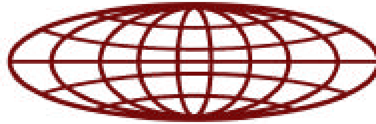

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Financial Services Modernization Act Executive Summary

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FINANCIAL SERVICES MODERNIZATION ACT EXECUTIVE SUMMARY

The Financial Services Modernization Act (Act) will create substantial new business opportunities for financial institutions and a revised regulatory framework for conducting financial services business. Based on the Conference Report of the Gramm-Leach-Bliley Act released November 1, 1999, this Memorandum summarizes the most significant aspects of the Act and provides key suggestions on actions financial institutions may want to consider when exploring opportunities made available under the Act.

I. AFFILIATIONS AMONG BANKS, SECURITIES FIRMS, AND INSURANCE COMPANIES (Title I)

- Provides flexibility in structuring affiliations among banks, securities firms and insurance companies either through a holding company structure or a financial subsidiary structure.
- Creates a new "financial holding company" under the Bank Holding Company Act. A bank holding company may convert into a financial holding company if the following conditions are met:

  (1) all bank subsidiaries are well-capitalized and well-managed;

  (2) the institution achieved a "satisfactory" or better rating in its most recent CRA examination; and

  (3) an application is filed with the Federal Reserve Board.

- Permits a financial holding company to engage in a statutorily provided list of financial activities, including: insurance and securities underwriting and agency activities, merchant banking and insurance company portfolio investment activities. A complete list of permissible activities is attached to this Executive Summary. Activities that are "incidental" to such financial activities, as well as those that are "complementary" to financial activities are also authorized, as determined by the Federal Reserve Board and the Secretary of the Treasury. Operating a travel agency in connection with financial services is also permitted.
- Permits securities affiliates of a financial holding company to engage in securities underwriting, dealing, market making and mutual fund sponsorship, management, advisory and distribution activities without any limit on revenues.

- Permits non-bank affiliates of a financial holding company to act as principal, agent or broker for the purpose of providing and issuing annuities and selling health insurance.

- Permits merchant banking investments by a financial holding company (either as a principal or an agent) in the stock or assets of any type of company engaged in non-financial activities.

- Streamlines bank holding company supervision by clarifying the regulatory role as follows: the Federal Reserve Board serves as the umbrella holding company supervisor and the state and federal financial regulators serve as the "functional" regulators of various affiliates (i.e., bank regulators regulate banks, the SEC regulates securities business and state insurance regulators regulate insurance business).

- Prohibits FDIC assistance to affiliates and subsidiaries of banks and thrifts.

- Allows a national bank to engage in new financial activities in a "financial subsidiary", (except for insurance underwriting, merchant banking, insurance company portfolio investments, real estate development and real estate investment), so long as the aggregate assets of all financial subsidiaries do not exceed 45% of the parent bank's assets or $50 billion, whichever is less. To take advantage of the new activities through a financial subsidiary, the national bank must be well-capitalized and well-managed. In addition, the largest 100 banks are required to have an outstanding issue of subordinated debt. Merchant banking activities may be approved as a permissible activity beginning 5 years after the date of enactment of the Act.

BEST PRACTICES

- Assess current strategic and operational plans to incorporate possible new lines of business. Note that mergers under the Act will be allowed 120 days after enactment.

- Review existing charter documents and anti-takeover provisions in light of updated game plan and the possibility of being a seller as well as a buyer.

- Review existing organizational/management structures.

- Devise broader-based merger and acquisition strategy utilizing creative corporate and tax planning techniques; consider regulatory capital requirements of various types of businesses.

II. FUNCTIONAL REGULATION (Title II)

- Amends the federal securities laws to incorporate functional regulation of bank securities activities.

- Replaces the broad exemptions banks have enjoyed from broker-dealer regulation with more limited exemptions of "broker" and "dealer" activities designed to permit

banks to continue their traditional activities and the buying or selling of "identified banking products."

- Provides for limited exemptions from broker-dealer registration for transactions in the following areas: trust, safekeeping, custodian, shareholder and employee benefit plans, sweep accounts, private placements (under certain conditions) and third party networking arrangements, among others.

- Allows national banks to continue to be active participants in the derivatives business for all credit and equity swaps (other than equity swaps to retail customers).

- Allows national banks to underwrite and deal in municipal revenue bonds.

