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Achieving the American Dream: May Financial Holding Companies Engage in Real Estate Brokerage?

I. INTRODUCTION

Home-ownership is often referred to as the American Dream.\(^1\) During the second quarter of 2004, the home-ownership rate was over sixty-nine percent, setting a new record.\(^2\) Financial companies, including both depository and non-depository institutions, play an instrumental role with assisting potential homeowners in reaching this dream by providing a plethora of services.\(^3\) Notwithstanding that fact, financial holding companies are the only financial companies that may not provide real estate brokerage services.\(^4\)

In 1999, the Gramm-Leach-Bliley Financial Modernization Act (GLBA) was enacted with a general purpose of enhancing competition in the financial services industry.\(^5\) In 2001, the Federal Reserve Board (the Board) drafted a proposal (the proposal) “to seek comment on whether to determine by rule that real estate brokerage is an activity that is financial in nature or incidental to a financial activity and therefore permissible for financial holding companies.”\(^6\) The proposal has


\(^2\) See President George W. Bush: A Remarkable Record Of Achievement, Expanding Home Ownership, available at http://www.whitehouse.gov/infocus/achievement/Achievement.pdf (last modified Aug. 2004). This period also marked the first time that the majority of minority Americans were homeowners. Id.

\(^3\) See infra notes 79-83 and accompanying text.

\(^4\) See infra notes 79-83 and accompanying text. For simplicity, the term financial holding companies will signify subsidiaries for these entities as well as financial subsidiaries of national banks. Any reference to banks in any ensuing quotations will likewise be synonymous with financial holding companies. Financial holding companies are essentially bank holding companies that meet additional criteria. See 12 U.S.C. § 1843(j)(4) (2000).


\(^6\) Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. 307, 307 (proposed Jan. 3, 2001) (to be codified at 12 C.F.R. pts. 225 and 1501). The proposal was a joint proposal between the Federal Reserve Board and the Secretary of the Treasury, who is authorized to regulate the activities of national banks. Id. The proposal would also allow financial subsidiaries of national banks to engage in real estate brokerage. Id. Moreover, the proposal would allow these entities to participate in real estate management activities, but
become the topic of a feverish debate between several interested parties, who have aligned into two visibly and vocally opposing factions.\textsuperscript{7} Three of the emerging issues will be explored in depth.\textsuperscript{8} One is the disagreement between the factions on whether real estate brokerage passes the financial test set forth in the GLBA.\textsuperscript{9} Another is the dispute between whether financial holding companies would promote or stifle competition in the real estate industry.\textsuperscript{10} Finally, there is discord on what effects, if any, financial holding company participation in real estate would have on consumers.\textsuperscript{11} This Note advocates the proposal's enactment, but examines both factions' arguments on the aforementioned issues.\textsuperscript{12} Part II provides a brief overview of both the GLBA and the proposal.\textsuperscript{13} Part III argues that Congress intended for the Board to determine whether financial holding companies may engage in real estate brokerage.\textsuperscript{14} Part IV maintains that the presence of financial holding companies in the real estate industry will not cause any adverse effects on the industry itself or consumers.\textsuperscript{15} Finally, Part V explains why the proposal should be enacted.\textsuperscript{16}

\textsuperscript{7} See id. at 310-11 (discussing the arguments of the American Banker Association and the National Association of Realtors). The American Banker Association represents all categories of banking institutions including community, regional, and savings banks as well as money banking centers and bank holding companies. See THE AMERICAN BANKERS ASSOCIATION, World-Class Solutions, Leadership and Advocacy Since 1875, at http://www.aba.com/About+ABA/default.htm (last visited Jan. 8, 2005). The National Association of Realtors (NAR) has approximately 800,000 members and in general represents the interests of real estate brokers and companies. See infra note 127 and accompanying text.

\textsuperscript{8} See infra Parts III-IV.

\textsuperscript{9} See infra notes 33-75 and accompanying text. The financial test refers to a number of requirements and considerations that the Board must address when determining whether an activity is permissible for financial holding companies. See infra notes 33-75 and accompanying text.

\textsuperscript{10} See infra notes 76-91, 99-109 and accompanying text.

\textsuperscript{11} See infra notes 92-98, 110-118 and accompanying text.

\textsuperscript{12} See infra notes 33-59, 76-118 and accompanying text.

\textsuperscript{13} See infra notes 17-32 and accompanying text.

\textsuperscript{14} See infra notes 33-75 and accompanying text.

\textsuperscript{15} See infra notes 76-148 and accompanying text.

\textsuperscript{16} See infra notes 149-70 and accompanying text.
II. THE GRAMM-LEACH-BLILEY ACT AND THE PROPOSAL

The GLBA was signed into law on November 12, 1999. At the signing ceremony, Senator Phil Gramm stated, "[t]he world changes, and Congress and the laws have to change with it. We have learned that we promote economic growth and we promote stability by having competition and freedom." 

