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**Bank Broker Exemption under Gramm-Leach-Bliley Act of 1999 (GLBA)**

Prior to GLBA, banks were exempt from the registration provisions of the Exchange Act. Following GLBA, this blanket exemption was significantly narrowed to a list of specified activities (the so-called "push-out provisions") for which the SEC was required to (and did) enact implementing regulations: the "Interim Final Rules" adopted in 2001 and proposed Regulation B in 2004. Both of these efforts were roundly criticized by the banking industry, bank regulatory agencies and members of Congress, leading to a rulemaking impasse lasting almost seven years.

Section 101 breaks this deadlock by requiring the SEC and FRB to propose joint rules within 180 days of enactment of the Relief Act to implement the bank exceptions from the definition of "broker" under the Exchange Act. Before jointly adopting such rules, the SEC and the FRB must consult with and seek the concurrence of the other federal banking agencies. The new process was created to ensure that such regulation would not unduly interfere with banks and thrifts that offer traditional products and services to their customers. Section 101 also states that the new rules will supersede the highly restrictive 2001 Interim Rules and proposed Regulation B.

**Merchant Banking Cross-Marketing**

Section 611 removes an anomaly that arose under the merchant banking provisions of GLBA. Specifically, this section allows depository institution subsidiaries of a financial holding company to engage in cross-marketing activities with portfolio companies that are held under the GLBA merchant banking authority to the same extent as such activities are currently permissible for portfolio companies held under the GLBA insurance company merchant banking authority. Banks are now permitted to cross-market products and services through statement stuffers or websites if the arrangement does not violate anti-tying restrictions and is approved by the FRB.

**Extended Exam Schedule**

Previously, community banks with up to $250 million in total assets qualified for an 18-month safety and soundness examination cycle under the Federal Deposit Insurance Act. Section 605 of the Relief Act doubles that threshold to $500 million, exempting more banks from the annual exam schedule.

**Financial Privacy Under GLBA**

Under Section 728, the federal banking agencies have six months to create a simple model disclosure form that is in compliance with Section 503 of the GLBA. The form should be succinct and comprehensible to consumers, enabling them to compare privacy practices among financial institutions. The section is in response to a high volume of consumer complaints regarding an inability to understand current notices.

Section 609 exempts certified public accountants (CPAs) from the GLBA disclosure requirements in states that already prohibit CPAs from disclosing non-public personal information.

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**Attorney-Client Privilege**

Section 607 of the Relief Act clarifies that a person or entity does not waive any attorney-client or other privilege they may claim when they submit information to a federal, state or foreign bank regulator during a supervisory or regulatory process. This section addresses a number of court rulings which have held that the attorney-client and other privileges are waived when such information (which would otherwise be privileged) is provided to bank regulatory agencies in the course of an examination or other regulatory process.

**Community Development Investments**

Banks were previously permitted under the National Bank Act to invest up to 10 percent of their capital and surplus in community development investments, which were previously defined as investment designed to promote the public welfare, including the welfare of low and moderate income communities and families. The Relief Act raises the investment authority to 15 percent, but narrows the type of permissible investments to those that benefit low- to moderate-income families and communities, rather than public welfare in general. The new standard will apply prospectively, and only to investments or written commitments to invest made or entered into after the date of enactment of the Relief Act.

**Mergers and Consolidations**

Section 606 streamlines the Bank Merger Act application requirements by providing that the responsible banking agency need only request a competitive factor report from the Department of Justice (and not also from all of the other federal banking agencies). Mergers of affiliated institutions have been made completely exempt from competitive factor report requirements. Post-approval waiting periods for affiliated institution mergers have also been eliminated.

**Insider Loans**

Section 601 repeals certain reporting requirements under the Bank Holding Company Act and the Federal Reserve Act. Banks will no longer be required to report loans to executive officers; executive officers and principal shareholders will no longer need to report extensions of credit from correspondent banks; and executive officers will not have to report excessive credit extensions from other banks. Substantive regulations regarding insider lending remain unaffected by the Relief Act.