- Makes The Investment Advisors Act of 1940 applicable to a bank that advises a registered investment company and narrows the exemption previously available with respect to bank common trust funds.

BEST PRACTICES

- Broaden existing knowledge base and access to regulatory expertise with respect to SEC broker-dealer registration, the Investment Company Act, Hart-Scott-Rodino approval process, state insurance regulation, etc.

- Advise business units of new and revised regulatory frameworks and ongoing compliance activities affecting existing lines of business.

- Analyze the applicable “functional regulatory” framework in advance of starting new lines of business.

III. INSURANCE (Title III)

- Provides for the functional regulation of insurance activities of national banks by state regulators.

- Establishes which insurance products banks and bank subsidiaries may provide as principal.

- National banks are prohibited from engaging in any title insurance underwriting or sales activities except to the extent and in the manner allowed by the laws of the state in which they operate.

- Directs the federal banking agencies to establish consumer protection governing bank insurance sales.

- Preempts, in general, state laws interfering with the ability of insurers to affiliate, become financial holding companies or demutualize.

- Permits mutual insurance companies to redomesticate in another state and reorganize as a mutual holding company or stock company under certain circumstances.

- Creates a 3 year timeline for multi-state licensing reform, giving the states the opportunity to enact uniform laws, or else a national association will be established to accomplish uniform licensing and other requirements.

BEST PRACTICES

- Assess strategic and operational plans to determine the extent/range of insurance business to engage in.

- Monitor consumer protection mechanisms that will be put into place by banking agencies governing insurance sales.

- Monitor state law "fall out" regarding affiliations, ins and outs of "functional regulation" and multi-state reform activities.

IV. UNITARY SAVINGS AND LOAN HOLDING COMPANIES (Title IV)

- Prohibits those companies that became unitary savings and loan holding companies pursuant to applications filed with the Office of Thrift Supervision after May 4, 1999, from engaging in non-financial activities or affiliating with a non-financial entity. This prohibits charters to Wal-Mart, CMS and others.

- Grandfathers the powers and authorities of existing unitary thrift holding companies or those that applied for a charter prior to May 4, 1999. Grandfathered companies may be sold only to companies that are financial services providers.

V. PRIVACY (Title V)

- Requires clear disclosure by all financial institutions of their privacy policy regarding the sharing of non-public personal information with affiliates and third parties.

- Requires notice to consumers and an opportunity to "opt-out" of sharing of non-public personal information with nonaffiliated third parties subject to certain limited exceptions.

- Addresses a potential imbalance between the treatment of large financial services conglomerates and small banks by including an exception, subject to strict controls, for joint marketing arrangements between financial institutions.

- Clarifies that the disclosure of a financial institution's privacy policy is required to take place at the time of establishing a customer relationship and annually thereafter during the continuation of the relationship.

- Prohibits a person from attempting to obtain customer information by making false, fictitious or fraudulent statements or representations, or knowingly providing a forged, counterfeit, lost or stolen document to a financial institution; a criminal penalty may be imposed on any person for knowing and intentional violation or attempted violation, which is punishable by fine or imprisonment for no more than five years, or both.

BEST PRACTICES

- Review existing privacy policy and revise as needed; review applicable state law standards and incorporate into policies.

- Train personnel on disclosing privacy policy (both initial roll-out and on an annual basis) and customer opt-out procedure.

- Assess marketing strategy regarding enhanced customer protection of information.

- Explore joint marketing arrangements.

VI. FEDERAL HOME LOAN BANK SYSTEM MODERNIZATION (Title VI)

- Allows banks with less than $500 million in assets to use long-term advances for loans to small businesses, small farms and small agri-businesses.

- Establishes a new, permanent capital structure for the Federal Home Loan Banks. Two classes of stock are authorized, redeemable on 6-months and 5-years notice. Federal Home Loan Banks must meet a 5% leverage minimum tied to total capital and a risk-based requirement tied to permanent capital.

- Equalizes the stock purchase requirements for banks and thrifts.

- Enacts voluntary membership for Federal savings associations, effective six months after enactment.

- Changes the current annual $300 million funding formula for the Resolution Funding Corporation obligations of the Federal Home Loan Banks to 20% of annual net earnings.

VII. MISCELLANEOUS (Title VII)

- Requires ATM operators who impose a fee for providing host ATM services to non-customers to post a notice on the machine that a fee will be charged and on the screen that a fee will be charged and the amount of the fee. This notice must be posted before the consumer is irrevocably committed to completing the transaction.