The GLBA amended the Bank Holding Company Act of 1956 (BHCA) by allowing for the creation of new entities, financial holding companies. The BHCA and the current GLBA restrict bank holding companies to engaging in activities "closely related to banking." In 1972, under the provisions of the BHCA, the Board determined that real estate brokerage was not closely related to banking. In 1987, the Board solicited public comment on a proposal that would have allowed bank holding companies to engage in real estate investment and real estate brokerage. 

Financial holding companies may engage in a broader range of activities than bank holding companies. They may engage in activities

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%20Banking_Bank%20Holding%20Companies/filename/financeandbanking_1_550 (last visited Jan. 8, 2005). The GLBA took effect on March 11, 2000. Id.


20. 12 U.S.C. § 1843(c)(8) (2000); see also LISSA L. BROOME & JERRY W. MARKHAM, REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES 255 (2d ed. 2004) (explaining that bank holding companies are no longer allowed to petition to engage in new activities, rather they can only engage in activities that were allowed up until November 11, 1999, the date that the GLBA was signed).

21. See Fed. Res. Bull. 427-28 (Apr. 1972) ("Real estate brokerage is not an activity that the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto.").

22. See Bank Holding Companies and Change in Bank Control, 52 Fed. Reg. 543, 549-50 (proposed Jan. 7, 1987) (to be codified at 12 C.F.R. pt. 225) ("[R]eal estate investment activities are defined as the direct or indirect ownership of any interest in real estate . . . as well as incidental activities such as property management, maintenance, and brokerage of such real property.").

23. See BROOME & MARKHAM, supra note 20, at 259 ("A financial holding company may offer a broader range of services than a traditional bank holding company."); see also
that are financial in nature, incidental to a financial activity, or complementary to a financial activity. 24

In the GLBA, Congress explicitly gives the Board the authority to determine what activities are permissible for financial holding companies. 25 In addition to this authority, Congress explicitly requires the Board to entertain requests for a determination that an activity is permissible for financial holding companies. 26 Furthermore, the Board has the discretion to seek public comment for any proposed activity that it initiates on its own. 27

After the enactment of the GLBA, several trade associations requested that real estate brokerage be considered a financial activity. 28 This request prompted the Board to issue the proposal and solicit public comments. 29 The Board defined real estate brokerage as "the business of bringing together parties interested in consummating a real estate purchase, sale, exchange, lease, or rental transaction and negotiating on behalf of such parties a contract relating to the transaction." 30 It went on to state that real estate brokerage can only be conducted in accordance with state licensing laws and regulations, a policy with which traditional


25. See 12 U.S.C. § 1843(k) (2000); see also Hearings 1, supra note 22, at 61 (statement of Michael G. Oxley, Chairman, House Committee on Financial Services) (stating that Congress created a process to allow the Board to update the list of activities deemed to be financial in nature or incidental to such activities).


27. See 12 U.S.C. § 1843(k)(2)(B)(ii) (2000) (stating that if the Board does not choose to seek public comment in determining whether an activity is financial in nature or incidental to a financial activity, it must notify the Secretary of the Treasury).


30. Id. at 308.
real estate firms have to comply. The large number of comments compelled the Board to extend the comment period deadline by two months. At the time of this writing, the proposal has not been passed.

III. CONGRESSIONAL INTENT FOR FINANCIAL HOLDING COMPANIES

A. The Argument that Real Estate Brokerage is a Financial Activity

The GLBA requires certain activities to be defined as financial in nature. One of these activities is “lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities.” Proponents argue that real estate brokerage is a financial activity because it involves safeguarding a financial asset, namely real estate. For example, a house is undoubtedly the largest asset that most individuals will ever have. Second, real estate is the underlying asset for mortgage-backed securities, which is a multi-billion dollar industry. Third, owning real estate creates wealth due to its appreciation in value over time and the opportunity to take advantage of tax benefits.

The GLBA also requires “[t]he arranging, effecting, or facilitating [of] financial transactions for the account of third parties,” to be defined as a financial activity. Proponents use this language to buttress the argument “that the purchase, sale, or lease of real estate is a financial transaction because it is the most important, complex, and financially difficult transaction that most individuals undertake.”

