage, including finder activities and securities and insurance brokerage." Finder activities were not found to be financial in nature. Rather, they were found to be "incidental" to a financial activity.

By no stretch of the imagination, could the Secretary and the Board consider real estate brokerage incidental to a financial activity. Acting as a finder is similar to real estate brokerage. Finders bring interested parties together for the purpose of completing a financial transaction. If, as the ABA contends, buying a home is indeed a financial transaction, it seems logical that acting as a finder in order to facilitate such a financial transaction would be incidental to that activity. Therefore, since FHCs can engage in finder activities, they should be able to broker real estate. Finders are not allowed to take title to any property bought or sold "through the finder service." This would sit well with FHCs because real estate brokers do not take title to the real estate they sell. However, finder activities expressly disallow finders from "engag[ing] in any activity that would require the [FHC] to register or obtain a license as a real estate agent or broker under applicable law." The language would have to be changed in the definition of "finder." Regardless, that is less of a challenge than having real estate brokerage itself declared financial in nature.

116. Meyer, supra note 16, at 67; see also Couch, supra note 17, at 3; Open The Door, supra note 4.
117. See generally Couch, supra note 17; Open The Door, supra note 4.
118. Hammond, supra note 55, at 10; see also Open The Door, supra note 4.
120. Id.
121. See 12 C.F.R. § 225.86.
122. Id.
123. See supra notes 52-77 and accompanying text.
124. Open The Door, supra note 4.
125. Id.
128. Id.
Also, the Secretary and Board could find real estate brokerage permissible for FHCs if they found it to be complementary to a financial activity.\textsuperscript{129} For instance, FHCs are able to assist in all aspects of buying a home but brokerage.\textsuperscript{130} Efficiency may be increased by allowing FHCs to engage in all aspects of the process leading to lower prices for the consumer.\textsuperscript{131} By filling the brokerage gap in the home purchasing continuum, people and FHCs would be better off.\textsuperscript{132} Real estate brokerage seems complementary to the business of title insurance, homeowner’s insurance, and mortgage loans which are all products and services that FHCs are currently able to offer their customers.\textsuperscript{133} This indicates the Secretary and Board should allow FHCs to participate in the market.\textsuperscript{134}

Unlike real estate brokerage, real estate management is less likely to be deemed financial in nature.\textsuperscript{135} Day-to-day activities of management are not as persuasively financial in nature.\textsuperscript{136} Rather, they appear to be more of an administrative function.\textsuperscript{137} If real estate brokerage were found to be financial in nature by the Secretary and Board, real estate management may be found to be either incidental to that activity or a complement to it.\textsuperscript{138} However, the day-to-day activities of management are more like that of an owner, and under the current proposal, FHCs would not be allowed to take title to any of the brokered real estate.\textsuperscript{139} Hiring someone to maintain a piece of property as well as charging and collecting rent is not easily recognized as incidental or complementary to any financial activity including real estate brokerage.\textsuperscript{140} It would not increase efficiency for the FHCs.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{129} 12 U.S.C. § 1843(k)(1) (2000).
\item \textsuperscript{130} \textit{See supra} note 64-65 and accompanying text.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{See generally supra} note 65 and accompanying text.
\item \textsuperscript{133} \textit{See supra} notes 69-71 and accompanying text.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{139} Hammond, \textit{supra} note 55, at 10.
\item \textsuperscript{140} \textit{But see} Meyer, \textit{supra} note 16. “[Commentators have stated that] many aspects of real estate management are similar in nature to existing banking activities. For example, collecting rental payments; maintaining security deposits; making principal, interest, tax, and insurance payments; and providing periodic accountings
\end{itemize}
Instead, it would merely be a new enterprise. That is not the goal of the GLBA.

Another persuasive argument is that FHCs should be able to conduct real estate brokerage activities and therefore “compete effectively” with other companies providing financial services in the United States including the real estate giants. “Real estate agents admit their industry has made some inroads into banking, with some large brokerages offering customers ‘one-stop shops’—real estate firms that have mortgage and insurance companies as wholly owned subsidiaries.” It simply does not seem fair, FHCs argue, that real estate brokers should be able to do everything FHCs can do and more. FHCs are not able to compete, and this inefficiency is not good for consumers. One effect of GLBA is to promote growth of competition and spur innovation in the banking industry. Cutting FHCs out of the loop contradicts the spirit of GLBA.

Lastly, experts believe allowing FHCs to engage in these activities will not threaten the safety or security of the financial industry. Anti-tying rules would stop FHCs from forcibly linking its products together to the detriment of the consumer, FHCs are currently subject to more stringent privacy rules than real estate firms, and they would suffer no principal risk as an agent/broker because FHCs have no ability to take title of the real estate.

In sum, the Secretary and Board will most likely determine real estate brokerage to be financial in nature and list it as a permissible activity for FHCs. On the other hand, real estate are functionally similar to collecting loan or lease payments, disbursing escrow payments, and performing related accountings.”

142. See supra notes 87-95 and accompanying text.
143. Id.
146. Roel, supra note 45, at C3.
147. OPEN THE DOOR, supra note 4.
150. See supra notes 60-63 and accompanying text.
151. OPEN THE DOOR, supra note 4.
153. See supra notes 52-77 and accompanying text.
management does not seem to be financial in nature, incidental to a financial activity, or complementary to real estate brokerage.\textsuperscript{154} Therefore, it will probably not be added to the list.\textsuperscript{155} A good argument made by NAR against both proposed activities is "[t]he safety and soundness of the U.S. economy should not be put at risk by an untested regulation. We should move slowly when moving in this direction."\textsuperscript{156} It will take time to realize the full effect of the FHCs entrance into the insurance brokerage and finder’s markets. The argument that we should wait until the full impact on the insurance market is studied is not without merit, but innovation comes only from action. To move forward, the Secretary and Board must be willing to accept some risk of the unknown.

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\textsuperscript{154} See supra notes 69-71 and accompanying text.

\textsuperscript{155} Id.

\textsuperscript{156} Institute of Real Estate Management, supra note 83.