- Requires full public disclosure of all CRA agreements.

- Requires each bank and each non-bank to a CRA agreement to make a public report each year on how money and other resources involved in the agreement were used.

- Grants regulatory relief regarding the frequency of CRA exams to small banks and savings and loans (those with no more than $250 million in assets). Small institutions having received an outstanding rating at their most recent CRA exam will not receive a routine CRA exam more often than once every 5 years. Small institutions having received a satisfactory rating at their most recent CRA exam will not receive a routine CRA exam more than once every 4 years.

- Requires federal banking regulators to use plain language in their rules published after January 1, 2000.

- Allows federal savings associations converting to national or state bank charters to retain the term “Federal” in their names.

BEST PRACTICES

- Check current ATM fee disclosures and update as necessary.

- Prepare public disclosure of CRA agreements and establish procedure for annual updates.

Permissible Financial Activities
For Financial Holding Companies

- ♦ Lending, exchanging, transferring, investing for others, or safeguarding money or securities.

- ♦ Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any state.

- Providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940).

- Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.

- Underwriting, dealing in, or making a market in securities.

- Engaging in any activity that the Board has determined, by order or regulation that is in effect on the date of the enactment of the Gramm-Leach-Bliley Act, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in such order or regulation, unless modified by the Board).

- Engaging, in the United States, in any activities previously approved for the bank holding companies.

FINANCIAL SERVICES MODERNIZATION ACT FREQUENTLY ASKED QUESTIONS

Overview

What is the general effect of this legislation?

The Financial Services Modernization Act (the Act) repeals Sections 20 and 32 of the Glass Steagall Act, thereby permitting the affiliation of securities firms, insurance companies and commercial banks. Banks, through certain operating structures, will now be able to participate in new financial activities involving securities transactions. One major impact of the Act is that not only will banks be able to acquire securities firms but securities firms will also be allowed to acquire banks.

What operating structure is required for a bank to engage in these new financial activities?

Banks are permitted to enter into new financial service activities though specialized bank holding companies, known as financial holding companies (FHCs), or national bank financial subsidiaries.

What is an FHC?

The Act amends the Bank Holding Company Act of 1956 to allow specialized bank holding companies, known as financial holding companies (FHC), to participate in the new financial activities contemplated in the Act. In order to become an FHC, a bank holding company must declare to the Federal Reserve Board its intent to become an FHC as well as meet several other statutory qualifications. These qualifications require all of the subsidiary banks of the bank holding company to be well-capitalized and well-managed. In addition, all of the subsidiary depository institutions of the bank holding company must meet the requirements for a satisfactory Community Reinvestment Act rating.

How does a bank holding company become an FHC?

To become an FHC, a bank holding company must satisfy the following conditions:

- all of its bank subsidiaries must be well-capitalized and well-managed;
- the bank holding company must file with the Federal Reserve Board its election to become a financial holding company, accompanied by a certification as to the well-capitalized, well-managed status of its bank subsidiaries; and
- each of the bank subsidiaries must have achieved a rating of "satisfactory" or better in its most recent CRA exam.

Does a bank holding company need prior approval from the Federal Reserve Board to become an FHC?

The Act does not require prior approval by the Federal Reserve Board for the FHC election to become effective. However, the Federal Reserve Board may take corrective measures against bank holding companies which expand their activities without complying with the requirements previously discussed.

To what extent can a national bank subsidiary participate in the new financial services activities?

The Act authorizes national banks to either control or have an interest in a "financial subsidiary" that engages in activities that are financial in nature or conducts activities that are incidental to these financial activities. The definition of permitted financial activities for "financial subsidiaries" is the same as that for FHCs with four exceptions. A financial subsidiary cannot act as an insurance company or manage insurance company portfolio investments, issue annuities, engage in real estate development or investment, or act as a merchant bank. These activities, however, can take place in FHCs. The Act mandates that banks using a "financial subsidiary" to conduct financial activities must meet the requirement that the consolidated assets of all of the bank's subsidiaries are not greater than the lesser of either 45% of the parent bank's consolidated total assets or $50 billion.

How does this legislation affect unitary thrifts?

The Office of Thrift Supervision can continue to grant unitary charters to financial companies, but cannot grant charters to nonfinancial companies that applied after May 4, 1999. This provision prohibits charters to Wal-Mart, CMS Energy and others.