31. See id. at 308.
32. See Hearings 1, supra note 23, at 65 (statement of Laurence H. Meyer, Member, Board of Governors of the Federal Reserve Board) (indicating that the deadline was postponed to May 1, 2001).
36. Id.; see also Hearings 1, supra note 23, at 142 (statement of Richard J. Parsons, Executive Vice President, Bank of America Corporation, on behalf of The Financial Services Roundtable) (indicating that real estate is the largest financial asset owned by most people and the most widely used source of collateral for people seeking credit).
37. See Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. at 310.
38. Id.
Therefore, real estate brokerage should be designated a financial activity.\textsuperscript{41}

The Board rejected these arguments but not before conceding to some points.\textsuperscript{42} For example, the Board admitted that real estate may have some attributes of a financial asset, but expressed doubt as to whether real estate actually is a financial asset.\textsuperscript{43} "Airplanes, boats, and automobiles are large assets that are often used as collateral for financial instruments (loans and leases in particular), yet these assets are generally considered to be non[-]financial."\textsuperscript{44}

The Board also admitted that real estate transactions have some attributes of financial transactions in the sense that people use such transactions for investment purposes.\textsuperscript{45} However, the Board stopped short of affirming real estate as a financial transaction stating that the size and complexity of a transaction should not have any bearing on whether the transaction is financial in nature.\textsuperscript{46}

B. The Argument that Real Estate Brokerage is a Commercial Activity

Opponents of the proposal argue that real estate brokerage is a commercial, rather than financial, activity and like the proponents, use the GLBA to support their argument.\textsuperscript{47} In determining whether an activity passes the financial test, the GLBA requires the Board to consider "changes or reasonably expected changes in the marketplace in which financial holding companies compete."\textsuperscript{48} While the GLBA's enactment was in response to changes in the marketplace, since its enactment, there have been no changes in the sectors of the marketplace in which financial holding companies compete.\textsuperscript{49}

\textsuperscript{42} See infra notes 43-46 and accompanying text.
\textsuperscript{43} See Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. at 310.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 311.
\textsuperscript{46} Id.
\textsuperscript{47} See Hearings \textit{1}, supra note 23, at 81 (statement of Richard A. Mendenhall, President, National Association of Realtors).
\textsuperscript{49} See Hearings \textit{1}, supra note 23, at 81 (statement of Richard A. Mendenhall, President, National Association of Realtors).
Richard A. Mendenhall, former president of the National Association of Realtors (NAR), stated “[proponents] say that because a home is financed, real estate brokerage is incidental to banking. [They] have it backwards. It is the mortgage that is, in fact, incidental to buying a home.”50 Furthermore, opponents point out that according to a recent housing survey and data from the U.S. Census Bureau, twenty percent of all home sales occur without financing.51 Also, in response to the argument that a real estate transaction may be a financial one because of the tax benefits and potential investment purposes, opponents state that most surveys show that less than ten percent of real estate buyers purchase real estate for tax benefits and potential investment purposes.52

On January 6, 2005, Representative Ken Calvert reintroduced the Community Choice in Real Estate Act.53 The purpose of the Act is “to amend the Bank Holding Company Act of 1956 and the Revised Statutes of the United States to prohibit financial holding companies . . . from engaging, directly, or indirectly, in real estate brokerage.”54 At last count the bills attracted 255 co-sponsors in the House and 28 co-sponsors in the Senate.55

During the last Congressional hearing for the bill, several Congressmen voiced their concerns with the Board’s proposal.56 Representative Ken Calvert, the sponsor of the bill, remarked that proponents of the proposal requested the inclusion of real estate brokerage as a financial activity “before the ink on the Gramm-Leach-Bliley Act was dry.”57 Representative Bob Barr stated, “[i]f finalized,
the [proposal] would substitute overwhelming public sentiment and the will of Congress with the arbitrary and capricious dictates of unelected agency bureaucrats."  

The bill, if passed, would nullify the Board's proposal.  

C. Congress's Silence Speaks Volumes

Opponents use language from the GLBA that requires the Board to consider factors to determine whether an activity passes the financial test. There is no indication that these factors are in a hierarchical order. Therefore, if the Board must consider "changes or reasonably expected changes in the marketplace in which financial holding companies compete," the Board must also consider the remaining factors including "the purpose of . . . [the GLBA]," which is arguably more important.

Although both factions cite language in the GLBA to support their arguments, Congress's silence may be the strongest indication of its intent. Congress explicitly forbids banks from engaging in real estate investment but does not, directly or indirectly, forbid banks from engaging in real estate brokerage. The importance of this silence is magnified when one weighs that more than a decade prior to the enactment of the GLBA, the Board issued a proposal that would have allowed bank holding companies to engage in both real estate investment and real estate brokerage.

Institutions and Consumer Credit of the House Committee on Financial Institutions).

58. Id. at 71 (opening statement of Representative Bob Barr, Member, Subcommittee of Financial Institutions and Consumer Credit of the House Committee on Financial Institutions).

59. The Board, or any regulatory agency for that matter, cannot supersede Congress' authority. U.S. CONST. art. VI, § 2. Thus if the Community Choice in Real Estate Act is passed the proposal will become moot since it would contradict the Act. See id; see also Rob Blackwell, In Brief: Financial Aspects of New Law, AM. BANKER, Dec. 20, 2004, at 19 (indicating that Congress passed a spending bill for 2005, which places the Board on a one year ban from using funds to enact the proposal).