**Personal Liability of Bank Directors and Organizers**

Bank directors and organizers may be faced with an increased risk of personal liability because of Section 702. This section strengthens federal banking agencies' ability to enforce the terms of any written condition or agreement with an institution or an institution-affiliated party (IAP) (relating, for example, to capital maintenance) without showing, in the case of an IAP, unjust enrichment or reckless disregard for the law. This section is especially controversial as banks are concerned that Section 702 will significantly diminish the pool of competent

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individuals interested in high-level banking positions.

**Debt Collection**

Several states have pre-trial diversion programs designed to help alleged bad-check offenders avoid prosecution. In exchange for avoiding prosecution, the offenders must attend state-run classes, make restitution to the wronged merchant and pay fees to state or district attorneys. The exemption in Section 801 was created to address several lawsuits claiming that the use of private contractors in such pre-trial diversion was a violation of the Fair Debt Collections Practices Act (FDCPA). As a result of this exemption, "debt collectors" no longer include private contractors hired to participate in such state-run bad-check offender programs.

Section 802 dissociates GLBA privacy notices, formal pleadings and certain IRS-required forms from "initial communications" with debtors. Recent decisions have treated certain pleadings as initial communications which requires institutions to make FDCPA disclosures to debtors, an often difficult practice. Further, the Section states that debt collection practices may continue during the 30-day debt validation period, provided that the debtor does not exercise validation rights and the collection practices do not "overshadow" the disclosure of the debtor's right to dispute the claim.

**Banking Agency Enforcement**

Several provisions, including Sections 708, 710, and 715, strengthen federal banking agency enforcement authority. Section 708 permits the appropriate federal agency to suspend, remove or prohibit an IAP charged with a felony from participating in the affairs of any depository institution, rather than just the affiliated institution.

Section 710 amends current provisions of the Federal Deposit Insurance Act by prohibiting convicted individuals from participating in the affairs of a bank holding company, savings and loan holding company and subsidiaries, and Edge or Agreement Corporations.

Section 711 clarifies the authority of home and host state regulators regarding the examination and supervision of interstate banking organizations. The appropriate home state supervisor has primary authority to examine and supervise the bank, subject to the right of any host state supervisor (upon notice to the home state) to determine compliance with host state laws relating to CRA, fair lending, consumer protection and usury and except as otherwise provided in any cooperative agreement between the home and host state supervisor. Only the home state supervisor may assess supervisory fees on the bank.

Under Section 715, either a notice or an order would be sufficient to initiate an enforcement action against an IAP for actions committed during affiliation with an entity regardless of whether the IAP has resigned.

**Studies on Regulatory Efficiency, Consolidation and Currency Transaction Reports**

Although these studies and analyses may ultimately prove to be merely academic exercises, the Government Accountability Office (GAO) is required to complete a study of: (1) the burden and utility of currency transaction reporting (due within 15 months) and (2) the impact made by diversity in size and complexity among financial institutions on regulatory oversight, compliance burdens and costs, efficiency, safety and soundness and charter options for financial institutions (due within one year). In connection with the latter study, the GAO must consider the possible efficacy and efficiency of consolidating the financial regulators, as well as charter simplification and homogenization.

**Conclusions**

The Financial Service Regulatory Relief Act provides meaningful, although somewhat limited, regulatory relief for the banking industry. Certain key issues - which were stripped from prior versions of the legislation - remain outstanding. Other provisions, most notably the revisions to proposed Regulation B, are subject to additional rulemaking which could affect their utility and effectiveness. Moreover, in light of the consolidation of the deposit insurance funds, it remains to be seen whether any reform with respect to consolidation among the federal financial regulators will occur or, given the recent mid-term elections, whether additional regulatory relief should be expected.

This article is intended only to summarize key provisions of the Relief Act, and thus does not address every section of the legislation. It does not constitute, nor should it be construed as constituting, the provision of legal advice. For the complete text of the bill please visit http://www.govtrack.us/congress/billtext.xpd?bill=s109-2856.

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