Securities Activities

In what types of securities-related financial activities can an FHC participate?

- In general, an FHC can participate in activities or buy companies that conduct activities that are "financial in nature" or the FHC can participate in activities that are incidental to the activities that are "financial in nature." Under some circumstances, banks will be allowed to conduct activities that are deemed complementary to these financial activities. The Act defines activities that are "financial in nature", and thus permitted by an FHC, and provides a process for classifying activities not yet considered. Permitted financial activities of a securities affiliate of an FHC include:
- underwriting securities;
- acting as a market maker for a securities;
- offering or participating as a dealer in a securities transaction;
- sponsoring and distributing mutual funds; and
- providing financial, investment and advisory services to investment companies.

These activities are permitted in nonbank subsidiaries of FHCs without any limit on revenues. FHCs can also participate in merchant banking activities. This is a significant change in the law since prior to this legislation, entities affiliated with banks could participate only in activities categorized as "closely related to banking."

May a bank engage in municipal securities activities?

Yes. A national bank can deal in, underwrite and purchase municipal bonds for its own investment accounts.

What governmental agencies regulate the FHCs and their activities related to securities?

The Act establishes a regulatory framework in which FHCs are generally regulated by the Federal Reserve Board while securities activities conducted by FHCs are subject to regulation by both the Securities and Exchange Commission (SEC) and the Blue Sky laws of each state.

How does a bank engage in broker dealer activities?

National banks must, within 18 months of the Act's enactment, conduct broker dealer activities in financial subsidiaries.

How does the Act affect a Bank's status as a broker dealer and what does that mean to the way banks transact business?

The Act removes the general exemption for banks from the definition of broker and dealer in the Securities Exchange Act of 1934. Banks, bank affiliates and subsidiaries are now governed by general securities regulations unless the specific activity carried out by the bank is exempted.

What transactions by banks are exempted from regulation as a broker?

Under specified conditions, transactions involving third party brokerage arrangements, trusts, commercial paper, exempted securities, certain Canadian government obligations, credit-enhanced debt securities, employee benefit plans, dividend reinvestment plans, issuer plans, sweep accounts, affiliate transactions, private securities offerings, safekeeping and custody duties, identified banking products and municipal securities are exempted from regulation as a broker.

What banking transactions are exempted from regulation as a dealer?

Under specified conditions, a bank will be exempt from regulation as a dealer when it transacts in commercial paper, exempted securities, qualified Canadian government obligations, credit-enhanced debt securities or participates in asset-backed transactions, buys or sells securities for investment purposes for the bank or for accounts which the bank manages as a trustee or buys or sells identified banking products.

If a bank wishes to transact in a new "hybrid product," will the bank be required to register as a broker or as a dealer?

The Act establishes a rulemaking process involving the Federal Reserve Board and the SEC to determine if transacting in a "hybrid product" will require the bank to register as a broker or dealer.

Will the Act require banks that advise mutual funds to register as investment advisors?

Yes, the Act amends the Investment Advisers Act to include banks and bank holding companies, or a department or division of a bank, within the definition of an investment advisor to the extent the bank advises a registered investment company. Thus, banks that advise mutual funds will need to register as investment advisors.

Insurance Activities

How does the Act affect a bank's ability to engage in insurance-related activities?

The effect of the Act on a national bank's ability to engage in insurance-related activities needs to be examined at three different levels:

- the holding company (i.e. through an FHC);
- the bank; and
- the bank subsidiary.

An FHC may engage in insurance-related activities after satisfying certain prerequisites specified by the Act, but a national bank or a subsidiary of a national bank cannot do so to the same extent.

How can a bank holding company engage in insurance-related activities?

To engage in insurance-related activities, a bank holding company needs first to elect to become an FHC. The Act permits an FHC to engage in, or acquire shares of a company which engages in, activities "financial in nature" or incidental to such financial activities, as determined by the Federal Reserve Board, together with the Secretary of the Treasury, provided that such activities do not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally. Insurance is one of a list of activities which the Act categorically defines as financial in nature.

Are there any other requirements before an FHC may engage in insurance-related activities?

To commence insurance activities or acquire shares of an insurance company, an FHC must provide written notice to the Federal Reserve Board within 10 days after starting the activities or consummating the acquisition. Prior approval by the Board is not required for such acquisition or expansion of activities. However, an acquisition may be subject to certain prenotification procedures under the Hart-Scott-Rodino Act.