62. Id.

63. See infra notes 64-67 and accompanying text.

64. 12 U.S.C. § 29 (2000); see generally supra note 4.

The probability that Congress simply forgot to include real estate brokerage from the list of activities in which financial holding companies may not engage is low. However, an inference that Congress decided to leave the issue for the Board to decide is plausible, especially when one considers the spirit of the GLBA and recognizes Congress's will to give the Board the authority to determine the activities in which financial holding companies may engage. As Chairman Oxley stated, "Congress should not pass legislation only to challenge its concepts once it is sent to the agencies for implementation."\(^{66}\)

The Board displayed this authority by determining that acting as a finder is permissible for financial holding companies.\(^{68}\) According to the Board, acting as a finder involves "bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate."\(^{69}\) However, finders cannot "engage in any activity that would require the company to register or obtain a license as a real estate agent or broker under applicable law."\(^{70}\)

The difference between the Board's definitions of finders and real estate brokers is the lack of the former to negotiate transactions and obtain a broker license.\(^{71}\) By these definitions, a real estate broker can be considered a specialized finder.\(^{72}\) The idea is that if finders negotiate

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66. See supra notes 17-27 and accompanying text.


69. See Bank Holding Companies and Change in Bank Control, 65 Fed. Reg. at 80,735.

70. Id.

71. Compare Bank Holding Companies and Change in Bank Control, 65 Fed. Reg. at 80,735 (stating that acting as a finder involves "bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate"), with Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. 307, 308 (proposed Jan. 3, 2001) (to be codified at 12 C.F.R. pts. 225 and 1501) (defining real estate brokerage to be "the business of bringing together parties interested in consummating a real estate purchase, sale, exchange, lease, or rental transaction and negotiating on behalf of such parties a contract relating to the transaction").

transactions and obtain broker licenses, financial holding companies can no longer act as finders, is tenuous.\textsuperscript{73}

Additionally, samples from a recent survey belie the overwhelming public sentiment of which Representative Barr speaks.\textsuperscript{74} Moreover, contrary to Representative Barr's remarks, the Board's rejection of the proponents' arguments evinces the Board's refusal to make arbitrary and capricious dictates for the appeasement of any faction.\textsuperscript{75}

\section*{IV. Effects on the Real Estate Industry and Consumers}

\subsection*{A. An Optimistic View of the Real Estate Industry}

Proponents claim the language of the GLBA indirectly supports the argument that financial holding companies' participation in the real estate industry should be allowed.\textsuperscript{76} They refer to the section that requires the Board to consider several factors in determining whether an activity is financial in nature or incidental to a financial activity.\textsuperscript{77} One of these is "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."\textsuperscript{78}

Proponents argue that financial holding companies are at an unfair competitive disadvantage in the real estate industry because other financial companies, both depository\textsuperscript{79} and non-depository,\textsuperscript{80} provide an

\textsuperscript{73} Compare Bank Holding Companies and Change in Bank Control, 65 Fed. Reg. at 80,735, with Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. at 308.

\textsuperscript{74} See generally MATTHEW GREENWALD & ASSOCIATES, INC., Consumer Real Estate Survey (conducted Apr. 23-29, 2001), available at http://www.abacom/Press+Room/051501realestate.htm (last visited Jan. 8, 2005) (indicating that a survey was given to households that had recently changed addresses). The participants expressed support for allowing banks to engage in real estate brokerage. \textit{Id.} For example, sixty-nine percent of the participants felt there would be a positive impact if banks were allowed to offer real estate services. \textit{Id.}

\textsuperscript{75} See supra notes 42-46 and accompanying text.

\textsuperscript{76} See infra notes 78-83 and accompanying text.


\textsuperscript{78} 12 U.S.C. § 1843(k)(3)(D)(i) (the other factors are omitted as they do not relate to competition among financial companies).

\textsuperscript{79} 12 C.F.R § 559.4 (2004) (granting authority for federal thrifts to engage in real estate brokerage activities); see \textit{Hearings 1, supra} note 23, at 108 (statement of Philip M. Burns, Chairman and CEO, Farmers & Merchants National Bank, Member, American

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array of real estate services, including brokerage services. For example, Weichert Realtors, the largest individually-owned real estate firm in the country, provides mortgage lending, title insurance, homeowner's insurance and brokerage services. Financial holding companies offer nearly all of these services and others, except real estate brokerage.

Proponents maintain that only those financial holding companies that feel they can effectively compete in the industry will choose to do so, which will ultimately have positive effects on both local real estate firms and agents. The presence of financial holding companies will give real estate firms a chance to expand or augment their business through partnership opportunities. This will allow for the possibility of stronger competition with larger real estate firms, such as the aforementioned Weichert Realtors. The presence of financial holding companies will also force all brokerage providers to offer attractive packages to secure the services of real estate agents. Agents discontent with the package offered by a particular brokerage provider

Bankers Association Relations Council) (explaining the activities of some credit unions in Wisconsin).