What types of insurance-related services may an FHC provide under the Act?

The Act permits an FHC to act in the capacity of principal, agent or broker in underwriting insurance and annuities: "insuring, guaranteeing. or indemnifying against loss, harm, damage, illness, disability, or death" and "providing and issuing annuities." In addition, an FHC may acquire a company or the shares of a company engaged in such insurance-related activities.

May an FHC engage in insurance company portfolio investment activities?

Under the Act, an FHC may indirectly engage in such activities through an insurance company (but not any of its bank subsidiaries). However this investment in a portfolio company can only occur when the FHC does not routinely manage or operate the portfolio company, except to the extent necessary to obtain a reasonable return on the investment.

May a bank itself engage in insurance-related activities?

While a national bank can have insurance company affiliates owned by the same FHC as the bank itself, a national bank is not permitted to provide insurance as principal except for authorized products. However, a bank as an insured depository institution may engage in insurance sales, solicitation or cross-marketing activity in the capacity of an agent.

May a national bank engage in any title insurance activities?

A national bank is not allowed to engage in any activity involving the underwriting or sale of title insurance, except to the same extent that the laws of the state within which the national bank is located allow state-chartered banks to perform title insurance agency activities.

May the subsidiary of a bank engage in insurance-related activities?

Under the Act, a financial subsidiary of a national bank is allowed to sell (but not underwrite) insurance as principal, except for authorized products. A financial subsidiary, can engage only in financial activities that are permitted for a national bank, and is explicitly prohibited by the Act from engaging in, among other things, insurance or annuity underwriting or insurance company portfolio investments.

Who will regulate the insurance activities of a bank or financial subsidiary?

The Act reaffirms the primacy of states in regulating insurance activities of any bank or bank affiliate, but prohibits states from restricting the affiliation permitted under the Act or any related laws or regulations. Likewise, the Act does not allow states to discriminate against insurers based on their association with depository institutions.

How will the multistate insurance reform contemplated by the Act affect insurance activities?

The Act provides for a three year period after enactment in which a majority of the states can adopt uniform licensing procedures. In the event this goal is not accomplished, a national association will be empowered to handle this task.

May a mutual insurance company redomesticate to another state?

Yes. Under the Act, a mutual insurance company can redomesticate to another state and reorganize into a mutual holding company or stock company under certain circumstances, thus facilitating the conversion of mutual insurance companies into stock form.

Thrift and Federal Home Loan Bank Provisions

Elimination of Unitary Thrift Charter

How does this legislation affect unitary thrifts?

The Office of Thrift Supervision can continue to grant unitary charters to financial companies, but cannot grant charters to nonfinancial companies that applied after May 4, 1999. This provision prohibits charters to Wal-Mart, CMS Energy and others.

What will happen to the existing unitary thrifts?

The powers and authorities of existing unitary thrift holding companies, as well as the companies that applied for the charter before May 4, 1999 are grandfathered.

Can the existing unitary thrifts be sold?

Grandfathered unitaries may be sold only to companies that are financial services providers.

Can a bank or trust company be owned by thrift?

One or more thrift institutions will be allowed to own a state-chartered bank or trust company, (i.e., a "banker's bank") provided that its business is restricted to accepting:

- deposits from thrift institutions or savings banks;
- deposits arising from the corporate business of the thrift institutions or savings banks that own the bank or trust company; or
- public funds deposits.

Easier Access to the Federal Home Loan Bank System

How can community banks access the Federal Home Loan Bank advances?

Community financial institutions (FDIC-insured depository institutions with assets less than $500 million) will be allowed to join the Federal Home Loan System without meeting the 10% mortgage-related assets test. Those institutions may obtain long-term Federal Home Loan Bank advances for lending to small businesses, rural loans, as well as housing loans. Eligible collateral for such advances will include secured loans for small business, small farms, and small agribusinesses, or securities representing a whole interest in such loans.

Are there any changes in limits on advances to nonqualified thrift lender members?

The systemwide 30% limit on advances to the nonqualified thrift lender members will be repealed and their stock purchase requirements will be equalized. The prohibition on new advances to savings association members falling out of "qualified thrift lender" compliance will be lifted.

Privacy, Community Reinvestment Act, and Miscellaneous Provisions

May a financial institution disclose nonpublic customer information to nonaffiliated third parties?

In general, a financial institution may not disclose, either directly or through an affiliate, any nonpublic customer information to a nonaffiliated third party unless:

- the financial institution clearly and conspicuously discloses to the customer that such information may be disclosed to such third party;
- the customer is given the opportunity to prevent the financial institution from disclosing such information; and
- the customer is given an explanation on how to exercise this "opt-out" right.

In what specific situations may a financial institution disclose nonpublic customer information to a nonaffiliated third party?

A financial institution may disclose nonpublic personal information to a nonaffiliated third party as necessary to effect, administer or enforce a transaction requested or authorized by the customer or in connection with:

- servicing or processing a financial product or service requested or authorized by the customer;
- maintaining or servicing the customer's account with the financial institution or with another entity; or
- a proposed or actual securitization, secondary market sale or similar transaction related to the customer's transaction.

Other instances in which a financial institution may disclose nonpublic personal information to a nonaffiliated third party include:

- with the customer's consent or at the customer's direction;
- to protect the confidentiality of the financial institution's records relating to the customer, the service or the product;
- to protect against fraud or unauthorized transactions;
- for risk control or resolving customer disputes;
- to persons holding a legal or beneficial interest relating to the customer and to persons acting in a fiduciary capacity on behalf of the customer;
- to provide information to insurance rate advisory organizations, guaranty funds, rating agencies, and the financial institution's attorneys, accountants and auditors;
- to the extent permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978, to law enforcement agencies, self-regulatory organizations or for public safety matters;
- to a customer reporting agency in accordance with the Fair Credit Reporting Act;
- in connection with a proposed or actual sale, merger, transfer or exchange, if the disclosure solely concerns customers of the business that is the subject of the sale, merger, transfer or exchange; and
- to comply with federal, state or local laws and rules or other purposes as authorized by law.

May a financial institution disclose nonpublic customer information to nonaffiliated third parties who perform services for or functions on behalf of the financial institution (e.g., marketing)?

Yes, so long as the financial institution fully discloses the providing of such information to its customers and enters into a contractual agreement with the third party requiring it to maintain the confidentiality of the information.

May a financial institution share nonpublic customer information with its affiliates without consent?

Yes.

May a financial institution disclose a customer's account number or access code for credit card accounts, deposit accounts or transaction accounts to nonaffiliated third parties for use in telemarketing, direct mail marketing or other marketing?

No, except that it may disclose such information to a consumer reporting agency.

At what point in the customer relationship and how frequently must the financial institution disclose its privacy policy?

The financial institution must disclose its privacy policy to the customer at the time the customer relationship is established. The financial institution must continue to disclose its policy and practices at least annually during the course of the relationship. The disclosure must be clear and conspicuous and in writing.

What specifically must be included in the privacy policy disclosure?

The following items must be included in the financial institution's disclosure:

- the policies and practices with respect to disclosing nonpublic customer information to nonaffiliated third parties, including the categories of persons to whom such information may be disclosed and the financial institution's policies with respect to disclosure of nonpublic customer information concerning former customers;
- the categories of nonpublic customer information;
- the financial institution's policies to protect the confidentiality of the nonpublic customer information; and
- the disclosures required (if any) under the Fair Credit Reporting Act.

What government authorities will have responsibility for publishing regulations under the Act's privacy provisions?

The federal banking agencies, the National Credit Union Administration, the Secretary of the Treasury, the Securities and Exchange Commission and the Federal Trade Commission, in consultation, as appropriate, with representatives of state insurance authorities will have this responsibility.

What government authorities or agencies will have responsibility for enforcement of the Act's privacy provisions and its regulations?

The federal functional regulators, the state insurance authorities and the Federal Trade Commission, with respect to financial institutions and persons subject to their jurisdiction under applicable law (e.g., section 8 of the Federal Deposit Insurance Act, the Federal Credit Union Act, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, state insurance law and the Federal Trade Commission Act) will be responsible for enforcing these regulations.

Do the Act's privacy provisions supersede, alter or affect analogous state statutes or regulations?

No, except to the extent that the state statutes or regulations are inconsistent with the Act, and then only to the extent of the inconsistency.

What constitutes false pretenses for purposes of obtaining or attempting to obtain customer information in violation of the Act ?

The following actions constitute false pretenses:

- false, fictitious or fraudulent statements or representations to an officer, employee or agent of a financial institution;
- false, fictitious or fraudulent statements or representations to a customer of a financial institution; or
- providing a forged, counterfeit, lost or stolen document to an officer, employee or agent of a financial institution, knowing that the document is forged, counterfeit, lost or stolen.