80. See Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. 307-14 n. 23 (Jan. 3, 2001) (to be codified at 12 C.F.R. § 225). "For example, General Motors Acceptance Corporation operates a thrift, makes mortgage loans, and provides real estate brokerage services; Prudential Insurance Company provides insurance and securities products and real estate brokerage services; Cendant Corporation provides insurance, mortgage loans, and real estate brokerage services; and Long & Foster provides mortgage loans, insurance products and real estate brokerage services." Id.

81. See supra notes 79-80 and accompanying text.

82. See Hearings 2, supra note 18, at 180 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association); see generally http://www.weichert.com (last visited Jan. 8, 2005).

83. But see, e.g., Hearings 1, supra note 23, at 117 (statement of Philip M. Burns, Chairman and CEO, Farmers & Merchants National Bank, Member, American Bankers Association Relations Council) (stating that many banks currently have trust departments in which their personnel provide real estate brokerage services for trust consumers).

84. See Hearings 2, supra note 18, at 173 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association); see Hearings 1, supra note 23, at 103 (statement of Philip M. Burns, Chairman and CEO, Farmers & Merchants National Bank, Member, American Bankers Association Relations Council).

85. See Hearings 2, supra note 18, at 173 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association).

86. See id. at 173 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association).

87. See id. at 173 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association).
will be able to negotiate with another provider as opposed to being forced to accept the package of the initial provider. 88

All brokerage providers will have no choice but to develop strategies that will provide benefits to consumers in order to be successful. 89 "Competition . . . ultimately makes [an] industry stronger because it forces the industry to meet new challenges, and to provide more and better services for consumers." 90 Thus, allowing financial holding companies to engage in real estate brokerage will lead to improvements in efficiency, service and pricing. 91

Opponents of the proposal argue that allowing financial holding companies to engage in brokerage activities will have a detrimental effect on consumer protection. 92 For example, financial holding companies may attempt to tie their brokerage services to their lending services. 93 Proponents counter this argument by asserting a lack of evidence of compromised customer interests in depository institutions, or other financial companies, that engage in real estate brokerage. 94 Furthermore, the Real Estate Settlement Procedures Act (RESPA) requires brokers to inform consumers of their affiliation with lenders prior to conducting business. 95 Brokers also have to inform consumers that they do not have to use the broker's lender. 96 Proponents go on to state that consumer protection will not be compromised and will actually increase if financial holding companies are allowed to engage

88. See id. at 173 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association).
89. See id. at 173 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association).
90. Hearings 1, supra note 23, at 62 (opening statement of Michael G. Oxley, Chairman, House Committee on Financial Services).
91. See id. at 103 (statement of Philip M. Burns, Chairman and CEO, Farmers & Merchants National Bank, Member, American Bankers Association Relations Council).
92. See Hearings 2, supra note 18, at 132 (statement of Martin Edwards Jr., President, National Association of Realtors).
93. See generally BROOME & MARKHAM, supra note 20, at 216 (explaining that in a tying arrangement a customer can only purchase a given product if they also purchase another product).
94. See Hearings 1, supra note 23, at 116 (statement of Philip M. Burns, Chairman and CEO, Farmers & Merchants National Bank, Member, American Bankers Association Relations Council); id. at 139 (statement of Richard J. Parsons, Executive Vice President, Bank of America Corporation, on behalf of The Financial Services Roundtable).
96. Id.
in real estate brokerage.  

Financial holding companies already comply with strict consumer protection and anti-tying provisions while real estate firms do not.  

B. A Pessimistic View of the Real Estate Industry

Opponents of the proposal describe the real estate industry as highly competitive with a high efficiency rating and virtually no barriers to entry. Opponents also assert that real estate brokers and companies play a significant role in community revitalization. "Local real estate brokers are more likely than financial conglomerates to bring wealth back into their communities and enter into business relationships with other neighborhood enterprises." They argue the presence of financial holding companies will stifle competition and tilt the playing field in favor of banks because of unfair advantages. In light of these advantages, opponents contend that the proposed benefits for real estate brokers and companies cited by proponents are inaccurate. Therefore, instead of opportunities for real estate brokers to expand their business, the presence of banks would force real estate brokers out of the market.

For example, opponents indicate that unlike other financial companies, banks have access to the Board’s discount window as a lender of last resort. This access “allows depository institutions to

97. See Hearings 1, supra note 23, at 116 (statement of Philip M. Burns, Chairman and CEO, Farmers & Merchants National Bank, Member, American Bankers Association Relations Council); id. at 139 (statement of Richard A. Mendenhall, President, National Association of Realtors).