Is there a penalty for violating privacy provisions?

There is a criminal penalty for knowingly and intentionally violating attempting to violate section 521 (privacy protection for customer information of financial institutions) the Act. The violator will be fined in accordance with Title 18 of the United States Code, imprisoned for not more than five years, or both. There is an enhanced penalty for aggravated cases.

ATM Fee Reform

What is the policy on fee disclosures by ATM operators who impose a fee for use by noncustomers?

Any ATM operator that imposes a fee on noncustomers for providing host transfer services must provide notice of the fact that a fee is imposed and the amount of the fee, at the time the service is provided. The notice stating that a fee will be charged for noncustomers must be posted in a prominent and conspicuous location on the ATM. The notice stating that a fee will be charged and the amount of the fee must appear on the screen of the ATM or on a paper notice issued from the ATM, after the transaction is initiated but before the noncustomer is committed irrevocably to completing the transaction. If the noncustomer does not elect to continue the transaction once he is made aware of the imposition of a fee, no fee may be charged.

Will an ATM operator be liable for notices on its ATM's that are subsequently removed, damaged or altered by any person other than the ATM operator?

No, so long as the notice required to be posted was posted in compliance with the Electronic Fund Transfer Act, the ATM operator will have no liability for its subsequent failure to comply.

Community Reinvestment

What disclosures are required under the Act's CRA "sunshine requirements"?

The following must be disclosed under the CRA:

- any agreement entered into by and among an insured depository institution or affiliate and a nongovernmental entity, after the date of enactment of the Financial Services Modernization Act;
- an annual report of activity by the insured depository institution or affiliate to the appropriate federal banking agency with supervisory responsibility over the insured depository institution; and
- an accounting of the use of funds received pursuant to the agreement by the nongovernmental entity to the appropriate federal banking agency with supervisory responsibility over the insured depository institution that is a party to the agreement, not less frequently than annually.

What constitutes a violation of the CRA requirements by persons other than insured depository institutions?

The following actions constitute a violation of the CRA requirements by persons other than insured depository institutions:

- willful failure to comply in a material way (which is determined by the appropriate federal banking agency), making the agreement unenforceable; and
- diversion of funds or resources for personal gain, for which the penalty is either disgorgement of funds or prohibition from being a party to an agreement for a period of time not to exceed 10 years.

How often will small banks (under $250 million in assets) be subject to routine examinations under the community reinvestment provisions?

Small banks that received an "outstanding" rating at their most recent CRA exam will not be subject to examination more than once every 5 years; small banks that received a "satisfactory" rating at their most recent CRA exam will not be subject to examination more than once every 4 years; and small banks that received a "less than satisfactory" rating at their most recent CRA exam will be subject to further examinations as deemed necessary by the appropriate federal financial supervisory agency. However, any small bank may be subject to more frequent or less frequent examinations for reasonable cause as determined by the appropriate federal financial supervisory agency.

Is there a plain language requirement for federal banking agencies?

Yes, each federal banking agency shall use plain language in all proposed and final rulemakings published by the agency in the Federal Register after January 1, 2000.

Are there any further compliance requirements with regard to plain language?

Yes, not later than March 1, 2001, each federal banking agency shall submit to Congress a report describing its compliance with plain language.

May a federal savings association convert to a national bank?

Yes. A federal savings association chartered before the Act's adoption may convert into one or more state or national banks, subject to the approval of the applicable regulator. Each such converted bank may encompass one or more of the branched of the federal savings association in one or more states.

May a federal savings association that is converted into a national or state bank retain the term "Federal" in its name?

Yes, any depository institution, the charter of which is converted from a federal savings association to a national or state bank after the date of enactment of the Financial Services Modernization Act, may retain the term "Federal" in its name, so long as such institution remains an insured depository institution

What will happen to SAIF special reserve?

Once effective, the bill will eliminate the requirement of the Savings Association Insurance Fund (SAIF) special reserve. The FDIC will be allowed to return the nearly $1 billion in the SAIF special reserve to SAIF general reserves.

These articles were provided by Squire, Sanders & Dempsey L.L.P. The data contained is subject to periodic updates and speaks only as of the indicated date. The material is provided only as information and is not intended to replace legal counsel.

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