100. See Hearings 2, supra note 18, at 200 (statement of John Taylor, President and CEO, National Community Reinvestment Coalition) (stating that women and minority-owned real estate firms have assisted with community revitalization).

101. Id. at 200 (statement of John Taylor, President and CEO, National Community Reinvestment Coalition). But see infra notes 119-24 and accompanying text.

102. Cook, supra note 99.

103. See supra notes 84-88 and accompanying text.

104. Cook, supra note 99.

105. See Keep Banks Out of Real Estate, supra note 51. See generally BROOME &
take greater risks than a comparable nonfinancial company and hold less liquid assets, which often yield greater returns than more liquid assets.” Another advantage is the ability of banks to borrow funds at a lower cost than other financial service companies through demand deposits or checking accounts. The idea that banks are too big to fail provides another avenue for borrowing funds at a lower cost. A third advantage afforded to banks comes in the form of significant barriers to entry into the banking industry.

Opponents argue that allowing banks to engage in real estate brokerage would lead to “[a] consolidation of the real estate industry [which] would reduce competitive pressures that would otherwise work to the consumers’ advantage.” For example, in response to the assertion that the presence of financial holding companies would lead to lower prices for consumers, opponents contend that one of the few ways this could happen is cross-subsidization. Thus, while consumers may enjoy lower costs for real estate brokerage, their fees associated with traditional banking services will likely increase. Moreover, given the significant barriers to entry, these increased fees would be permanent.

Opponents also contend the way in which real estate brokers are employed would be detrimental to consumer interests. “There is also the likelihood that financial holding companies entering the real estate

MARKHAM, supra note 20 at 170-72 (explaining that the discount window is a term used to describe the process by which banks can go to the Federal Reserve for a loan to meet reserve requirements). The loan is set at a rate called the discount rate. Id. The term lender of last resort refers to the fact that if banks cannot get a loan from another source, they can turn to the Federal Reserve as a last resort. Id.

106. See Keep Banks Out of Real Estate, supra note 51.
107. See id.
108. See id.; but see Hearing Before the Comm. on Banking, Housing, and Urban Affairs, 108th Cong., (2003) (statement of Alan Greenspan, Chairman, Federal Reserve Board) (stating that the Board rejects that notion that any bank is too big to fail).
109. See Keep Banks Out of Real Estate, supra note 51.
110. See Cook, supra note 99 (quoting Leonard Zumpano, Executive Director, Alabama Real Estate Research Center, University of Alabama).
111. See Hearings 2, supra note 18, at 140 (statement of Martin Edwards Jr., President, National Association of Realtors) (indicating that consumers costs can only go down through economies of scale or scope, cross-subsidization or predatory lending).
112. See id. at 140 (statement of Martin Edwards Jr., President, National Association of Realtors).
113. See id. (statement of Martin Edwards Jr., President, National Association of Realtors).
114. See infra notes 115-16 and accompanying text.
industry would retain their real estate agents as salary-based employees, rather than as commission-based independent contractors.”

As salary-based employees, real estate agents would look for cross-selling opportunities for banks as opposed to providing the best brokerage service to consumers. Representative Ken Calvert commented, “our national banking system has become cold and impersonal, more focused on acquisition and market dominance than on customer needs.” Overall, opponents believe “[t]he real estate brokerage business could change from a localized, highly competitive industry to one that is dominated by nationwide federally chartered firms.”

C. A Realistic View of the Real Estate Industry

Opponents paint a picture of a competitive real estate industry with several thousand small real estate brokers vying to serve consumers. This portrait fails to take into account the large national real estate firms that currently dominate the market. For example, a recent study traces one out of every four real estate agents’ affiliation with Cendant Corporation. Moreover, since 1997, Cendant has acquired on average one local real estate firm per week. In line with this statistic, there are approximately half as many residential real estate firms now as in 1990. The NAR asserts that the presence of banks will force real estate firms out of the market, but this phenomenon

115. *Hearings 2, supra* note 18, at 140 (statement of Martin Edwards Jr., President, National Association of Realtors).


117. *Id.* at 72 (statement of Honorable Ken Calvert, Member, Subcommittee of Financial Institutions and Consumer Credit of the House Committee on Financial Institutions).

118. *See id.* at 140 (statement of Martin Edwards Jr., President, National Association of Realtors).

119. *See supra* note 99 and accompanying text.

120. *See Hearings 2, supra* note 18, at 178-81 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association).

121. *See id.* at 178 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association); *see generally* http://www.cendant.com (last visited Jan. 8, 2005).

122. *See Hearings 2, supra* note 18, at 13 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association).

123. *See id.* at 177 (statement of James E. Smith, Chairman and CEO, Union State Banker & Trust, President, American Banker Association).
already occurs. 124

Patrick Grabill, a former NAR director, sustains that if individual members of the NAR do not comply with the association's sentiment, they run the risk of not gaining access to the NAR's listing database or using the term "realtor," which is a trademark owned by the NAR. 125 To this end, the voice of the NAR is essentially the board of directors that has little accountability to the individual members. 126 Thus the NAR misleads interested parties by asserting that it represents the sentiment of its approximately 800,000 members and the real estate industry as a whole. 127 The sentiment of two other real estate groups captures this point. 128

The Realty Alliance, consists of forty-five of the largest independently owned and operated real estate firms. 129 By a vote of forty-one to four, the Realty Alliance supports the proposal. 130 Furthermore, members of the Alliance "have grown increasingly concerned that the NAR's position and vehemence would have a negative impact on consumers, [the members'] companies and the industry as a whole." 131

Another group, the Real Estate Services Providers Council (RESPRO), consists of approximately 200 residential real estate brokerage firms. 132 RESPRO attests that the presence of financial companies, such as Cendant and Prudential, "has caused traditional real estate brokerage firms to be more efficient and more consumer-focused than . . . before." 133 Moreover, RESPRO has explicitly supported the proposal stating "we believe that any bank should be able to compete

124. See supra notes 119-23 and accompanying text.
125. See Hearings 2, supra note 18, at 158 (statement of Patrick Grabill, President, King Thompson/Holzer-Wollam Realtors).
126. See id.
127. See id.
128. See infra notes 129-34 and accompanying text.
129. See Hearings 2, supra note 18, at 92 (statement of Stephen W. Baird, President and CEO, Baird and Warner, on behalf of Realty Alliance).
130. See id. at 93 (statement of Stephen W. Baird, President and CEO, Baird and Warner, on behalf of Realty Alliance).
131. See id. at 92 (statement of Stephen W. Baird, President and CEO, Baird and Warner, on behalf of Realty Alliance).
132. See id. at 98 (statement of George T. Eastment, III, Executive Vice-President, Long and Foster, on behalf of Real Estate Service Providers Council, Inc.).
133. See id. at 15 (statement of George T. Eastment, III, Executive Vice-President, Long and Foster, on behalf of Real Estate Service Providers Council, Inc.).
with us.'”

Any advantages offered to banks are offset by several Congressional acts. For example, sections of the Federal Reserve Act place restrictions on the amount of credit and support that a bank can provide its affiliates. Additionally, the GLBA requires a financial holding company to be well-capitalized and well-managed before the entity can engage in any additional financial activities. Furthermore, as was mentioned earlier, the RESPA places restrictions on any tying features in which a bank may attempt to engage. These statutes collectively and effectively quell concerns about consumer interest issues.

Several thousand state banks operate in the United States. The majority of states allow their banks to engage in real estate brokerage. A minority of the states that allow their banks to engage in real estate brokerage require it to be conducted through a subsidiary. Moreover, many statutes allowing state banks to engage in real estate brokerage have been in place for a range of ten to twenty years.

In a letter addressing the proposal, the president and CEO of the Conference of State Bank Supervisors (CSBS) expressed support for allowing financial holding companies to engage in real estate brokerage. “While the states are often referred to as the ‘laboratories

134. See id.
138. See supra notes 135-37 and accompanying text.
139. See generally Hearings 1, supra note 23, at 179 (statement of Neil Milner, President and CEO, Conference of State Bank Supervisors) (indicating that there are approximately 7,000 state-chartered banks).
140. See id. at 180, 184-85 (statement of Neil Milner, President and CEO, Conference of State Bank Supervisors). Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming allow their banks to engage in real estate brokerage. Id. at 184-85.
141. See id. Arizona, Delaware, Florida, New Hampshire, North Carolina, Rhode Island, and Virginia require their banks to engage in real estate brokerage through a subsidiary. Id.
142. See id. at 180 (statement of Neil Milner, President and CEO, Conference of State Bank Supervisors). North Carolina has allowed its banks to engage in real estate brokerage for more than 100 years. See id.
143. See id. at 182-83 (statement of Neil Milner, President and CEO, Conference of State Bank Supervisors).
for innovation' for our banking system, it is the evolution of these agency and brokerage services as permissible bank activities that truly embodies this concept."\textsuperscript{144} The president went on to write, "[w]e believe the Federal Reserve's... interpretation of real estate brokerage as an appropriate activity for [national] banks is supported by the experience of the states."\textsuperscript{145}

Opponents claim that state banks do not engage in real estate brokerage to any significant degree.\textsuperscript{146} While conceding this point, members of the CSBS note that the communities in which state banks engage in real estate brokerage "clearly enjoy greater competitive opportunities and choices for the consumer."\textsuperscript{147} Furthermore, the opponents' claim implicitly concedes the bigger picture: state banks, like financial holding companies, are depository institutions that engage in real estate brokerage and do not adversely affect the real estate industry.\textsuperscript{148} Therefore, the precedent established by state bank commissioners, albeit not controlling on Congress, warrants some level of deference.\textsuperscript{149}

V. CONCLUSION

Julie L. Williams and Mark P. Jacobsen wrote "the financial services industry is continuing to evolve rapidly. If banks do not keep up, they will become obsolete."\textsuperscript{150} While this quote may be an exaggeration, the fact remains, banks are losing ground to other financial companies.\textsuperscript{151} And while banks cannot participate in all types

\begin{itemize}
\item \textsuperscript{144} See Hearing 1, supra note 23, at 180-81 (statement of Neil Milner, President and CEO, Conference of State Bank Supervisors).
\item \textsuperscript{145} See id. at 181 (statement of Neil Milner, President and CEO, Conference of State Bank Supervisors).
\item \textsuperscript{146} See Keep Banks Out of Real Estate, supra note 51.
\item \textsuperscript{147} See Hearings 2, supra note 18, at 149 (statement of E. Joseph Face Jr., Commissioner, Financial Institutions for the Commonwealth of Virginia, Chairman, Legislative Committee of the Conference of State Bank Supervisors).
\item \textsuperscript{148} See id. at 150 (statement of E. Joseph Face Jr., Commissioner, Financial Institutions for the Commonwealth of Virginia, Chairman, Legislative Committee of the Conference of State Bank Supervisors).
\item \textsuperscript{149} See supra notes 138-47 and accompanying text.
\item \textsuperscript{151} See supra notes 79-83 and accompanying text.
\end{itemize}
of activities, participation in real estate brokerage should be allowed.\textsuperscript{152} Although opponents of the proposal present compelling arguments, when viewed collectively, the arguments for enacting the proposal are significantly stronger.\textsuperscript{153}

The GLBA was intended to expand, not contract, the range of permissible activities for financial holding companies as opposed to bank holding companies.\textsuperscript{154} The sponsors of the Act had the opportunity to explicitly prohibit financial holding companies from engaging in real estate brokerage activities, but did not.\textsuperscript{155} The Board, under mandates from Congress, had the authority to issue the proposal, and did.\textsuperscript{156} The Board also proved that it can render an unbiased decision by refuting arguments that real estate brokerage is a financial activity.\textsuperscript{157}

To this extent, the GLBA specifically authorizes financial holding companies to engage in activities that are incidental to a financial activity.\textsuperscript{158} The similarity of the Board's definitions of finders and brokers arguably shows the Board's acquiescence in determining real estate brokerage to be incidental to the financial activity of purchasing a home.\textsuperscript{159}

Given the foregoing facts, Congress should not disrupt a legal process that operates smoothly.\textsuperscript{160} Furthermore, if Congress undermines the Board's decision, then no regulatory agency can effectively make any decisions.\textsuperscript{161}

The GLBA was also intended to expand, not contract, the ability of financial holding companies to compete with other financial companies.\textsuperscript{162} This desire should be granted for several policy

\textsuperscript{152. See supra Parts III-IV.}
\textsuperscript{153. See supra Parts III-IV.}
\textsuperscript{155. See supra notes 65-67 and accompanying text.}
\textsuperscript{156. See supra notes 6 and 25 and accompanying text.}
\textsuperscript{157. See supra notes 42-46 and accompanying text.}
\textsuperscript{159. See supra notes 68-73 and accompanying text.}
\textsuperscript{160. See supra notes 25-27 and accompanying text.}
\textsuperscript{161. See generally Chevron U.S.A v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984) (explaining that if Congress' intent is not clearly stated in a statute then deference will be given to a reasonable interpretation of the statute by the agency responsible for interpreting it).}
\textsuperscript{162. Gramm-Leach-Bliley Financial Modernization Act, Pub. L. 106-102, 113 Stat. 1338}
reasons.¹⁶³ Financial holding companies already provide a host of other real estate services.¹⁶⁴ Moreover, many other depository institutions engage in real estate brokerage and their presence has not disrupted the industry.¹⁶⁵ There is no cogent justification for prohibiting financial holding companies from joining this group.¹⁶⁶ Additionally, comments of the largest independent real estate firms affirm that they welcome competition with financial holding companies.¹⁶⁷ This competitive spirit will only force all brokerage providers to provide the highest level of service.¹⁶⁸ Finally, several federal statutes alleviate issues dealing with consumer protection.¹⁶⁹

Overall, the potential effects of financial holding companies engaging in real estate brokerage are beneficial to all parties.¹⁷⁰ Ultimately, the home-ownership rate will continue to reach new records, and more Americans will have the ability to achieve the American Dream.¹⁷¹ Thus, the Gramm-Leach-Bliley Financial Modernization Act implies that financial holding companies can engage in real estate brokerage. Accordingly, the Board should adopt the proposal.

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